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STANDARD OF PROOF, PRESUMPTION OF INNOCENCE, AND PLEA BARGAINING: HOW WRONGFUL CONVICTION DATA EXPOSES INADEQUATE PRE-TRIAL CRIMINAL PROCEDURE

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STANDARD OF PROOF, PRESUMPTION OF INNOCENCE, AND PLEA BARGAINING: HOW WRONGFUL CONVICTION DATA EXPOSES INADEQUATE PRE-TRIAL CRIMINAL PROCEDURE

DR. ROBERT SCHEHR*

ABSTRACT

This article addresses two fundamental principles directly affecting plea convictions – the standard of proof required for indictment, and the presumption of innocence. In grand jury states, prosecutors procure indictments with ease. This, accompanied by the lack of a robust pre-trial presumption of innocence, increases the likelihood of wrongful conviction. Therefore, it is my opinion that in order to maintain justice for an accused, contemporary criminal procedure must return to the proof beyond a reasonable doubt standard to indict. It is for precisely these reasons that this standard was originally adopted by our nation's founding judges. Concerns about prosecutorial overreach that were

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common at the founding of our American judicial system were primarily driven by prior experiences with England. Today, we see the manifestation of these concerns as legal and social science scholars have generated comprehensive assessments of the correlates generating wrongful convictions of actually innocent men and women.

Plea bargaining has become an important instrument of state authority necessary to efficiently process felony criminal cases. However, given its hegemonic ubiquity throughout the system, it is apparent to me that the failure of both Supreme Court case law, and Congressionally generated federal rules legitimating pleas has given rise to a shadow administration of justice. Therefore, it is not difficult to conclude that the sleight of hand remains the presumption of guilt from arrest through indictment. This is in spite of our nation's tendency to valorize a system of due process that affords protection of rights accruing to defendants who elect to plead not guilty and go to trial, and the opaque exercise of prosecutorial authority that constitutes 95 to 97 percent of all felony convictions procured through plea bargaining. Viewed in this context, Federal Rule 11 – with its "rational" colloquy ostensibly designed to assure the court and serve as a palliative to the public that a defendant is entering the plea knowingly and voluntarily, in addition to the requirement that pleas must possess a "factual basis" (never yet clearly defined by either a court or the United States Congress) – is a tissue-thin cloak to legitimate what is otherwise a severe usurpation of the protection of liberty interests that are paramount to a democracy.

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I. INTRODUCTION

In a strongly worded 177-page opinion, Federal District Court Judge, William G. Young, said, "The focus of our entire criminal justice system has shifted away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen."[1] Because we now have a criminal justice system that is largely constituted by plea bargaining, in essence "Americans are bargaining away their innocence."[2] How did this happen?

At least four important events merged in the 1970s to bowtie plea bargaining, thereby virtually insulating it from constitutional challenges. These four events were: (1) the last of the decade's Supreme Court jurisprudence addressing the constitutionality of plea bargaining;[3] (2) incorporation of the probable cause standard of proof for indictment at both the state and federal levels;[4] (3) the Supreme Court's limiting the presumption of innocence to trial;[5] and (4) the 1975 Amendment to Rule 32(a)(2) of the Federal Rules of Criminal Procedure. Rule 32 (a)(2) (now Rule 32 (c)(5)) was amended in 1975 to say, "Proposed subdivision (a)(2) provides that *the court is not dutybound to advise the defendant of a right to appeal when the sentence is imposed following a plea of guilty or nolo contendere*."[6]

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1. Adam Liptak, *Federal Law on Sentencing is Unjust, Judge Rules*, N.Y. TIMES (June 23, 2004), http://www.nytimes.com/2004/06/23/us/federal-law-on-sentencing-is-unjust-judge-rules.html.

2. Tim Lynch, *Americans are Bargaining Away their Innocence*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/in-theory.wp.2016/01/20/americans -are-bargaining-away-their-innocence/.

3. *See* Bordenkircher v. Hayes, 434 U.S. 357, 362–65 (1978).

4. JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL GRAND JURY CHARGE ¶ 25 (Mar. 2005), http://cldc.org/wp-content/uploads/2012/10/model-gj-charge.pdf.

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

6. FED. R. CRIM. P. 32(a)(2) (emphasis added). Rule 32 was amended in 1994, and the section pertaining to the responsibility of judges to advise defendants of their right to appeal following a guilty plea is now Rule 32(c)(5). The language in the notes to the 1994 amendment is unchanged: "Subdivision (c)(5), concerning notification of the right to appeal, was formerly included in subdivision (a)(2). Although the provision has been rewritten, the Committee intends no substantive change in practice. That is, *the court may, but is not required to, advise a defendant who has entered a guilty plea, nolo contendere plea or a conditional guilty plea of any right to appeal (such as an appeal challenging jurisdiction)*. However, the duty to advise the

A strong argument can be made that the Supreme Court and various legislative bodies addressed these four matters in a coordinated way to significantly limit the potential for constitutional challenges to pleas.[7] With the exception of the Court's plea jurisprudence (which I have already addressed in a previous article confronting the constitutionality of pleas)[8] and the language specifying a judge's responsibility under Rule 32, I will examine both the evolution and prudence of the probable cause standard to indict, and the limitation of the presumption of innocence to trial. Each represents a matter of pressing concern.

The purpose of this article is to advance questions seemingly so obvious that they largely go without comment in published legal scholarship. For example, one could ask: What is the standard of proof required for conviction via plea bargain? When compared to the constitutionally mandated requirement that prosecutors must meet the burden of proof beyond a reasonable doubt to convict at trial, does the criminal procedure *leading up to* plea negotiations represent an unconstitutional deviation both in principle and in practice? Should there exist a *pre-trial* presumption of innocence?[9] In the absence of a pre-trial presumption of innocence and with the low standard of proof required for indictment, is it likely that a significant number of accused but innocent suspects may be wrongfully convicted? For reasons articulated below, I do not believe that the criminal procedure *leading up to* plea negotiations satisfies the Supreme Court's high standard for felony conviction, because these procedures lack a presumption of innocence. It is this presumption of guilt that generates fertile ground

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defendant in such cases extends only to advice on the right to appeal any sentence imposed" (emphasis added).

7. During the 1970s, legislative initiatives generated new categories of crime, and most important, enhanced sentencing. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); MARIE GOTTSCHALK, CAUGHT (2015); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA (2014); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

8. *See generally* Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea Bargaining*, 2 TEX. A&M L. REV. 385 (2015).

9. G.P. Garrett, *False Presumptions Counter to the Presumptions of Innocence*, J. AM. INST. CRIM. L. & CRIMINOLOGY 851, 853 (1917) ("Presumptions, in and of themselves, contain no virtue and no vice. Justly drawn, they are advantageous, useful and inevitable. Wrongly drawn, they are mere insubstantial illusions.").

for law enforcement and prosecutors to procure convictions via grand jury indictments where only probable cause is the standard of proof to indict.

To convincingly develop my argument, I am going to request that my readers suspend their disbelief. Since the 1970s, plea bargaining has become so ubiquitous that much about its procedure has attained an essentialist quality that takes for granted the requisite standard of proof in criminal cases. At issue in this article is whether it is conceptually and procedurally efficacious to frame plea bargaining within the context of standards of evidence sufficiency, also referred to as "standards of proof." When taken together, institutional rationales and the implementation of plea bargaining have been established as legal norms reaching hegemonic status. That is, nearly all criminal justice practitioners, as well as victims and offenders, view the institutionalization of plea bargaining as an immutable matter of fact.[10] Whether it serves systematic efficiency interests by saving resources, or by dispensing justice with greater speed and efficiency, plea bargaining exists for all actors as the normative mechanism through which felony cases are prosecuted. I quite intentionally invoke Antonio Gramsci's[11] conceptualization of hegemony to introduce a theoretical level of complexity. In doing so, I hope this will move our discussion away from one that is exclusively doctrinal and internal to administrators of justice in order to locate plea practice in a system-reproducing context. Specifically, Gramsci defines social hegemony as possessing two aspects:

> 1. The "spontaneous" consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is "historically" caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production.

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10. Santobello v. New York, 404 U.S. 257, 261 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice.").

11. Antonio Gramsci was an Italian Communist Party leader who died in prison after being arrested for speaking out against fascism during the early twentieth century. *Antonio Gramsci Biography*, BIOGRAPHY.COM, http://www.biography.com/people/antonio-gramsci-9317929.

> 2. The apparatus of state coercive power which "legally" enforces discipline on those groups who do not "consent" either actively or passively. This apparatus is, however, constituted for the whole of society in anticipation of moments of crisis of command and direction when spontaneous consent has failed.[12]

Colloquially, we may define hegemony as rule by consent, backed up by the threat of coercion. Actions taken by the Supreme Court, Congress, and the Judicial Conference in the 1970s, as they pertained to setting the foundation for plea bargaining, have generated consent from bureaucratic actors administering justice (e.g., law enforcement, prosecutors, defense attorneys, judges), defendants, and from the public more generally. Invoking the concept of hegemony tips my hand as one who views the proliferation of plea bargaining as being on par with enhanced social control.[13] After all, plea bargaining takes place in private, requires renunciation of fundamental rights protections,[14] and proceeds following indictment based upon the second lowest standard of proof.[15] Included is the fact that when presenting evidence before a grand jury, prosecutors need not concern themselves with Federal Rules of Evidence nor the presentation of exculpatory evidence and can reconvene a grand jury as frequently as necessary until finally procuring an indictment.[16] What emerges is a portrait of state power that bears a

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12. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 12 (1971).

13. My emphasis upon plea bargaining as social control is clearly antithetical to both the resource efficiency and mutual benefit claims established by the United States Supreme Court. *See* Corbitt v. New Jersey, 439 U.S. 212 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Chaffin v. Synchcombe, 412 U.S. 17 (1973); Santabello v. New York, 404 U.S. 257 (1971); Brady v. United States, 397 U.S. 742 (1970); North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

14. Plea bargaining requires the waiver of Fifth and Sixth Amendment rights, with the exception of the right to counsel. *Plea Bargain*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/plea_bargain (last visited Nov. 14, 2017).

15. *See infra* Figure 1.

16. *See* FED. R. CRIM. P. 6.; *see also* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261 (1995); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2346 (2008). For relevant case law, *see, e.g.*, United States v. Williams, 112 S. Ct. 1735, 1743–44 (1992) (federal appellate courts may not exercise supervisory power to dismiss an otherwise valid indictment because of the prosecutor's failure to disclose exculpatory evidence to the grand jury); United States v. Calandra, 414 U.S. 338, 349–50 (1974)

striking resemblance to the fifteenth-century Star Chamber;[17] hardly the epitome of due process in a democracy. Viewing pleas through the lens of hegemony, a taken-for-granted normative acceptance of an undernourished system of due process emerges where public consent has been manufactured through a series of significant legal and political maneuvers. Furthermore, we cannot forget the potential threat of coercion should a defendant reject the plea and elect to pursue trial. This threat is leveraged by the fact that that the defendant will confront a "trial tax"[18] if convicted and as a consequence, suffer a far graver punishment.[19] With this in mind, plea bargaining then manifests as a

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(refusing to extend the exclusionary rule to grand juries); Costello v. United States, 350 U.S. 359, 363 (1956) (indictment not subject to challenge on grounds it was based on hearsay).

17. While there are qualitative differences, the similarities between contemporary plea negotiations and the Star Chamber are too recognizable to resist. The Star Chamber was established in 1487 by King Henry VII. The name, Star Chamber, is based upon the star-painted ceiling of the room at Westminster Palace where the court sat. Beginning with the reigns of James I (1603–25) and Charles I (1625–49), the Star Chamber became increasingly oppressive. *Star Chamber*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Star+Chamber (last visited Nov. 14, 2017). According to Black's Law Dictionary, the Star Chamber was "[a]n English Court having broad civil and criminal jurisdiction at the king's discretion and noted for its secretive, arbitrary, and oppressive procedures, including compulsory self-incrimination, inquisitorial investigation, and the absence of juries." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999) [hereinafter BLACK'S LAW DICTIONARY].

