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The Current Role of the Presumption of Innocence in the Criminal Justice System

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NOTE

THE CURRENT ROLE OF THE PRESUMPTION OF INNOCENCE IN THE CRIMINAL JUSTICE SYSTEM

I. INTRODUCTION

The presumption of innocence has traditionally been considered a fundamental principle of the criminal justice system in this country. Two major areas of dispute, however, have been discernible: whether the principle is merely a shorthand method of explaining the burden of proof and the reasonable doubt standard, and whether the doctrine is applicable outside the trial stage. Recent United States Supreme Court opinions have tried in three different contexts to resolve these issues regarding the presumption of innocence.

The first context involves the use of the presumption of innocence in jury instructions. In *Kentucky v. Whorton,*[1] the Court held that the Constitution does not require a judge to instruct the jury about the presumption of innocence in every case in which the instruction is requested.[2] The Court, in effect, considered the presumption an additional explanation of the allocation of the burden of proof that, if otherwise expressed to the jury, negates the necessity of instructing the jury specifically on the presumption of innocence.

The second context in which questions about the presumption have arisen is the practice of compelling a defendant to wear his prison clothes at trial. In *Estelle v. Williams,*[3] the Court held that compelling a defendant to wear his prison clothes during his trial was constitutionally impermissible[4] because the practice impaired the presumption of innocence,[5] which the Court considered a basic component of a fair trial.[6] The standard designated by the Court for waiver of this right, however, was a weaker

1. 99 S. Ct. 2088 (1979).
2. *Id.* at 2090.
3. 425 U.S. 501, *rehearing denied,* 426 U.S. 954 (1976).
4. 425 U.S. at 512.
5. *Id.* at 504.
6. *Id.* at 503.

standard than that ordinarily used for waiver of a constitutional right.[7] Thus, although the Court found the presumption of innocence applicable to this situation, the Court's treatment of the waiver issue greatly diminished the benefit of its holding to criminal defendants.

The third context is the applicability of the presumption of innocence outside the trial stage. Many lower courts have used the presumption of innocence as a means to strike down harsh conditions of pretrial detention.[8] In *Bell v. Wolfish,*[9] however, the Court stated that the presumption of innocence is nothing more than a rule of evidence at trial, even though the Court itself had previously applied the presumption of innocence to situations outside the courtroom.[10] The Court said that the principle has no applicability when determining the rights of a detainee[11] during pretrial confinement.[12]

These three cases have completely eliminated application of the presumption outside the courtroom and, in the courtroom, have reduced its importance to an extent that it now provides little if any protection for the criminal defendant. These limitations on application of the principle may be avoided, however, if state courts can be induced to use their own state constitutions to support the presumption of innocence. An examination of the history of the presumption of innocence is helpful in evaluating the issues surrounding the principle.

II. History

Greenleaf,[13] the nineteenth century commentator, is generally credited with having traced the doctrine of the presumption of innocence back to the book of Deuteronomy.[14] The relevant passage in Deuteronomy, which concerns the crime of idolatry, states that when one is informed or has learned of the crime, a thorough inquiry must be made, and if the charge is true, the

7. *Id.* at 512-13.

8. See text accompanying note 117 *infra.*

9. 99 S. Ct. 1861 (1979).

10. See text accompanying notes 98-111 *infra.*

11. A pretrial detainee is one who is detained because he cannot afford bail or because he is accused of committing a nonbailable offense.

12. 99 S. Ct. at 1871.

13. S. Greenleaf, A Treatise on the Law of Evidence (14th ed. 1883).

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

person must be punished.[15] In essence, the verse discusses the procedure used and the proof necessary to find the accused guilty. The principle of presumed innocence, basically the same in Sparta, Athens, and Rome,[16] was part of the explanation of the allocation of the burden of proof: the accuser had to prove the accused's guilt. In the early common law of England, the presumption was evident in the belief that in a doubtful case it was better to release the accused than to risk convicting the innocent.[17] Until the nineteenth century, emphasis in English practice was placed not on the presumption of innocence but on the rule that a person must be proved guilty by the evidence beyond a reasonable doubt.[18]

The earliest mention of the presumption of innocence in American law was in 1657 in Massachusetts:[19] "in a criminal case, . . . every man is honest and innocent unless it be proved legally to the contrary."[20] From that time until the nineteenth century, the presumption of innocence received little attention by the courts.[21]

In 1895, in *Coffin v. United States,*[22] the United States Supreme Court held that it was reversible error not to charge the jury on the presumption of innocence when requested to do so, even though the judge had instructed the jury fully about reasonable doubt.[23] The Court stated that the presumption of innocence was a concept separate and distinct from the reasonable doubt standard. Distinguishing the two concepts, the Court said that the presumption of innocence was one of the instruments of proof, whereas reasonable doubt was a condition of mind produced by the proof; one was a cause, the other, the effect.[24] The Court concluded that the presumption of innocence was substantive evidence in favor of the accused.[25]

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15. *Deuteronomy* 14:4.

16. 3 S. GREENLEAF, *supra* note 13, § 29 n.3.

17. *Id.*

18. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 555 (1898).

19. Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial,* 1978 WIS. L. REV. 441, 460.

20. J. THAYER, *supra* note 18, at 552 (quoting Records of Massachusetts, iii. 434-35 (1657)).

21. J. THAYER, *supra* note 18, at 554.

22. 156 U.S. 432 (1895).

23. *Id.* at 461.

24. *Id.* at 460.

25. *Id.* at 459 (quoting 1 S. GREENLEAF, *supra* note 13, § 34).

Professor Thayer adamantly attacked this conclusion.[26] He believed the presumption of innocence was

> merely one form of phrase for what is included in the statement that an accused person is not to be prejudiced at his trial by having been charged with crime and held in custody, or by any mere suspicions. . . . [I]t is a convenient and familiar phrase, and probably a useful one, when carefully explained; but it has not played any conspicuous part in the development of our criminal law[27]

except as a synonym for the reasonable doubt standard. Thayer was joined in this belief by two other commentators, Wigmore[28] and McCormick.[29]

Nevertheless, Thayer conceded that a defendant should have the right to such a jury instruction.[30] He said that the principle had assumed a very important additional function, namely, "that of warning our untrained tribunal, the jury, against being misled by suspicion, conjecture, and mere appearances."[31] Again, Wigmore[32] and McCormick[33] agreed.

After Thayer's scathing attack on *Coffin,* the Supreme Court changed its opinion that the presumption constituted substantive evidence. In *Agnew v. United States,*[34] the Court heard a chal-

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26. J. THAYER, *supra* note 18, at 551.

27. *Id.* at 565-66.

28. "[T]he 'presumption of innocence' is in truth merely another form of expression for a part of the accepted rule for the burden of proof . . . the rule that it is for the prosecution to adduce evidence . . . , and to produce persuasion beyond a reasonable doubt . . . ." 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940).

29. "[I]t consists of nothing more than an amplification of the prosecution's burden of persuasion." C. MCCORMICK, MCCORMICK ON EVIDENCE § 342 (2d ed. 1972).

30. J. THAYER, *supra* note 18, at 572.

31. *Id.* at 559.

32. [T]he term does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, . . . the presumption of innocence . . . conveys for the jury a special and additional caution . . . to consider, . . . *nothing but the evidence* . . . .

9 J. WIGMORE, *supra* note 28, § 2511.

33. In the first edition Dean McCormick called the presumption of innocence an unnecessary amplification of the instructions about the burden of proof and the reasonable doubt standard. C. MCCORMICK, *supra* note 29, § 342 n.45. In the second edition, the text stated that the presumption of innocence, even though misleading in the sense that it suggests some inherent probability that the defendant is innocent, "should not be discarded." *Id.* § 342.