18. "Trial tax" is the colloquial reference to the difference between a sentence offered to a defendant in a plea deal and what the defendant may expect to receive if convicted at trial. As a matter of right, all felony defendants may exercise their Sixth Amendment right to trial. However, to discourage exercise of that right via guilty pleas, courts give defendants far more severe sentences if they go to trial and are found guilty. For more information on the trial tax, *see* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1082–83 (1976). A 2015 analysis found that federal defendants who exercised their right to trial and were found guilty experienced a sixty-four percent sentencing enhancement. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1200 (2015).

19. To be clear, the United States Supreme Court has indicated that neither plea bargaining alone, nor the threat of significantly harsher sentences upon conviction at trial, amounts to coercion. In one case, the Supreme Court held, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . . But in the 'give-and-take' of plea bargaining there is no

"legal-rational"[20] mode of hegemonic state power.[21] Recognition of this fact appears in European human rights law where plea bargaining in exchange for downward departures in sentencing "may violate the presumption of innocence" because the *incentive of a reduced sentence* may be at odds with the presumption.[22] As my argument develops in the following pages, it will be helpful to keep this emphasis on hegemony in mind.

Since the 1970s, the scales have tipped heavily in the direction of pleas following indictment as opposed to establishing proof beyond a reasonable doubt at trial before triers of fact. Given the pervasiveness of plea bargaining, we must step back and deconstruct existing criminal procedure leading to indictment *prior to* commencement of plea negotiations. This will allow us to discern whether the standard of proof, upon which rests determination of the quantum of proof necessary to indict, is a signifier that is comprehensive enough to generate a conviction in a criminal case.

II. STANDARD OF PROOF

A standard of proof is "the level of persuasion required in court to be able to reach a judicial verdict."[23] There are eight standards of evidence proficiency, also referred to as standards of proof.[24] Standards range from the minimum amount of evidence required—none or

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such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). I will not pursue the Court's emphasis on the contractual nature of plea bargaining, as I have already done so elsewhere. *See* Schehr, *supra* note 8, at 391.

20. Legal-Rational authority was theorized by German sociologist Max Weber to mean three principal things: (1) law is rational to the extent that decisions are based upon existing unambiguous rules; (2) law is formal to the degree that the standards used for arriving at a decision are internal to the legal system (autopoiesis); and (3) law is logical to the degree that rules are the product of conscious construction through syllogistic reasoning. *See* MAX WEBER, ECONOMY AND SOCIETY 217 (1978).

21. *See id.*

22. *See* Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 123 S. AFRICAN L.J. 63, 80 (2006).

23. Thomas Christopher Rider, *What is the Most Useful Standard of Proof in Criminal Law?*, PRAGMATISM TOMORROW, 2013, at 1, 1.

24. *See* MARVIN ZALMAN, CRIMINAL PROCEDURE: CONSTITUTION AND SOCIETY 139 (Pearson Prentice Hall, 5th ed. 2008).

"mere" suspicion (also referred to in Common Law as "scintilla of evidence")—to that requiring virtually no doubt about the facts alleged and the defendant's culpability i.e., proof beyond a reasonable doubt.

Table 1: Standards of Evidence Sufficiency[25]

STANDARDS OF EVIDENCE SUFFICIENCY—ALL	**STANDARDS OF EVIDENCE SUFFICIENCY—CRIMINAL**
Proof beyond a reasonable doubt	Proof beyond a reasonable doubt
Clear and convincing evidence	
Preponderance of the evidence	
Prima facie case	
Substantial evidence on the whole record	
Probable cause	Probable cause
Reasonable suspicion	Reasonable suspicion
None or "mere" suspicion	

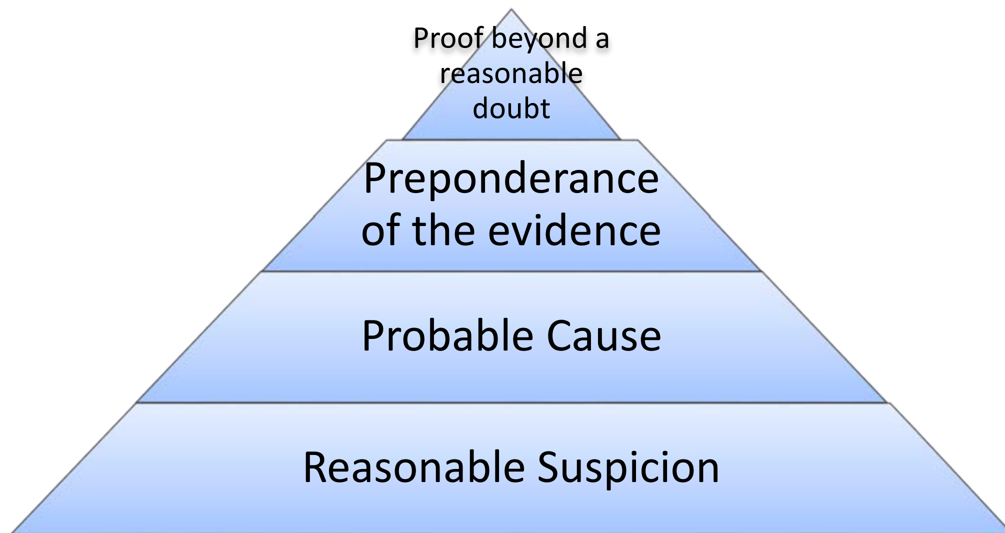
We can visually represent the standard of proof using the pyramid chart (Figure 1) below,[26] where the quantum of evidence increases as we move from bottom to top.

In criminal cases, we typically apply only the reasonable suspicion, probable cause, and proof beyond a reasonable doubt standards. Figure 1 below attempts to visually demonstrate, from bottom to top, the increasingly rigorous standards of evidence-sufficiency applied in criminal cases.[27] Starting from the bottom, the lowest standard of proof depicted in the pyramid is reasonable suspicion, which pertains to a "particularized and objective basis, supported by articulable facts, for suspecting a person of criminal activity."[28] It is the first level of proof required by police officers to justify Fourth Amendment search and seizure, as clarified in the Supreme Court's opinion in *Terry v. Ohio*.[29] Requiring more than a hunch, reasonable suspicion demands a "totality of the circumstances" assessment that considers the experience and

25. *Id.*
26. *See infra* Figure 1.
27. *See id.*
28. BLACK'S LAW DICTIONARY, *supra* note 17, at 1273.
29. Terry v. Ohio, 392 U.S. 1868, 1885 (1968).

expertise of police officers, the reliability of informants, and the probability that a crime may be in progress or previously occurred.[30]

Figure 1: Standards of Proof



Moving up the pyramid, with a modicum of enhanced sufficiency of evidence over reasonable suspicion is probable cause. Probable cause is defined as:

> A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause – which amounts to more than a bare suspicion but less than evidence that would justify a conviction – must be shown before an arrest warrant or search warrant may be issued.31

Probable cause is the standard of proof necessary to make an arrest, and to indict a defendant before a grand jury.[32]

Unlike the two standards of proof previously discussed, preponderance of the evidence is not a standard of proof applied in criminal cases. Rather, it is used in civil trials and requires meeting a standard of proof that is "the greater weight of the evidence."[33] It is

30. BLACK'S LAW DICTIONARY, *supra* note 17.
31. *Id.* at 977.
32. *See* State v. Atwood, 301 P.3d 1255, 1260 (2013).
33. BLACK'S LAW DICTIONARY, *supra* note 17, at 1201.

evidence that while insufficient to establish proof beyond a reasonable doubt, "is still sufficient to incline a fair and impartial mind to one side of the issue" over the other.[34]

The most stringent of the standards of proof is proof beyond a reasonable doubt. Model Penal Code section 1.12(1) establishes that in criminal proceedings, "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed."[35] And while the definition and interpretation of proof beyond a reasonable doubt avoids precision, we may agree that it is, "[t]he standard that must be met by the prosecution's evidence in a criminal prosecution: that no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty."[36] Why is this important?

In their dissenting opinion in the 1952 case of *Leland v. Oregon*,[37] Justices Frankfurter and Black emphasize the probity of the proof beyond a reasonable doubt standard:

> [F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion – basic in our law and rightly one of the boasts of a free society – is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'[38]

In *In re Winship*,[39] the United States Supreme Court upheld proof beyond a reasonable doubt as the standard necessary for procuring a criminal conviction.

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34. *Id.*

35. MODEL PENAL CODE § 1.12(1) (AM. LAW INST. 2016).

36. *Beyond a Reasonable Doubt*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Beyond+a+Reasonable+Doubt (last visited Mar. 5, 2017).

37. Leland v. Oregon, 343 U.S. 790, 802–03 (1952).

38. *Id.*

39. 397 U.S. 358, 361 (1970).

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt."[40]

The Court continues by reiterating the significance of the "proof beyond a reasonable doubt" standard to "[reduce] the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[41] Still, for my purposes the most impactful statement from the Court comes from the dissenters in an earlier New York Court of Appeals case:

> [A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, *if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case* [preponderance of the evidence] (emphasis added).[42]

Returning for a moment to both Table 1 and Figure 1, conviction based upon a standard of proof required in a civil case—preponderance of the evidence—is a far lower hurdle to overcome than the proof beyond a reasonable doubt standard applied to criminal convictions.[43] That means that the amount of certainty required to establish guilt is far less stringent in civil than in criminal cases. This is because damages resulting from civil convictions are primarily monetary and do not include the loss of liberty or the degree of public shaming, damage to reputation, loss of family and friends, loss of work, and the like, which generally transpire from a criminal conviction. Furthermore, the *Winship* majority proclaimed that, "[i]t is critical that the moral force of

40. *Id.*
41. *Id.* at 363.
42. *Id.* (quoting W. v. Family Court, 24 N.Y.2d 196, 205 (1969)).
43. *See supra* Table 1 & Figure 1.

the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[44] Before turning its attention to application of the proof beyond a reasonable doubt standard to juvenile defendants, the Court affirmed the constitutionality of the standard: "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[45] The conclusion cannot be more clear: in criminal cases where the loss of personal liberty and resources are at stake, the Fourteenth Amendment's Due Process Clause requires the state to bear the burden of proving each element of its case beyond a reasonable doubt.

The Supreme Court's articulation of the proof beyond a reasonable doubt standard for criminal convictions is laudable for its emphasis on the presumption of innocence and the magnitude of evidence required before the accused may suffer loss of liberty. However, it is now widely known that at both the state and federal levels only about five percent of criminal cases will proceed to trial, with 95 to 97 percent of cases being resolved via plea bargains.[46] Despite the fact that defendants who plead guilty may suffer the same negative effects as those who are convicted at trial, the state is not required to prove its case beyond a reasonable doubt in the plea bargain context. Rather, plea bargains commence upon indictment, often followed by presentment before a grand jury.[47]

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44. *In re Winship*, 397 U.S. at 364.

45. *Id.*

46. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas." Lafler v. Cooper, 132 U.S. 156, 170 (2012) (citing Missouri v. Frye, 132 U.S. 134, 143 (2012)).

47. According to Wayne LaFave et al., there are 18 states that require an indictment for most felonies: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE 775 (5th ed. 2009). In addition to the states identified by LaFave et al., the National Center for State Courts includes: District of Columbia, Guam, Michigan, Minnesota, North Dakota, Oregon, South Dakota, and Wyoming. *Grand Jury Statutes and Rules*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Topics/Jury/Grand-Juries/State-Links.aspx (last visited Mar. 25, 2018). The state of Arizona permits the use of a grand jury for purposes of indictment. *Reporter's Guide to Arizona's Legal Community*, ST. BAR OF ARIZ.,

The standard of proof required for indictment, whether it is the product of a preliminary hearing or grand jury hearing,[48] is probable cause. Returning to the definition of probable cause used above, "more than a bare suspicion but less than evidence that would justify a conviction" is required.[49] Also, recall the Supreme Court in *Winship* established that the constitutionally mandated burden of proof required by the Due Process Clause of the Fourteenth Amendment—proof beyond a reasonable doubt, along with its accompanying presumption of innocence—applies to all criminal convictions.[50] It is appropriate to be reminded of the extremely precise language used by the Court to emphasize this point: "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[51] And as indicated above, the Court makes clear that any standard of proof falling below proof beyond a reasonable doubt must certainly be unconstitutional. Returning for a moment to our standard of proof pyramid, it is clear that even the preponderance of the evidence standard typically applied in civil trials, which requires significantly greater evidentiary weight than probable cause, fails the Court's constitutional test.[52] The Court in *Winship* raised the evidentiary bar in its concise statement of what is required for criminal conviction.

To summarize, there are two standards of proof required for criminal conviction – proof beyond a reasonable doubt, and probable cause. The proof beyond a reasonable doubt standard only applies to

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http://www.azbar.org/newsevents/mediacontact/reporterguide/ (last visited Nov. 17, 2017).

48. "Prosecutors in twenty-eight states may bring a felony charge based on a sworn statement (information) and then may bring a charge either before a preliminary hearing or before a grand jury." MATTHEW LIPPMAN, CRIMINAL PROCEDURE 530 (2011).

49. BLACK'S LAW DICTIONARY, *supra* note 17, at 1219.

50. *In re Winship*, 397 U.S. at 361.

51. *Id.* at 364.

52. "The preponderance of the evidence standard is satisfied if the maximum weight of the applicable pro argument outweighs the maximum weight of the applicable con arguments, by even a small amount of evidential weight." Thomas F. Gordon & Douglass Walton, *A Formal Model of Legal Proof Standards and Burdens*, PROCEEDINGS OF THE SEVENTH INT'L CONF. OF THE INT'L. SOC'Y FOR THE STUDY OF ARGUMENTATION, http://dougwalton.ca/papers%20in%pdf/11ISSAStndard.pdf (last visited Mar. 25, 2018).

trials whereas felony criminal conviction as a result of plea bargaining is satisfied by a probable cause determination, usually from a preliminary hearing or grand jury proceeding. It is my contention that, when juxtaposed with the Supreme Court's compelling case for proof beyond a reasonable doubt as the constitutionally mandated standard for conviction at a criminal trial, the standard of proof required to convict between 95 and 97 percent of criminal defendants via plea bargaining is unconstitutional. The remainder of this article challenges the constitutional legitimacy of convictions based upon the probable cause standard as opposed to the more rigorous beyond a reasonable doubt standard.

III. PLEA BARGAINS, WRONGFUL CONVICTIONS, AND THE PROBABLE CAUSE STANDARD

At the time of this writing there are 1886 exonerees listed in the National Registry of Exoneration database, spanning from 1989 to 2016.[53] Of particular interest to this article is the number of wrongful convictions generated as a result of the guilty plea. From 1989 to 2016 there have been a total of 276 identified cases of wrongful conviction where the accused accepted a guilty plea but was later determined to be innocent.[54] That amounts to a little more than fifteen-percent of the total number of identified wrongful convictions.

Among those states that make use of grand jury indictments as their principal charging instrument, there are 180 exonerees who originally entered guilty pleas.[55] Table 2,[56] provided below, culls data from the National Registry to illustrate the following three data points: (1) states that make use of grand jury indictments as their principal charging instrument, (2) the number of exonerees who entered into guilty pleas, and (3) the total number of exonerations from each of the grand jury states. Since 1989, twenty-six grand jury states collectively convicted 180 innocent people via the plea, about twenty percent of the total 895 wrongful convictions.[57]

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53. NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Apr. 26, 2016).

54. *Id.*

55. *Id.*

56. *See infra* Table 2.

57. NAT'L REGISTRY OF EXONERATIONS, *supra* note 53.

I present this particular plea exoneration data to emphasize one significant point: in 180 cases (twenty percent of the total), innocent people were presented with an indictment following presentment before a grand jury where the standard of proof was probable cause. All of these 180 people accepted the terms of a guilty plea.[58] I have argued elsewhere that guilty pleas give rise to a significant number of wrongful convictions.[59] Legal and social science scholars simply do not have access to the kind of data necessary to determine which among the felony plea convictions, comprising of 95 to 97 percent of all felony convictions, are cases where the defendant is innocent. The National Registry data presents us only with cases that *have been identified as wrongful convictions*, but surely there are more.

A host of legal fictions have been constructed to rationalize the constitutionality of conviction by way of plea bargain. Surely, some reading this article will object to my juxtaposition of trial with plea convictions as being a comparison of apples to oranges. In fact, those critics would be correct. In the United States, we have established two distinct mechanisms for criminal conviction: a trial that affords the accused their constitutionally mandated due process protections, and plea bargaining which occurs in the privacy of the prosecutor's office.[60] It is important to note the *temporal aspect* of the plea process. Legal

58. There were an additional 758 wrongfully convicted people whose cases passed through the grand jury probable cause indictment phase, but who proceeded to trial and were erroneously convicted. Because my primary focus in this article is on the standard of proof, presumption of innocence, and evidentiary standards leading to an indictment by grand jury and ultimately, to the plea, I will forego assessment of the remaining cases that proceeded to trial. However, it should be noted that these 758 cases passed through the same grand jury indictment procedure, thereby placing the innocent accused in the position of having to choose between plea and trial. For many reasons that have been well documented, the decision to proceed to trial is equally fraught. *See* Robert Schehr & Chelsea French, *Mental Competency Law and Plea Bargaining: A Neurophenomenoligical Critique*, 79 ALBANY L.R. 1091 (2016) [hereinafter *Mental Competency Law*].

59. *See* Schehr, *supra* note 8.

60. These protections include the highest standard of proof and protection provided by the Federal Rules of Evidence, which only applies to five percent of criminal cases, and a plea bargain which occurs in the privacy of the prosecutor's office, and where the accused may be indicted by a grand jury that has been presented with "evidence" that would otherwise violate the Federal Rules of Evidence were it to be presented at trial. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1 (2004).

scholars will often contend that pleas are constitutional, and that the accused relinquishes her right to the presumption of innocence upon admission or confession to the charges.[61] However, my concern, and the substance of this article, is *temporally sensitive*. What I am addressing is the legal process that unfolds for an accused between the time of the defendant's arrest and her grand jury indictment. Once the indictment is procured, the prosecutor may advance toward negotiation of a plea. This article contends that the unconstitutionality of the plea process commences prior to the admission or confession where guilt is affirmed at the plea colloquy. It seems clear that it is the confluence of police investigation activities, pre-sentencing reports, case law, courtroom working groups, and neurophenomenological characteristics[62] of the accused (occurring upon arrest and ending with

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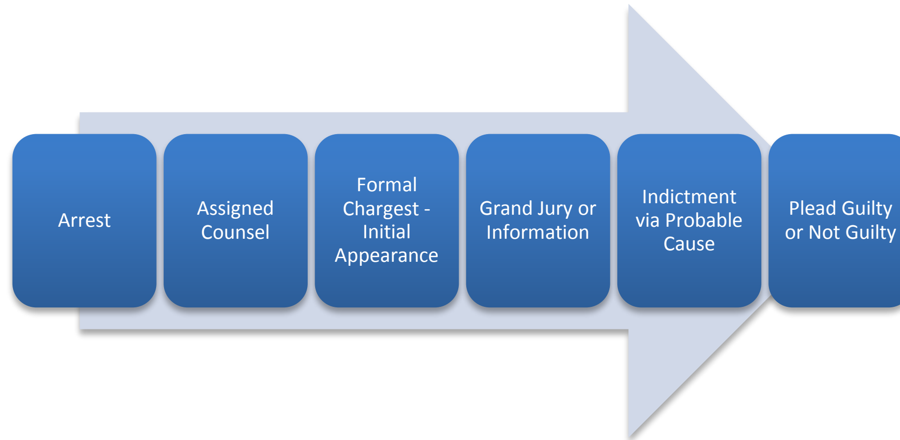
61. While not the primary purpose of this article, it is important to raise an objection here to the certainty with which legal scholars draw this conclusion. In a string of Supreme Court cases including Jackson v. Denno, 378 U.S. 368 (1964), Lego v. Twomey, 404 U.S. 477 (1972), and Crane v. Kentucky, 476 U.S. 683 (1986), the United States Supreme Court has raised concerns over the probity of relying upon confession evidence as indicative of guilt. Specifically, in *Crane* Justice Sandra Day O'Connor writing for the majority said, "Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise . . . unworthy of belief.'" *Crane*, 476 U.S. at 689 (quoting *Twomey*, 404 U.S. at 486). Additionally, the Federal Rules of Criminal Procedure require a "factual basis" to indict and engage in plea negotiations. FED. R. CRIM. PROC. R. 11. The construct, factual basis, has never been objectively defined to explain precisely what kind of evidence is necessary to meet this requirement. In most cases, there likely will be enough evidence in the file to garner an indictment before a grand jury, whose standard of proof to indict is probable cause. But that is a far cry from corroborating evidence necessary to validate a so-called "knowing and voluntary" confession. Of course, and this is the point I am addressing in this article, procedural rules directed at preservation of safe convictions at trial are not typically applied to the plea process. Rather than apply its sound reasoning in *Crane* to the plea process, the Court would likely return to its prior positions as taken in Brady v. United States, 397 U.S. 742 (1970) and its progeny to rely upon the contractual nature of the plea. *See also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J., 1909 (1992); Schehr, *supra* note 8.

62. Neurophenomenology is a theoretical construct that seeks a holistic approach to understanding consciousness, especially with regard to decision-making. The theory, first advanced by Francisco Varela in the late 1990s, combines the substantive areas of neurology, neuropsychology, and phenomenology. Neurophenomenology posits a far more nuanced assessment of human consciousness

grand jury indictment), that directly implicate police officers, prosecutors, and defense attorneys in an unconstitutional but immanently efficient practice of moving cases toward rapid conviction.

Figure 2: Arrest to Pleading Continuum



It is my contention that the confluence of the following factors all but assure innocent men and women will be wrongfully convicted via the plea:

(1) The low standard of proof necessary to indict (probable cause);
(2) The absence of a pre-trial presumption of innocence;
(3) The fact that prosecutors are not bound by the Federal Rules of Evidence—there is no evidentiary requirement that the state presents exculpatory evidence;
(4) The absence of adversarial due process;
(5) The fact that a prosecutor may convene as many grand juries as is necessary to procure an indictment;
(6) The fact that neurophenomenological factors heavily influence the plea bargaining process;[63] and
(7) The prevalence of Draconian state and federal sentencing statutes that are used by prosecutors and defense attorneys to encourage resolution of cases via the plea.

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and decision-making and can be applied to plea bargaining. *See Mental Competency Law*, *supra* note 58, at 1091.

63. *Id.*

Equally important to the legitimacy of a democracy, as the Supreme Court recognized in *Winship*, is the "moral force of the criminal law" that must not be "diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[64] In Table 2, data is culled from the National Registry of Exonerations pertaining to exonerations occurring since 1989 in grand jury states.

64. *In re* Winship, 397 U.S. 358, 364 (1970).

Table 2: Exonerations by states that use grand jury indictments as charging instrument.

STATE[65]	**PLEA**	**TOTAL STATE**	**TOTAL FEDERAL**	**TOTAL**[66]
Alabama	2	25	1	26
Alaska	1	8		8
Arizona	2	18	3	21
Delaware		1		1
District of Columbia	1	15	4	19
Georgia	4	27		27
Guam	1	1		1
Kentucky	1	10	1	11
Maine		2		2
Massachusetts	3	42	3	45
Michigan	3	62	3	65
Minnesota	2	11	1	12
North Dakota	1	2	1	3
New Hampshire		1		1
New Jersey	3	21	1	22
New York	8	211	11	222
North Carolina	8	41		41
Ohio	3	56	1	57
Oregon	2	10		10
South Carolina		6		6
South Dakota		4	1	5
Tennessee	2	18	5	23
Texas	130	248	5	253
Virginia	3	43	2	45
West Virginia		9		9
Wyoming		3		3
TOTAL	180	895	43	938

Probable Cause Standard of Proof

[65] These states represent those that have been identified as requiring presentment before a grand jury prior to indictment. *Supra* note 47.
[66] At the time this article was written, there were 1886 exonerations listed as part of the National Registry. NAT'L REGISTRY OF EXONERATIONS, *supra* note 53. The 938 exonerations reported by state in Table 2 represent roughly 53 percent of those 1886.