34. 165 U.S. 36 (1897).

lenge to a jury instruction that charged the presumption of innocence, but despite counsel's request, did not mention the principle as substantive evidence. The Court held that the charge was sufficient as given.[35] *Coffin,* nevertheless, still stood for the proposition that an instruction on the presumption of innocence must be given to the jury upon request.

III. THE PRESUMPTION OF INNOCENCE AS A JURY INSTRUCTION

Recent Supreme Court cases have implicitly overruled the holding in *Coffin* to the detriment of criminal defendants. In *Taylor v. Kentucky,*[36] the Court held, *on the facts of the case,* that failure to give a requested instruction on the presumption of innocence resulted in a violation of defendant's due process right to a fair trial.[37]

Defendant was convicted of robbery and sentenced to a term of five years[38] at a trial in which the victim and defendant were the only witnesses.[39] The testimony was no more than a swearing contest.[40] The victim claimed that defendant and a companion had forced their way into the victim's home, struck the victim and then took his house key and billfold, neither of which had been recovered.[41] Defendant claimed that he had spent the night in a parked car with two friends watching a rainstorm and a power failure.[42] The prosecutor implied in both opening and closing arguments that the jury should infer guilt from the arrest, the indictment, and certain conduct of defendant.[43] Moreover, at the close of the evidence, the court refused requested jury instructions on the presumption of innocence and the fact that the indictment is not evidence.[44] Furthermore, the court gave only a very brief statement about the reasonable doubt standard.[45] On the basis of these facts, the Supreme Court reversed defendant's

35. *Id.* at 51-52.
36. 436 U.S. 478 (1978).
37. *Id.* at 490.
38. *Id.* at 481.
39. *Id.* at 480.
40. *Id.* at 488.
41. *Id.* at 480.
42. *Id.*
43. *Id.* at 486-87.
44. *Id.* at 479.
45. *Id.* at 486.

conviction, finding that defendant's due process right to a fair trial had been violated by the court's failure to instruct the jury on the presumption of innocence.

The language of the opinion, however, clouded the meaning of the holding. The Court extolled the importance of the presumption of innocence, reiterating from *Estelle v. Williams*[46] that the principle of presumptive innocence was a basic component of a fair trial,[47] and quoting *Coffin v. United States*:[48] " '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.' "[49] On the other hand, the Court stated that an instruction using the specific phrase, the presumption of innocence, may not be constitutionally mandated.[50] It "simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial."[51] Reverting to its previous stance in strong support of the principle, the Court indicated that it should not be abandoned[52] because it provides an additional warning to the jurors to consider only the evidence presented at trial. The Court cited commentators Thayer, Wigmore, and McCormick in support.[53]

The concurring and dissenting opinions compounded the confusion concerning the majority opinion. Justice Brennan wrote a concurring opinion in which he stated that because the presumption of innocence was a basic component of a fair trial, the instruction should be required in all cases in which it is requested "as is clear from the Court's opinion."[54] In a dissent joined by Justice Rehnquist, Justice Stevens wrote, citing *Coffin*, that although it was reversible error to refuse a request for a proper instruction on the presumption of innocence, this was not a sufficient reason for holding that the instruction was constitutionally required in every criminal trial.[55] Thus, three justices

46. 425 U.S. 501 (1976).
47. 436 U.S. at 479 (citing 425 U.S. at 503).
48. 156 U.S. 432 (1895).
49. 436 U.S. at 483 (citing 156 U.S. at 453).
50. 436 U.S. at 485.
51. *Id.* at 486.
52. *Id.* at 484. *See* notes 32 & 33 and accompanying text *supra.*
53. 436 U.S. at 484.
54. *Id.* at 490-91 (Brennan, J., concurring).
55. *Id.* at 491 (Stevens, J., dissenting).

believed that the majority opinion held that an instruction on the presumption of innocence was constitutionally required in every case, even though the Court had specifically stated that a violation occurred only *on the facts of the case.*