There are countless activities that people and institutions engage in because it is what they have always done. In fact, in many ways what constitutes being human is our frequently inconsiderate return to habitual pathways regardless of whether they pertain to a morning commute to work, conversations with family, friends, and colleagues, or conventions relating to the way we eat and dress. When those habits rise to the level of bureaucratic procedure, as in criminal due process, they may take on superstructural hegemonic significance, ultimately manifesting as legal-rational mechanisms for the reproduction of state power. Such is the case with our contemporary reliance upon the probable cause standard of proof as it applies to the presentation of charges, at information hearings, or before a grand jury. It is doubtful that prosecutors, defense attorneys, or judges stop to question the bureaucratic significance of the probable cause standard, especially as it applies to the standard necessary for obtaining an indictment at information or grand jury proceedings. Indeed, the standard is so ubiquitous and steeped in over fifty years of practice applied to plea bargaining, that it has attained hegemonic status. The probable cause standard for indictment is taken for granted by everyone who occupies the courtroom working group. Like the presumption of innocence, the probable cause standard is so ubiquitous that merely questioning the prudence of the standard of proof as it pertains to criminal charges before a grand jury, for instance, generates a quizzical look akin to questioning whether the sun rises in the east. The practical application of the probable cause standard of proof required for indictment, a standard that has existed for over one-hundred years,[67] has taken on an essentialist quality that through its proliferation over time, has developed a deeply worn channel. The question then becomes: Is it true that just because we have been operating on the premise that the probable cause standard is hegemonic, must it necessarily be so?

In an article published in March of 2016 by the *Stanford Law Review*, Professor William Ortman provides a thorough historical assessment of the origins and applications of probable cause both in England and the United States.[68] Professor Ortman's article provides a thorough account of the origin and evolution of probable cause,

67. *See* Atwell v. United States, 162 F. 97, 100 (4th Cir. 1908).

68. *See generally* William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511 (2016).

something that this article will not entirely repeat here. However, it will reveal some prescient insights as they may prove to be important in assisting my claims.

As already considered, the standard of proof is an important procedural mechanism to ensure fairness. If there were no charging standards, a prosecutor could bring a case before a grand jury with illegitimate evidence, or even no evidence whatsoever. Ortman contends that, "charging standards act as a constraint on prosecutors."[69] Accordingly, "[t]he more one ratchets up a charging standard. . . the more confident one can be that prosecutors are constrained and that convicted defendants are actually guilty."[70]

The probable cause standard was known to American judges and attorneys at the time of our nation's founding primarily through English "Whig tracts, legal treatises, and justice of the peace manuals."[71] It appears that disputes arising between Whigs and Tories are what generated intense focus on whether one could be charged and indicted before a grand jury based upon "probabilities."[72] The grand jury in England originated with the creation of the Assize of Clarendon in 1166 by Henry II,[73] but little attention is given to charging standards until Edward Coke and Matthew Hale comment on them in the mid-seventeenth century.

Coke and Hale represent what would emerge in the United States as the two most prominent narratives on the subject. For Coke, an indictment required far greater evidence of guilt than mere probability. He contended that, "it is most necessary to have substantial proof."[74] Hale disagreed. Because a grand jury indictment did not establish guilt once and for all and was merely an accusation, Hale argued that the existence of "probable evidence" of guilt should be enough to return a true bill.[75] Political power was the primary motivation for increasing attention to the grand jury indictment process. Whigs lost power when

69. *Id.* at 517 n.19.
70. *Id.* at 518.
71. *Id.* at 526.
72. *Id.*
73. *Id.* at 521.
74. *Id.* at 522.
75. *Id.*

King Charles II dissolved the Oxford Parliament.[76] Nevertheless, Charles went ahead and prosecuted Whigs, including two individuals named Stephen Colledge and Anthony Ashley Cooper.[77] To prosecute his case against Colledge and Cooper, among other Whig activists, Charles had to first procure a grand jury indictment.[78] The first grand jury was empaneled in London where the Whigs held power.[79] Both men were acquitted when the "grand jury returned an 'ignoramus,' what today we would call a 'no bill.'"[80] However, Colledge was later presented before a grand jury in Oxford, where Charles possessed considerably greater power, and was indicted.[81]

As Ortman notes, one of the most important publications addressing the topic of grand jury indictments was Henry Care's, *English Liberties: Or, The Freeborn Subject's Inheritance*, was first published in the 1680s.[82] There, Care argues for a strict standard to be required for grand jury indictment.[83] According to Ortman, Care challenged Pemberton's "probable evidence" standard by arguing that jurors "must be fully satisfied in their Consciences, that [the defendant] is *Guilty*."[84] Care challenged Pemberton by emphasizing the fact-finding role of the grand jury.[85]

The Founding generation of American judges and attorneys were well aware of the debate taking place between Tories and Whigs over the evidentiary standard necessary to generate an indictment before a grand jury. From our founding through the late nineteenth and early twentieth centuries, judges routinely applied the stricter evidentiary standard introduced by the Whigs. For example, the following statement is the jury instructions given by Justice James Wilson of the Federal Circuit Court in Pennsylvania, clearly expressing his opposition to applying the probable cause standard to grand jury verdicts:

76. *Id.* at 523.
77. *Id.*
78. *Id.*
79. *Id.* at 524.
80. *Id.*
81. *Id.*
82. *Id.* at 525.
83. *Id.*
84. *Id.*
85. *Id.*

> Ought not moral certainty to be deemed the necessary basis, of what is delivered under the sanction of an obligation so solemn and so strict [as a grand jury's verdict]? The doctrine, that a grand jury may rest satisfied merely with probabilities, is a doctrine, dangerous as well as unfounded: It is a doctrine, which may be applied to countenance and promote the vilest and most oppressive purposes: It may be used, in pernicious rotation, as a snare, in which the innocent may be entrapped, and as a screen, under the cover of which the guilty may escape.[86]

Echoing Wilson's concerns, New Jersey Chief Justice James Kinsey said: "[T]ho' I have often heard it laid down as a rule, that probability is a sufficient ground for you to indict a citizen, . . . [I] have always viewed it as a principle against which reason revolts."[87] Further, Justice Samuel Chase went so far as to argue that the evidence necessary to indict should be on par with evidence that would be brought before a Petit Jury at trial: "[E]very Grand Jury, before they find an indictment, should expect the same proof, and as satisfactory evidence of guilt of the accused as the Petit Jury would require to Justify their verdict against him."[88]

Echoing the sentiment expressed by these judges, the early American judicial system adopted the Whig position regarding the magnitude and factual accuracy of evidence required to generate an indictment before a grand jury. The reason for this is because of fear over the abuse of power; a healthy skepticism regarding the authority of the Executive branch to charge and prosecute cases against American citizens.[89]A revolutionary war for independence fought over similar concerns may have influenced American judges to adopt stricter charging criteria to be certain that the Executive would not abuse its prosecutorial authority. Once again, Ortman cites the grand jury instruction language that was invoked by judges in the eastern states, leaving no doubt about the influence of Whig, and now American concerns over abuse of power. Specifically, indictments were only to be decided if the grand jury was "satisfied; well satisfied; fully satisfied;

86. *Id.* at 519.

87. *Id.* at 531–32.

88. *Id.* at 532.

89. *See* David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L. REV. 131, 138–39 (1992).

[or] convinced;" when there was "the most unequivocal evidence; moral certainty; evidence sufficient to convict;" when there were "the most probable grounds; the strongest appearance of criminality; or when the grand jury had no reasonable cause of doubt."[90]

To summarize, the founding era judges were keenly aware of the possibility that the Executive would abuse its power through prosecutorial misconduct. While this article provides the reader with current data relating to the wrongful conviction of defendants who were indicted by a grand jury, but were later proven to be actually innocent, the founding era concerns over police and prosecutorial overreach were largely anecdotal. Today, however, legal and social science scholars have well established the prevalence of police and prosecutorial misconduct. Furthermore, errors taking place in police forensics laboratories, reliance upon jailhouse informants, false confessions, false eyewitness identifications, and inadequate or absent indigent defenses have also come to light.[91]

In 1905, former President of the United States and Chief Justice of the United States Supreme Court, William Howard Taft, said, "the administration of the criminal law in all the states of the Union (there may be one or two exceptions) is a disgrace to our civilization."[92] Chief Justice Taft was cited by Justice Frankfurter in his 1952 dissent in *Leland v. Oregon*.[93] While Justice Frankfurter modifies Chief Justice Taft's tone somewhat, he states that no matter how much things may have improved in the intervening forty-seven years, "no informed person can be other than unhappy about the serious defects of present-day American criminal justice."[94] In *Powell v. Alabama,* the Supreme Court held that, "[h]owever guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent."[95] In a case where the Court zeroed in on assistance of counsel as instrumental to a fair trial, it made the more general declaration that, "It was the duty of the court having their cases in

90. *Id.* at 531.

91. *See generally* JAMES R. ACKER & ALLISON D. REDLICH, WRONGFUL CONVICTION (2011).

92. Leland v. Oregon, 343 U.S. 790, 802–03 (1952) (Frankfurther, J., dissenting).

93. *See id.*

94. *Id.* at 802.

95. 287 U.S. 45, 52 (1932).

charge to see that they were denied no necessary incident of a fair trial."[96]

A more contemporary exposition of both Chief Justice Taft and Justice Frankfurter's assessment of the sad state of American criminal justice bookends more than a century's worth of concern for fair application of due process.[97] It has become apparent that the American criminal justice system is broken in much the same way that founding era judges feared it might be. But the difference today is that the probable cause standard has usurped the far stricter emphasis upon near certainty of guilt required to indict, and it has done so at precisely the moment when plea bargaining demands less evidentiary resistance.

By 1978, the principle and evidentiary standards pertaining to grand jury instructions had substantially changed following publication of the Federal Judicial Conference's model grand jury charge. The new language, which was applied in all courtrooms across the United States, said: "[Y]our duty [is] to see to it that indictments are returned against those who you find probable cause to believe are guilty."[98]

Although not discussed, the fact that defendants are indicted based upon probable cause means they are not being protected by the Constitution's Fifth, Sixth, or Fourteenth Amendments. Instead, they are being convicted based upon an anorexic due process that significantly increases the likelihood of innocent people being wrongfully convicted, and where those who may be factually guilty, but who may be guilty of something other than the facts as alleged, will be exposed to minimal due process protections. The remainder of this article will address the presumption of innocence.

IV. PRESUMPTION OF INNOCENCE

As indicated in Part I, the majority in *Winship* referred to the proof beyond a reasonable doubt standard as procedural manifestation of "that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law."[99] The Court's reference to the presumption of innocence was echoed by none

96. *Id.*

97. *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

98. *See* Ortman, *supra* note 68, at 520.

99. *In re* Winship, 397 U.S. 358, 363 (1970).

other than Alexander Hamilton, when he stated that the presumption of innocence was "a great principle of social security."[100] And while it would be reasonable to conclude that the majority of Americans are familiar with this "axiomatic and bedrock" principle ensconced in hundreds of years of common law and popular culture, it is doubtful that those same Americans understand that there is no presumption of innocence in due process *prior to trial*.[101]

Data collected between June 3 and June 5 of 2013 by the Center for Prosecutorial Integrity (CPI) on the topic of prosecutorial misconduct included a question about the presumption of innocence.[102] As with most treatments of the construct, CPI researchers assumed what they might well have sought to establish when they asked: "Do you believe the presumption of innocence is being lost in our nation's legal system?"[103] With an average of 993 individuals responding to thirteen questions with a dichotomous "yes" or "no" answer, the CPI indicates that 66.8 percent of respondents "think the presumption of innocence is becoming lost in our nation's legal system."[104] It is difficult to deduce from the CPI data just what the significance of the presumption of innocence is for most Americans, but the hermeneutic beauty of the declarative, "presumption of innocence," is its ontological simplicity (or so it would seem). I agree with Andrew Ashworth's conviction that:

> The presumption of innocence is a moral and political principle, based on a widely shared conception of how a free society. . . should exercise the power to punish. One element in this is the high value placed on the fundamental right not to be wrongly convicted. Another element stems from the huge disparity of resources between the State and defendant.[105]

100. François Quintard-Morénas, *The Presumption of Innocence in The French and Anglo-American Legal Traditions*, 58 AM. J. OF COMP. L. 107, 133 (2010).

101. Bell v. Wolfish, 441 U.S. 520, 533 (1979).

102. *CPI Survey Methods*, CTR. FOR PROSECUTOR INTEGRITY, http://www.prosecutor integrity.org/survey-summary/methods/ (last visited Oct. 20, 2017).

103. *Id.*

104. *CPI Survey Highlights*, CTR. FOR PROSECUTOR INTEGRITY, http://www. prosecutorintegrity.org/survey-summary/ (last visited Oct. 30, 2017).

105. Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10 INT'L J. EVIDENCE & PROOF 241 249–50 (2006).

While a thorough historical overview of the presumption of innocence is beyond the scope of this article, it is important to consider its relevance to the democratic administration of justice in the United States.[106] This is more than an academic dispute. In a 2016 publication, the Department of Justice's Community Oriented Policing Program (COPS) issued a report titled "A Victim-Centered Approach,"[107] suggesting that "[a]gencies should have policies and practices that ensure victims are treated with respect and care and that victims retain some sense of control during the criminal justice process."[108] The Ashland, Oregon Police Department's "You Have Options Program" is highlighted in chapter two of the report.[109] It discusses how the Victim-Centered Approach, as one would suppose, is an exemplary way forward. The substance of the You Have Options Program is constituted by twenty "elements" that were culled by the Ashland Police Department from feedback elicited from sexual assault victims to, "determine what they needed most from law enforcement . . . ."[110] At issue here is element number seventeen which states:

> Investigators will collaborate with victims during the investigative process *and respect a victim's right to request certain investigative steps not be conducted.* Criminal investigations will be conducted at a pace set by the victim, not the law enforcement officer. Victims will be informed that no case can proceed to the arrest or referral to

106. Like pleas, pre-trial detention hearings are based upon the probable cause standard where "all the evidence presented pretrial goes to the merits of the case . . . . Thus, the defendant quickly gives up her right to due process before a deprivation of liberty." Pre-trial detention hearings are precursors to plea bargains. As such, "with one mini-trial, the defendant loses all opportunities to gain access to the umbrella of constitutional protections she receives at trial, including the presumption of innocence." *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 754 (2011).

107. U.S. DEP'T. OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVS., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 9 (2016) [hereinafter COPS], https://ric-zai-inc.com/Publications/cops-w0796-pub.pdf.

108. *Id.* at 2.

109. *Id.* at 12–13.

110. *Id.*

> an office of prosecution until the investigative process is complete.[111]

The report goes on to state that "[f]ollowing the implementation of the You Have Options Program, the Ashland Police Department saw sexual assault reporting increase by more than 100 percent."[112]

Authors of the CPI report, Christopher Perry and Richard Davis, have made the important point that throughout the COPS report, complainants are referred to as "victims."[113] This immediately suggests that a crime has occurred *prior to* determination by law enforcement.[114] But their most vital concern, as well as mine, is the report's disregard for any sense of a presumption of innocence for the accused. Perry and Davis state:

> We agree that trauma-informed interviews, use of victim advocates, and respectful interactions are essential and should be encouraged. But "victim-centered investigations," which explicitly instruct the officer to believe the complainant, regardless of the circumstances, should be discouraged because of the likely negative results. Victim-centered investigations represent an approach for complainants that is built upon a system of injustice for the accused.[115]

On a psychological level, nomenclature matters, especially when it is oxymoronic. The Department of Justice (DOJ) and COPS appear to recommend an approach to investigation of sexual assault allegations that is victim-centered, thereby ensconcing the presumption of guilt into policy. Thus, the nomenclature being adopted by the DOJ and COPS *presumes* that a crime has been committed. Unfortunately, that *presumption of guilt* will confound law enforcement investigation in sexual assault allegations, from the initial point of contact with the

111. *Id.* at 13 (emphasis added).

112. *Id.*

113. Letter from Christopher J. Perry, Program Dir., Ctr. for Prosecutor Integrity, & Richard L. Davis, Former Police Lieutenant, Brockton Police Dep't, to Ronald L. Davis, Dir., Office of Cmty. Oriented Policing Servs., & Chuck Wexler, Exec. Dir., Police Exec. Research Forum (June 6, 2016) (on file with author) ("Finally instead of 'complainant,' the report repeatedly uses the word 'victim,' a word that presumes a crime has occurred, which is not always the case.").

114. *Id.*

115. *Id.* at 2.

complainant, through prosecutorial filing of formal charges, and to presentment before a grand jury.

A. Police Misconduct and Wrongful Conviction

From arrest to indictment, pressure is placed upon law enforcement to make arrests and gain convictions.[116] As early as 1934, John A. Seiff, publishing on the subject of the presumption of innocence, mentioned "the tendency to cast a stone whenever an unfortunate is charged with the commission of an offense either against morals or the law."[117] He cautions against willful acceptance of suspect confessions because, "[t]he source of information is frequently polluted by the zeal of a police officer twisting every statement into proof of guilt."[118] Contemporary documentation of police misconduct as a principle factor in causing wrongful convictions appeared in a 2013 *Washington University Law Review* article by Professor Russell Covey.[119] Post-mortem analysis of exoneration cases to document each of the errors leading to wrongful convictions appears on both the Innocence Project[120] and National Registry of Exonerations[121] websites.

Professor Covey addresses the causes of wrongful convictions arising from two Texas cases—*Rampart*s and *Tulia*.[122] He indicates that these two cases are responsible for as many as two-hundred wrongful convictions with the primary cause being procedural and substantive

116. *See* Dean Scoville, *What's Really Going on with Crime Rates*, POLICE MAG. (Oct. 9, 2013), http://www.policemag.com/channel/patrol/articles/2013/10/what-s-really-going-on-with-crime-rates.aspx (discussing the twin practices of inflating and deflating crime statistics). *See also Policing and Profit*, 128 HARV. L. REV. 1723 (Apr. 10, 2015), http://harvardlawreview.org/2015/04/policing-and-profit/.

117. John A. Seiff, *The Presumption of Innocence*, 25 J. OF CRIM. L. & CRIMINOLOGY 53, 53 (1934).

118. *Id.*

119. *See* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013).

120. *Government Misconduct*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/government-misconduct/ (last visited Nov. 22, 2017) [hereinafter INNOCENCE PROJECT].

121. NAT'L REGISTRY OF EXONERATIONS, *supra* note 53.

122. Covey, *supra* note 119, at 1137–43.

police perjury.[123] Among the examples of procedural perjury was police lying about the circumstances of an encounter with a suspect, specifically, about receiving consent to search, probable cause, and compliance with constitutional rules like administration of Miranda.[124] Substantive perjury refers to incidences where police lie to incriminate innocent suspects. In both the *Ramparts* and *Tulia* cases, Covey reports that police were found to have planted drugs and weapons, lied about consent searches, engaged in coercing confessions, and lied about having probable cause for searches by making "dropsy" cases where police claimed that drugs or weapons fell from the suspect's person thereby appearing in plain view making the evidence admissible.[125]

The Innocence Project identifies the following police misconduct activities as having been associated with the 344 currently documented DNA exonerations:

(1) Employing suggestion when conducting identification procedures,
(2) Coercing false confessions,
(3) Lying or intentionally misleading jurors about police observations of crime scene events,
(4) Failing to turn over exculpatory evidence to prosecutors,
(5) Providing incentives to secure unreliable evidence from informants.[126]

Moreover, prosecutors have engaged in the following forms of misconduct leading to wrongful convictions:

(1) Withholding exculpatory evidence from the defense,
(2) Deliberately misleading, mistreating or destroying evidence,
(3) Allowing witnesses that they know or should know are not truthful to testify,
(4) Pressuring defense witnesses not to testify,
(5) Relying upon fraudulent forensic experts, and
(6) Making misleading arguments that overstate the probative value of testimony.[127]

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123. *Id.* at 1155.
124. *Id.* at 1158.
125. *See generally* Covey, *supra* note 119.
126. INNOCENCE PROJECT, *supra* note 120.
127. *Id.*

As mentioned in Part III of this article, at the time of its writing, the National Registry of Exonerations indicates there are 1886 exonerations in its database.[128] In a report released on September 22, 2016, Kaitlin Jackson and Samuel Gross presented disturbing data relating to "police misconduct and tainted identifications."[129] Of the 1886 exonerations, 30 percent included unintentional identifications.[130] Most importantly, 26 percent of those cases were the result of lies from witnesses who intentionally identified the wrong person.[131] Other errors pertained to mistakes made by police officers. The patterns identified by Jackson and Gross include:

(1) Misidentifications by witnesses who know the suspect, are generally lies.
(2) Misidentifications by strangers are generally mistakes.
(3) Police initiated identification procedures, generally in-person or photographic lineups, almost always involve witnesses who are strangers to the suspect.
(4) Police manipulate an eyewitness into mistakenly believing she saw a suspect she did not actually see.
(5) The police convince the witness that they, the police, know the suspect is guilty, which may lead the witness to lie and identify a suspect she does not recognize in order to help police obtain a conviction.
(6) Some witnesses are induced to lie and identify innocent suspects out of self-interest: they are promised benefits if they do, are threatened with harsh consequences if they do not, or both.[132]

Jackson and Gross analyzed 1365 exonerations through April of 2014 and found that some type of false identification existed in 75 percent of these cases.[133] In 57 percent of the tainted identifications found in this database, the witnesses made mistakes; in 43 percent they

128. NAT'L REGISTRY OF EXONERATIONS, *supra* note 53.

129. Kaitlin Jackson & Samuel Gross, *Tainted Identifications*, NAT'L REGISTRY OF EXONERATIONS (Sept. 22, 2016), https://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

lied.[134] There are four police practices identified in these case files that are worth noting, and each generated wrongful convictions of actually innocent people. These four practices are telling, displaying, repeating, and lying.[135]

Telling refers to police "telling" the witness who to pick out of a lineup, and this occurred in nearly half of the tainted identification cases.[136] Jackson and Gross found that 12 percent of the tainted identifications included situations where "police not only told witnesses who to identify but threatened those who were reluctant to do so."[137] *Displaying* refers to the police practice of constructing photo and/or live arrays in such a way that the suspect is physically unique among others appearing in the photo array or live lineup. For example, if police first show a suspect a photo array and follow it with a live lineup, they may only include one person from the original photo array in the live lineup. Consequently, this practice draws the witness's attention to that particular suspect. Other display tactics police use to make a suspect standout may include clothing, color versus black and white photos, facial hair, and the like. *Repeating* refers to the police practice of reusing suspects in either a photo array or live lineup after having already presented a witness with those same suspects, but where the witness could not initially make a positive identification. Repeating occurred in 14 percent of the tainted identification cases. Finally, *lying* occurred in 7 percent of the tainted identification cases.[138] Specifically, "police used false information to explain away discrepancies between the suspect and the eyewitness's initial description."[139]

This information begs the question of whether a *pre-trial* presumption of innocence is necessary. The institutional and sub-cultural data generated by legal and social science scholars, as well as the Innocence Project,[140] Innocence Network,[141] and National Registry

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. INNOCENCE PROJECT, *supra* note 120.
141. *See generally* THE INNOCENCE NETWORK, http://innocencenetwork.org (last visited Nov. 22, 2017).

of Exonerations[142] as it pertains to police misconduct would certainly make it seem so. Would a pre-trial presumption of innocence have a significant effect upon police misconduct? Not alone. It would serve as a principle that guides improved police procedure and due process. However, as the law now stands there is no legal expectation of a pre-trial presumption of innocence, and as the data presented above makes clear, the presumption of *guilt* that law enforcement operates under generates severe consequences for the innocent, as well as crippling systemic legitimacy. As Professor Dworkin proclaimed, actually innocent people have a fundamental right not to be convicted.[143] In fact, it is my contention that the United States should consider adopting a pre-trial presumption of innocence similar to what has been established by European human rights law, where pre-trial procedures are conducted, so far as possible, as if the defendant were innocent.[144] This would require adoption of what Paul Roberts refers to as "the principle of asymmetry," where greater weight is placed upon protection of the innocent through adoption of a presumption of innocence as a matter of principle.[145]

B. Innocent Until Proven Guilty?

Is it truly the case, as many actors within the judicial system claim, that the accused is presumed innocent until proven guilty? If so, when *should* that presumption attach? For example, we know that the presumption of innocence *does not* attach upon arrest, but should it? If so, how would that manifest? Upon initial contact with law enforcement?[146] Upon assignment of counsel? Upon initial appearance? Upon presentment before a grand jury? We may all agree that once an accused makes an admission or confession to some or all facts as alleged in an indictment and thereby enters into a guilty plea, then logically, the accused could no longer be presumed innocent. But as indicated in Part I above, my concern *precedes* such an admission or

142. NAT'L REGISTRY OF EXONERATIONS, *supra* note 53.

143. *See* Ashworth, *supra* note 105, at 71.