Confusion over the opinion crystallized in *Kentucky v. Whorton.*[56] A divided Supreme Court of Kentucky, interpreting *Taylor,* held that an instruction on the presumption of innocence was constitutionally required in all criminal trials in which it is requested and that the failure to give it is always reversible error.[57] The United States Supreme Court granted certiorari to consider the Kentucky Supreme Court's interpretation.[58] In a per curiam opinion, the Court held that the failure to give an instruction on the presumption of innocence when requested does not in and of itself constitute a violation of the Constitution.[59] The Court said that in *Taylor* the focus was on the failure to give the instruction within the context of the overall fairness of the trial,[60] and that no intention existed to create a rule that an instruction on the presumption of innocence was constitutionally required in every case in which it is requested.[61]

The Court indicated that the determination of whether a constitutional violation had occurred must be evaluated on the basis of the totality of the circumstances, including all the instructions given to the jury, the arguments of counsel, the weight of the evidence, and other relevant factors.[62] The Court pointed out that in *Whorton,* unlike *Taylor,* numerous eyewitnesses identified defendant, defendant's car contained incriminating evidence,[63] and defendant did not take the stand, although his wife and sister were alibi witnesses.[64] The Court remanded the case to the state court[65] to determine whether a violation had occurred. By using a totality of the circumstances test, instead of a defini-

56. 99 S. Ct. 2088 (1979).

57. Whorton v. Commonwealth, 570 S.W.2d 627, 633 (Ky. 1978); *see* Note, *Criminal Procedure—Jury Instructions—Presumption of Innocence—Denial of Request Requires Automatic Reversal*—Whorton v. Commonwealth, *570 S.W.2d 627 (Ky. 1978),* 6 N. Ky. L. Rev. 205, 210 (1979).

58. 99 S. Ct. 832 (1979).

59. 99 S. Ct. at 2090.

60. *Id.* at 2089.

61. *Id.* at 2090.

62. *Id.*

63. *Id.* at 2088.

64. *Id.* at 2089.

65. *Id.* at 2090.

tive rule, the Court dictated an ad hoc approach. As a result, trial judges and defendants are faced with uncertainty. The circumstances demanding the instruction on the presumption of innocence are undefined, and the decision is left to the discretion of each trial judge.

In *Whorton* the Court impliedly accepted that the presumption of innocence simply represents one way of illustrating that the prosecutor has the burden of proof and must present evidence at trial of defendant's guilt beyond a reasonable doubt. This function of the presumption dates back to the time of Thayer's attack on *Coffin.*[66] Although in *Whorton* the Court held that an instruction on the presumption of innocence is not constitutionally required, in *In re Winship*[67] the Court had held that the reasonable doubt standard is constitutionally required. In *Winship* the Court held 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."[68] The reason for such a demanding standard is to reduce the risk of convictions based on factual error,[69] convictions that would deprive a criminal defendant of his liberty and permanently stigmatize him.[70]

A second reason that supports this high standard is to command the respect and confidence of the public in the criminal justice system. "It 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."[71] Additionally, it is important that every individual be free from concern that the government might impose criminal sanctions without convincing the factfinder of guilt to the utmost certainty.[72] The Court stated that this reasonable doubt standard embodied the concrete substance of the presumption of innocence.[73] Thus, as a result of *Winship,* defendants are still guaranteed the protection

66. 156 U.S. 432 (1895). *See* text accompanying notes 22-29 *supra.*

67. 397 U.S. 358 (1970).

68. *Id.* at 364.

69. *Id.* at 363.

70. 397 U.S. at 363. The Court emphasized this point recently in Addington v. Texas, 99 S. Ct. 1804, 1810 (1979), when it held that the proper standard of proof at a civil commitment hearing was greater than a preponderance; the reasonable doubt standard was held not constitutionally required. *Id.* at 1812.