144. *Id.* at 80.

145. *Id.* at 73.

146. *See* Salinas v. Texas, 570 U.S. 178, 189–90 (2013) (holding that a suspect's pre-Miranda non-custodial silence may be considered by jurors at trial as an aggravating factor).

confession and instead focuses on due process rights accruing to the accused upon arrest.

C. Brief Historical Account of the Presumption of Innocence

The earliest written reference to the presumption of innocence for the accused can be found in the Babylonian Code of Hammurabi (1792–1750 BC).[147] Allen H. Godbey says, "it is a fundamental principle of the code of Hammurabi that the presumption is always in favor of the innocence of the accused: the burden of proof is thrown upon the accuser."[148] In 352 B.C., Greek orator, Demosthenes, stated, "no man comes under that designation [criminal] until he has been convicted and found guilty."[149] King Ptolemy of Egypt (118 B.C.), Roman Emperor's Honorius and Theodose (423 A.D.), and French Emperor Charlemagne each articulated a similar common commitment to the presumption of innocence for the accused prior to conviction.[150]

The maxim: "Innocent until proven guilty," can be traced to thirteenth-century France where it is believed that French canonist, Johannes Monachus, was the first person to coin this phrase.[151] It is likely that the French people were well-aware of the maxim by the fourteenth-century, despite frequent egregious violations of it during the latter Middle Ages.[152] However, in what by contemporary standards would appear downright progressive, King Louis XVI of France gave the presumption of innocence his imprimatur when in "his Declaration of May 1788 [he abolished] the humiliating use of the *sellette* [a wooden stool that the accused was forced to sit upon during questioning], prohibiting that suspects wear prison garb, and imposing

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147. The Babylonian Code of Hammurabi was "developed during the reign of Hammurabi of the first dynasty of Babylon [and included] penalties for breaking the laws [that] varied according to the status of the offender and circumstances of the offense." *Hammurabi's Code (1792 BC–1750 BC)*, ONLINE LIBR. OF LIBERTY, http://oll.libertyfund.org/pages/hammurabi-s-code-1792-bc-1750-bc (last visited Apr. 1, 2018).

148. Quintard-Morénas, *supra* note 100, at 110, 149 n.20 (quoting Allen H. Godbey, *The Place of the Code of Hammurabi*, 15 THE MONIST 199, 210 (1905)).

149. *Id.* at 112 (quoting DEMOSTHENES, AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 231 (J.H. Vince trans., 1935)).

150. *Id.* at 112–14.

151. *Id.* at 114.

152. *Id.* at 115.

the publication of judgments of acquittal to reinstate accused individuals in the public opinion."[153] In eighteenth-century France, the presumption of innocence was premised upon a commitment to treat the accused with humanity, which was a concept that also appeared in the Declaration of the Rights of Man.[154] Finally, by the end of the eighteenth-century in Scotland, the presumption of innocence was adopted as an aspect of Natural Law.[155]

D. The Presumption of Innocence in the United States

There is no specific mention of a presumption of innocence in the United States Constitution. However, case law has identified three distinct locations articulating the spirit of the presumption: the Fifth Amendment's right to remain silent, the Sixth Amendment's right to a jury trial, and the Fourteenth Amendment's due process clause.[156] The Supreme Court first implemented the presumption of innocence into United States law in its opinion in *Coffin v. United States*.[157]

The *Coffin* case presents a fifty count indictment against Theodore P. Haughey, Francis A. Coffin, Percival B. Coffin, and Albert S. Reed, for "wrongfully, unlawfully, feloniously, and willfully misapply[ing] the moneys, funds and credits of said association [Indianapolis National Bank] as aforesaid, to wit, the sum of six thousand three hundred and eighteen dollars."[158] In an otherwise undifferentiated misdemeanor bank fraud case, *Coffin* is recognized for being the first acknowledged Supreme Court affirmation of the presumption of innocence. The Court commences its articulation of the presumption of innocence in response to the forty-fourth charge presented in the *Coffin* appeal. In question, was a jury instruction that failed to specifically reference the

153. *Id.* at 122 (emphasis added).

154. *Id.* at 122–23 ("Every man being presumed innocent until he has been found guilty, if it shall be deemed absolutely necessary to arrest him, every kind of rigor used, not necessary to secure his person, ought to be severely repressed by the law.").

155. *See id.* at 132.

156. Taylor v. Kentucky, 436 U.S. 478 (1978) (as to the Fourteenth Amendment's due process clause).

157. Coffin v. United States, 156 U.S. 432, 452 (1895).

158. *Id.* at 436.

presumption of innocence.[159] The language used by the judge in the *Coffin*, emphasized the necessity for jurors to reach a guilty verdict only if they were convinced by the evidence that the defendants were guilty beyond a reasonable doubt.[160] Justice White's opinion reversed the trial court's jury instruction because of its failure to include the "presumption of innocence" element as requested by the defendants.[161] The Court could have stopped there, but it did not.

The greater proportion of the *Coffin* opinion is dedicated to a lengthy exposition regarding the presumption of innocence. It commences its presumption of innocence commentary with the now famous affirmation: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[162] From there, Justice White launches into a historical contextualization of the presumption of innocence that has, despite its critics, been fundamental to the principle ever since.[163] Justice White begins by citing to Simon Greenleaf's

159. *Id.* at 452 ("The law presumes that persons charged with crime are innocent until they are proven, by competent evidence, to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt.").

160. In *Coffin*, the Supreme Court concluded that, "Before you can find any one of the defendants guilty, you must be satisfied of his guilt, as charged in some of the counts of the indictment, beyond a reasonable doubt." The judge continued by elaborating upon the meaning of proof beyond a reasonable doubt by instructing jurors as to what "reasonable doubt" would entail: "A 'reasonable doubt,' as that term is employed in the administration of the criminal law, is an honest, substantial misgiving, generated by the proof, or the want of it. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused." *Id.* at 452–53.

161. *Id.* at 463; *see also* Bruce A. Antkowiak, *The Irresistible Force*, 18 TEMP. POL. & C.R. L. REV. 1, 31 (2008).

162. *Id.* at 453.

163. *See* James Bradley Thayer, *The Presumption of Innocence in Criminal Case*s, 6 YALE L.J. 185 (1897). Thayer challenges the notion that the presumption of innocence should be viewed as evidence weighing in favor of the accused, rather than as a principle embedded in the Common Law rule pertaining to guilty beyond a reasonable doubt. "There is no need to trace it further, for no one doubts that in one form or another this has always continued to be a great and recognized rule. It has, in our inherited system, a peculiarly important function, that of warning our untrained tribunal, the jury, against being misled by suspicion, conjecture and mere appearances.

publication, *A Treatise on the Law of Evidence*.[164] According to Justice White, Greenleaf identifies the origins of the presumption of innocence as appearing in ancient Sparta and Athens.[165] Justice White then cites to Roman law saying, "Let all accusers understand that 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."[166] Roman emperor Trajan is reported to have written to Julius Frontonus that, "no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent."[167] Justice White continues by pointing out that in 1678 Lord Hale said:

> In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him; but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die.[168]

Hale's maxim is followed by Blackstone's, which doubles the number of guilty we'd prefer to see released than to convict one innocent person.[169] He also references "McKinley's" case from 1817, where an incredulous Lord Gillies stated:

> But the presumption in favor of innocence is not to be reargued [to prove wrong or invalid] by mere suspicion. I am sorry to see, in this

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In saying that the accused person shall be *proved* guilty, it says also that he shall not be presumed guilty; that he shall be convicted only upon legal evidence, not tried upon prejudice; that he shall not be made the victim of the circumstances of suspicion which surround him, the effect of which it is always so difficult to shake off . . . that after an investigation by the grand jury he has been indicted, imprisoned, seated in the prisoner's dock, carried away handcuffed, isolated, watched, made an object of distrust to all that behold him." *Id.* at 196.

164. *Coffin*, 156 U.S. at 454.

165. *Id.*

166. *Id.* (citing Code, L. IV, T. XX, 1, 1. 25).

167. *Id.*

168. *Id.* at 456.

169. *Id.* ("The law holds that it is better that ten guilty persons escape than that one innocent suffer.").

> information, that the public prosecutor treats this too lightly. He seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this 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, and I was happy to hear from Lord Hermand he is inclined to give full effect to it.[170]

Justice White's exegesis suggests that there is no known reference in the United States to the presumption of innocence until the publication of *McNally's Evidence* in 1802.[171] He contends that this is likely due to the ubiquitous American awareness of the principle, and therefore it was not necessary to overtly discuss it.[172] He also cites to a statement made in an 1889 publication in *Criminal Law Magazine*: "The practice of stating this principle to juries is so nearly universal that very few cases are found where error has been assigned upon the failure or refusal of a judge to do so."[173]

The Justice White opinion has drawn considerable debate over its contention that "the presumption of innocence is evidence *in favor of* the accused, introduced by the law in his behalf (emphasis added),"[174] instead of serving as a guiding principle signifying proof beyond a reasonable doubt. But for the Court in *Coffin*, the proof beyond a reasonable doubt standard owes its origin to the ancient Greek and Roman expression of the presumption of innocence that privileged "their devotion to human liberty and individual rights."[175] In perhaps his strongest statement in defense of retaining the presumption of innocence as an evidentiary element, Justice White stated:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of

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170. *Id.*
171. *Id.* at 455.
172. *Id.*
173. *Id.* at 458.
174. *Id.* at 460. For later criticism of this point, *see* Thayer, *supra* note 163, at 189–90.
175. *Id.*

> so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of a crime.[176]

So ends the *Coffin* opinion and its unequivocal support for the presumption of innocence. With the exception of the Court's defense of the presumption of innocence as evidence in favor of the accused (a point taken up only two years later by the Supreme Court in *Agnew v. United States*[177]) the full-throated defense of the presumption of innocence in *Coffin* would stand as prevailing law until 1979 when the Court confronted the question in the case of *Bell v. Wolfish*.[178] However, two cases preceding *Bell* are each worth mentioning for immediate historical context.

In *Estelle v. Williams*,[179] the United States Supreme Court addressed the question as to whether an accused who was standing trial before a jury, and who was presented in court wearing prison clothes, amounted to a violation of his Fourteenth Amendment due process rights pertaining to the presumption of innocence.[180] The greater proportion of the Court's opinion stresses the importance of the presumption of innocence by citing *Coffin*. The Court acknowledges the probity of adhering to the presumption of innocence going so far as to assert:

> [T]hat compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment (citation omitted).[181]

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176. *Id.*

177. *See* 165 U.S. 36, 52 (1897) (holding similarly to *Coffin* regarding the centrality of the presumption of innocence, but with the one significant exception being its rejection of the opinion that the presumption of innocence should be considered evidence in favor of the accused).

178. 441 U.S. 520 (1979).

179. 425 U.S. 501 (1976).

180. *Id.* at 502 ("We granted certiorari in this case to determine whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws.").

181. *Id.* at 505–06.

Here, the Court clearly seems to recognize the symbolic significance of a defendant being presented before a jury in prison clothes thereby indicating guilt. Despite its obvious commitment to the presumption of innocence in principle, the majority held in favor of the state.[182]

A far stronger assertion of the principle and constitutional verity of the presumption of innocence can be found in the Supreme Court's 1978 opinion in *Taylor v. Kentucky*.[183] In *Taylor*, the Court cites to *Estelle* by emphasizing that, "the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[184] At issue in *Taylor* was a request by the defendant to have the trial judge include a presumption of innocence statement along with recitation of the proof beyond a reasonable doubt standard, which the judge refused.[185] Additionally, in its opening and closing statements, the prosecution referred to the fact that by virtue of simply being arrested, indicted, and appearing in court as a defendant, the jury was permitted "to draw inferences of guilt."[186] For the Court, this was a bridge too far. Important to note, in its opinion the Court dismissed an attempt by the Commonwealth of Kentucky to argue that precedent from another case, *Howard v. Fleming*,[187] "does not require instructions on the presumption of innocence."[188] Rather, the Court clarified the *Howard* opinion (and by extension *Agnew*), to mean that the presumption of innocence instruction may *not* include reference to the presumption being considered as evidence in favor of the accused.[189]

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182. *Id.* at 510. Here, the majority contended that while it may often be inappropriate for the defendant to appear before a jury wearing prison clothes, there may be times when it serves the defendant's interests to do so. But because there was no objection by defense counsel to his client being presented at trial wearing prison clothes, the Court concluded that there was no evidence that "non-bailed defendants were compelled to stand trial in prison garments if timely objection was made to the trial judge."

183. 436 U.S. 478 (1978).

184. *Id.* at 479 (citing *Estelle,* 425 U.S. at 503).

185. *Id.* at 490.

186. *Id.* at 487.

187. 191 U.S. 126 (1903).

188. *Taylor*, 436 U.S. at 489–90.

189. *Id.* at 490.

A trial judge may, however, issue a presumption of innocence instruction that intersects with the rule established in *Winship,* requiring that jurors must consider whether each of the elements in the case have met evidentiary standards of proof beyond a reasonable doubt.[190] Therefore, in *Taylor,* the Supreme Court once again affirmed the centrality of the presumption of innocence as manifested in the Fourteenth Amendment's due process and fundamental fairness clauses. However, in an about face occurring only one year later in the case of *Bell v. Wolfish*,[191] the Supreme Court would severely limit the presumption of innocence.

At issue in *Bell* were questions pertaining to whether various aspects of pre-trial detention violated the defendant's presumption of innocence.[192] Citing *Coffin*, *Taylor*, *Estelle*, and *Winship*, the Court acknowledges the centrality of the presumption of innocence as an aspect of proof beyond a reasonable doubt.[193] But without citing to any legal authority, the Court then truncates the presumption by asserting that "it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[194] This means that there is no presumption of innocence prior to trial. Commenting on the *Bell* opinion in an article addressing the origins of the presumption of innocence in both civil and common law, Quintard-Morénas states that:

> The one-dimensional conception of the presumption of innocence endorsed by the U.S. Supreme Court in 1979 [*Bell v. Wolfish*], is more than a departure from the Anglo-American tradition. It challenges the very foundation of a social contract in which society, by prohibiting private vengeance and guaranteeing the right to be tried by an impartial jury, acknowledges that there is a time for innocence and a time for guilt.[195]

The question then becomes, to presume or to hold? The question over whether the presumption of innocence should be tied to a law of proof,

190. *See In re* Winship, 397 U.S. 358 (1970).
191. 441 U.S. 520 (1979).
192. *Id.* at 523.
193. *Id.* at 533.
194. *Id.*
195. Quintard-Morénas, *supra* note 100, at 109.

or, as Natural Law theorists and judges would have it, be returned to its substantive meaning from antiquity, is intriguing. It is not just a matter of semantics either. In *People v. Gazulis*[196] the Court held that, "[i]t is, perhaps, unfortunate that the 'presumption of innocence' is loosely referred to by the judiciary and the bar as a 'presumption;' it is all of that and more . . . . The 'presumption' of innocence is a substantive right and not a procedural or evidentiary rule."[197] It is my belief that this opinion was shared by Justices Stevens and Brennan in their *Bell* dissent:

> An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be no matter how acceptable in a community where equality of status is the dominant goal – *it is obnoxious to the concept of individual freedom protected by the Due Process clause* (emphasis added).[198]

Striking at the heart of the point being advanced in this article, the dissenters conclude by saying, "In sum, although there may be some question as to what it means to treat a person as if he was guilty, there can be no dispute that the government may never do so at any point in advance of conviction."[199] Although dissenting opinions are not legal authority, it is clear from the preceding case law that the dissenters got it right. That said, the 1970s ended with a significantly revised interpretation of the presumption of innocence that limits its protections solely to trial.

After the *Bell* opinion, we know that no presumption of innocence prior to trial exits. We can now answer the questions posed at the beginning of this section by concluding that there is no presumption of innocence upon arrest, upon assignment of counsel, or through the grand jury indictment process leading up to the decision to plead not guilty and proceed to trial, or even at the commencement of guilty plea negotiations. Recall for a moment my contention that the administration of justice in the United States is a two-tiered system of rights

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196. People v. Gazulis, 212 N.Y.S.2d 910, 943 (N.Y. City Ct. 1961).
197. Quintard-Morénas, *supra* note 100, at 110 n.347.
198. *Bell*, 441 U.S. at 579 (Stevens, J., dissenting).
199. *Id.* at 599.

protections. The first tier is that significant constitutional protections are afforded to those who plead not guilty and go to trial; these people will subsequently be cloaked in the lingua franca of presumed innocence. The second is for those who never realize the presumption of innocence because they interrupt the flow of constitutional protections by ending the process with a guilty plea. This is because for those who waive their right to trial, from arrest through indictment and admission or confession, *there is only the presumption of guilt*.

Accordingly, I am in complete agreement with *Bell* dissenters, Justices Stevens and Brennan, in their conclusion that:

> An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be, no matter how acceptable in a community where equality of status is the dominant goal – it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.[200]

But this presumption of guilt is precisely what is imposed upon every person accused of a crime from arrest through indictment. The Court's opinion in *Bell* flies in the face of historical precedent. Even as far back as 1764, Cesare Beccaria declared:

> No man can be judged a criminal until he be found guilty; nor can society take from him the public protection until it have been proved that he has violated the conditions on which it was granted. What right, then, but that of power, can authorise the punishment of a citizen so long as there remains any doubt of his guilt? This dilemma is frequent. Either he is guilty, or not guilty. If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary, if he be not guilty, you torture the innocent; for, in the eye of the law, every man is innocent whose crime has not been proved.[201]

200. *Id.* at 579.

201. Cesare Beccaria, *Of Crimes and Punishments: Of Torture*, CONSTITUTION.ORG, http://www.constitution.org/cb/crim_pun.htm (last visited Sept. 1, 2017).

"Axiomatic" is how the *Winship* Court referred to the presumption of innocence.[202] And despite the *Bell* Court's contention that it only applies at trial, it is still the case that, "the presumption of innocence is, along with its sister, proof beyond a reasonable doubt, the Holy Grail of the criminal justice system,"[203] and a "cornerstone of Justice in Western Civilization."[204]

Based on his personal experience, Judge Mark W. Bennett, a veteran district court judge for the Northern District of Iowa, concluded that most jurors have no idea what the presumption of innocence actually means.[205] For example, Judge Bennett cites his attempts as a young trial court judge in the mid-1990s to discern the extent to which prospective jurors understood the presumption. He began by asking the jurors to take a good look at the defendant and tell him whether they (the jurors) believed defendant was guilty.[206] Jurors routinely responded by saying, "I have no idea, I haven't heard any of the evidence yet."[207] For Judge Bennett, this experiment with jurors was chilling because it was clear to him that they did not have any understanding of the pre-trial presumption of innocence.[208] Consequently, Judge Bennett now explains to jurors that:

> [T]he presumption of innocence is so important that it applies in every criminal case from Maine to California and Hawaii to Florida. It applies in all 94 federal district courts and all state courts. The presumption, and "reasonable doubt". . . are, for my money, the two most important concepts in the American judicial system.[209]

Perhaps most efficacious and visually dramatic, Judge Bennett goes further by explaining to jurors that the presumption of innocence is "a steel curtain that surrounds the accused . . . . The presumption

202. *In re* Winship, 397 U.S. 358, 363 (1970).

203. Judge Mark W. Bennett, *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*, THE CHAMPION 18 (Apr. 2015).

204. Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, AM. J. OF JURIS. 229, 231 (1996).

205. Bennett, *supra* note 203, at 18.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 19.

surrounds the accused throughout the entire trial . . . . I explain that the presumption may, all by itself, be sufficient to find the accused not guilty."[210] I share this recitation of Judge Bennett's experiences and his thoughtful approach to educating jurors and discerning whether jurors actually understand the presumption of innocence, because Judge Bennett is applying the lessons he learned to the trial.

Even at trial, with its constitutional protections and application of the Federal Rules of Evidence, it is not clear whether jurors properly adopt the presumption of innocence. Similar findings were reported in a much more substantial study conducted by Mitchell J. Frank and Dawn Broschard.[211] In their study of actual jurors, Frank and Broschard had the members respond to a statement, such as, "*I believed throughout the entire trial that the defendant was presumed innocent*."[212] The results of this poll were described by Frank and Broschard as "disturbing."[213] "Out of 564 responding criminal jurors, more than one in five, 21.1%, disagreed with this most fundamental protection. Of equal importance—some may say it is greater—fewer than one in four jurors, 24.3%, 'agreed strongly' with it."[214]

It is clear that Judge Bennett takes the presumption of innocence at trial very seriously. Let us juxtapose his approach to the one that was applied to the Boston Marathon bombing case.[215] In that case, which took place on April 15, 2013, prospective jurors were provided with a 101 question questionnaire.[216] One of the questions asked jurors whether they believed that Dzhokhar Tsarnaev, one of the two people accused of the Boston Marathon bombing, was guilty.[217] According to Masha Gessen writing for the *The New Yorker*, most believed that he

210. *Id.*

211. Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, is Either of them Safe?*, 10 LEWIS & CLARK L. REV. 237, 260 (2006).

212. *Id.*

213. *Id.*

214. *Id.*

215. *In re* Tsarnaev, 780 F.3d 14 (1st Cir. 2015).

216. *Id.* at 35.

217. *Id.*

was guilty.[218] While this is not surprising given the media attention directed at the case, the judge's response during *voir dire* when questioned about whether a proper presumption of innocence instruction was being delivered to prospective jurors is troubling. According to Gessen, "[t]he judge sided with the prosecution, saying that 'presumption of innocence' is 'a term of art' that does not actually mean presuming the innocence of a defendant."[219] So, even in a high profile trial like Tsarnaev's, the judge diminished the presumption to little more than a rhetorical tool. However, it may be that this response is an outlier and that most judges adopt the more historically conventional application of the presumption of innocence as an aspect of a proof beyond a reasonable doubt finding.

In his application of Natural Law to the presumption of innocence and the "knock and announce rule," Joseph Cascarelli seems to suggest that the presumption must attach *prior* to trial.[220] For example, application of the "knock and announce rule"[221] requires police officers with a warrant to "knock and announce" their presence prior to entering a home.[222] This is because, according to Cascarelli, the law first

218. Masha Gessen, *Dzhokhar Tsarnaev and the Presumption of Innocence*, THE NEW YORKER (Jan. 22, 2015), https://www.newyorker.com/news/news-desk/dzhokhar-tsarnaev-presumption-innocence.

219. *Id.*

220. Cascarelli, *supra* note 204, at 267.

221. The probity of the knock and announce rule was upheld in Hudson v. Michigan, 547 U.S. 586 (2006). At issue in *Hudson* was whether evidence gathered in violation of the knock and announce rule should be excluded. In a 5–4 opinion with Justice Scalia writing for the majority, the Court held that knocking and announcing and only waiting for three to five seconds before entering amounted to a Fourth Amendment violation. However, the majority also held that the evidence seized could be introduced at trial. Why? For Justice Scalia, the knock and announce rule spoke to a specific set of values—"the lives, safety, and dignity of the inhabitants and the protection of property." The knock and announce rule did not prohibit police officers from seeing and seizing evidence that was identified for seizure in the search warrant. *See* ZALMAN, *supra* note 24, at 74. What is primarily at issue for me is Justice Scalia's reference to the life, safety, and dignity of the suspects who are the subjects of the warrant. Those values are consistent with the presumption of innocence, especially in a Natural Law context.

222. However, drug interdiction cases have increasingly led to no-knock warrants if police officers believe that the items they are looking for may be destroyed, or if by knocking in advance there may be a threat to police officer safety. *See* Wilson v. Arkansas, 514 U.S. 927, 936 (1995) (where the Supreme Court held that exceptions

presumes that people are law abiding citizens.[223] Cascarelli cites to *Kerr v. State of California*[224] and the specific reference to the presumption of innocence articulated by Justice William Brennan:

> The first is that any exception not requiring a showing of such awareness [of police officer's presence by the occupants of the home] necessarily implies a rejection of the inviolable presumption of innocence.[225]

How does Justice Brennan's "inviolable presumption of innocence" explain police practices that clearly fly in the face of it? Is it true, as Quintard-Morénas suggests, that "[a]ll too often suspects are treated as guilty by a society that owes them protection, even in light of the appalling nature of the alleged crime[?]"[226] After all,

> Police are trained to act on a presumption of guilt in ways that exacerbate natural tendencies toward confirmation bias. Police are trained, for example, to make quick assessments of guilt and to interrogate suspects, not to learn information about the case, but to obtain a confession that confirms their suspicions.[227]

It seems, therefore, that the presumption of guilt and not the presumption of innocence initiates the criminal investigation process.

There can be little doubt that in order for law enforcement to investigate cases of alleged harm, it must in some way be legally permitted to detain suspects for questioning. However, there is an important caveat to this principle. Law enforcement should be required to take extreme steps, consistent with the historical presumption of

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to knock and announce included: a threat of physical violence; a suspect escapes from an officer and retreats to his dwelling; a demand to open the door is refused; and there is reason to believe that evidence would likely be destroyed if advance notice were given).

223. Cascarelli, *supra* note 204, at 266.

224. Kerr v. California, 374 U.S. 23, 56 (1963).

225. Cascarelli, *supra* note 204, at 267 (quoting Kerr v. California, 374 U.S. 23, 56 (1963)).

226. Quintard-Morénas, *supra* note 100, at 109.

227. Keith Findley, *The Presumption of Innocence Exists in Theory, Not Reality*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/01/19/the-presumption-of-innocence-exists-in-theory-not-reality/.

innocence discussed above, to ensure that suspects' reputations are not tarnished by either the arrest or the investigation.

Let us consider one of the conditions under which a suspect may be properly detained. Suspects may be detained by law enforcement for questioning, "ensuring a person's attendance at trial, safeguarding the judicial process from interference by a defendant, and protecting the security of the facility if a defendant is detained."[228] Most important, and consistent with historical invocations of the presumption of innocence, the state must be committed to ensuring that the reputation of the accused is preserved. This may be accomplished by seeking as a matter of policy to make suspect arrests outside the public eye and thereby avoiding the proverbial "perp walk."[229] But that is just the beginning. Clearly, as referenced above, law enforcement strategies designed to procure confessions based upon presumptions of guilt violate not only their truth-seeking and evidence gathering functions, but also may lead to wrongfully convicting the innocent.[230] Once again, the literature addressing each of the known correlates pertaining to wrongful conviction is extensive. But it is clear that for law enforcement the pressure to arrest, tunnel vision, destruction of evidence, the pressure to induce confessions, reliance upon inaccurate eyewitness identification procedures, and reliance upon faulty forensic practices have each been identified with wrongful conviction.[231] As it pertains to the presumption of innocence, and assurances regarding the

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228. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 768 (2011).

229. *Id.* at 768–69.

230. For several examples of false confessions leading to wrongful convictions, *see* TRUE STORIES OF FALSE CONFESSIONS (Rob Warden & Steven A. Drizin eds., 2009). *See also* ACKER & REDLICH, *supra* note 91; BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012); Hannah Laqueur, Stephen Rushin & Jonathan Simon, *Wrongful Conviction, Policing, and the "Wars on Crime and Drugs," in* EXAMINING WRONGFUL CONVICTIONS 92–107 (Allison D. Redlich et al. eds., 2014).

231. For a detailed set of exoneration cases and causes, *see* NAT'L REGISTRY OF EXONERATIONS, *supra* note 53. Out of 2110 exonerations since 1989, the Registry identifies as the leading causes of wrongful conviction, in order of prevalence: perjury or false accusation, official misconduct, mistaken eyewitness identification, false or misleading forensic evidence, and false confession.

reliability of evidence procured,[232] much could be gained by changing police sub-culture to: (a) avoid tunnel vision, (b) alter police interrogation methods, (c) improve eyewitness identification procedures to avoid biasing witnesses consistent with police assumptions, (d) changing criminal procedure so that police are no longer permitted to lie to suspects about evidence against them,[233] (e) changing criminal procedure so that suspects are permitted to have legal representation present for photographic eyewitness identification procedures,[234] and (f) changing criminal procedure to severely limit the use of showups.[235] Another alarming trend is that now law enforcement may not only deduce from a suspect's pre-Mirandized, non-custodial silence that she or he is guilty, but that silence may now be used by

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232. My thanks to Professor Christopher Slobogin for emphasizing the difference between what must be required of law enforcement when it comes to preserving the presumption of innocence, and those procedural activities necessary to procure reliable evidence necessary to establish proof of guilt. The point that I am attempting to make here is that if law enforcement adopts the presumption of innocence upon arrest, that ethic will stimulate enhanced procedural controls necessary for the generation of valid and reliable evidence.

233. Frazier v. Cupp, 394 U.S. 731, 739 (1969).

234. Current law restricts suspect access to assigned counsel to live lineups. United States v. Wade, 388 U.S. 218 (1967). The Supreme Court denied the right to the presence of assigned counsel during police presentation of a photo array to an eyewitness in the case of United States v. Ash, 413 U.S. 300 (1973). Given the ubiquity of photo arrays, and what is known about the procedural errors that may occur if photo arrays are not properly administered, this is a matter that should return to the Supreme Court for reconsideration.

235. Wrongful conviction scholarship has influenced new state criminal procedure by confronting the serious shortcomings expressed in the Neil v. Biggers, 409 U.S. 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977) totality of the circumstances test. As early as 1986 the state of Utah's Supreme Court held in *State v. Long* that, "several of the [*Biggers/Brathwaite*] criteria listed by the Court are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies." State v. Long, 721 P.2d 483, 491 (Utah 1986). Perhaps the most comprehensive overhaul of a state eyewitness identification procedure has taken place in the state of New Jersey. In State v. Henderson, 27 A.3d 872 (2011), the New Jersey Supreme Court significantly modified its state eyewitness identification procedures based upon current science. Beginning with Part III of its opinion, "Proof of Misidentifications," and continuing with Part V, "Scope of Scientific Research," the Court iterates in methodical fashion the most current eyewitness identification scholarship.

prosecutors as incriminating evidence.[236] Were the presumption of innocence to carry any pre-trial weight this kind of Supreme Court opinion, apparently predicated upon enhancing police investigation and prosecutorial powers, would be viewed as unprincipled and dangerous.

V. CONCLUSION

As a hegemonic practice, plea bargaining is ubiquitous. It meets systemic needs for efficiency and the preservation of scarce local resources that otherwise would be dedicated to preparation for, and administration of, trials. But is this legally rational and cost-benefitting institutional remedy the most principled way to manifest the administration of justice in a democratic state?

This article sets out to address two fundamental principles directly affecting plea convictions—the standard of proof required for indictment, and the presumption of innocence. As discussed, the ease with which prosecutors procure indictments in grand jury states, accompanied by the lack of a robust pre-trial presumption of innocence, increases the likelihood of wrongful conviction. Contemporary criminal procedure must return to the proof beyond a reasonable doubt standard to indict as originally adopted by our founding judges, out of concern for and for precisely the same reason discussed in this article.[237] Judicial

236. *See* Salinas v. Texas, 570 U.S. 178, 188–90 (2013).

237. In two compelling papers, Professor Slobogin argues for adoption of what he refers to as "Hybrid-Inquisitorialism" to replace our current retributive adversarial plea system. Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism* 1 (Vanderbilt Univ. Law Sch. Pub. Law and Legal Theory, Working Paper No. 15–4, 2015); Christopher Slobogin, *Lessons from Inquisitorialism* (Vanderbilt Univ. Law Sch. Pub. Law and Legal Theory, Working Paper No. 13–36, 2013). Each paper provides detailed application of a hybrid-inquisitorial model that would in many ways provide enhanced due process protections. I consider Professor Slobogin's hybrid-inquisitorial model as complementary to the argument made in this article, in that Professor Slobogin shares many of the same concerns over the lack of the presumption of innocence, prosecutorial control over adversarial due process, and the ambiguous Rule 11 "factual basis" conviction language. In particular, in *Lessons from Inquisitorialism*, *supra* at 23, Slobogin suggests that "[i]n an inquisitorial regime, the judge would have an obligation to conduct an independent investigation of facts relevant to sentencing, whether that investigation takes place during a plea hearing or at a separate sentencing proceeding." A judge's involvement with factual determinations regarding defendant

concerns about prosecutorial overreach that were common at our founding were primarily driven by our American experiences with England. Today, legal and social science scholars have generated comprehensive assessments of the causes and correlates producing wrongful convictions of actually innocent men and women. Americans are no longer a colonized people concerned about abuses of monarchical power. However, the modern American justice system is fraught with recognized pre-trial errors of omission and commission. These errors highlight the concerns expressed by President Taft, Justice Frankfurter, and William Stuntz, each of whom were cited in this Article as viewing the American criminal justice system as being in serious need of resuscitation.

It is true that plea bargaining is an important instrument of state authority necessary to efficiently process felony criminal cases and has hegemonic ubiquity throughout the system. However, it is apparent to me that the failure of both Supreme Court case law, and Congressionally generated federal rules legitimating pleas, has created a shadow administration of justice that is anything but just. As a nation, we valorize a system of due process that affords rights protections accruing to defendants who elect to plead not guilty and go to trial. Yet there remains the presumption of guilt from arrest through indictment, and the opaque exercise of prosecutorial authority that constitutes 95 to 97 percent of all felony convictions procured by way of the plea. Viewed in this context, Federal Rule 11 with its "rational" colloquy ostensibly designed to assure the court, and serve as a palliative to the public, that a defendant is entering the plea knowingly and voluntarily, in addition to the requirement that pleas must possess a "factual basis" (not yet clearly defined by either a court or the United States Congress), is a tissue-thin cloak to legitimate what is otherwise a severe usurpation of the protection of liberty interests that in a democracy, must be paramount.

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guilt would, in my view, enhance both the presumption of innocence and enhance the validity, reliability, and quantum of proof necessary to meet the proof beyond a reasonable doubt standard. On this last point Professor Slobogin and I would likely part company, as I have not read that he would support the enhanced burden of proof that I am suggesting here that would be required to return a true bill. *See Plea Bargaining* and *Lessons from Inquisitorialism*, *supra*.