71. 397 U.S. at 364.

72. *Id.*

73. *Id.* at 363.

afforded by this function of the presumption of innocence—an explanation of the allocation of the burden of proof and the reasonable doubt standard.

The Court in *Whorton,* however, ignored what traditionally has been the other important function of the presumption—that of an additional caution specifically directed to the jury to put aside all suspicions and consider the evidence only.

> In practical terms, the presumption of innocence serves as a counterweight that is intended to nullify the tendency of jurors to assume that the defendant is guilty . . . . Since the presumption of innocence is one facet of the law that is familiar to laymen, it is probable that a jury will listen more closely to an instruction on this subject than to one on some complex substantive rule of law.[74]

As indicated in the historical discussion,[75] even those commentators who believed that the presumption was merely a synonym for the burden of proof and the reasonable doubt standard stated that because of its importance to the jury, it should not be abandoned. The Court itself recognized this function in *Taylor*: "While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence."[76] Nevertheless, in *Whorton,* the Court refused to mandate its use whenever requested. The lack of a constitutional mandate in this area can only result in a critical loss of protection to criminal defendants.

IV. Compelling a Defendant to Wear Prison Clothes at Trial

In *Estelle v. Williams,*[77] the Court held that a defendant cannot be compelled to wear prison clothes to his trial[78] because the practice impairs the presumption of innocence,[79] undermines the fairness of the factfinding process, and dilutes the principle that guilt must be established by the evidence presented at trial.

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74. 24 Vand. L. Rev. 412, 416-17 (1971).
75. See text accompanying notes 30-33 *supra.*
76. 436 U.S. at 484.
77. 425 U.S. 501 (1976).
78. *Id.* at 504.
79. *Id.*

The Court said that the presumption of innocence is a basic component of a fair trial,[80] even though it is not expressly stated in the Constitution.[81] The application of the doctrine in this context reinforces its connection with the burden of proof. A prosecutor must carry that burden with the evidence produced at trial and cannot be aided by a courtroom practice that prejudices the jury against the defendant.

Despite this finding that the practice did violate defendant's due process right to a fair trial, the Court refused to adopt a per se violation rule.[82] It focused instead on the necessity of proving that defendant was compelled by the state to wear prison clothing.[83] The reason given for this focus on compulsion was that wearing prison clothes was considered by the Court to be a common defense tactic used to elicit sympathy from the jury,[84] even though, as the dissent pointed out, no empirical data to support that position exists, and even though the Court was able to cite only one case in which it was proved that defendant wore his prison clothes for tactical purposes.[85]

Obviously, if defendant waived his right to appear in ordinary attire, no state compulsion existed. For this situation, the Court, refusing to use the standard of a knowing, voluntary, and intelligent waiver established in *Johnson v. Zerbst*[86] for waiver of the right to counsel, created a new standard to determine waiver. The Court found that because defense counsel failed to object at trial, defendant had waived his right to be tried in civilian clothes.[87] With this finding, the Court promulgated "the novel

80. *Id.* at 503.

81. *Id.* In Cool v. United States, 409 U.S. 100, 104 (1972), the Court had said that the presumption of innocence was "constitutionally rooted."

82. 425 U.S. at 512. For a history of the cases in this area, see Comment, Estelle v. Williams *and the Waiver of Due Process Trial Protections,* 14 SAN DIEGO L. REV. 1252, 1253-57 (1977).

83. 425 U.S. at 507-08.

84. *Id.* at 508.

85. *Id.* at 520 (Brennan, J., dissenting).

86. 304 U.S. 458 (1938).

87. 425 U.S. at 512. The Court has permitted counsel to bind the defendant in other situations, *e.g.,* Henry v. Mississippi, 379 U.S. 443 (1965). In *Henry,* counsel had failed to make a timely objection to the admission of illegally seized evidence. The Court remanded to determine whether counsel had deliberately failed to object in order to bypass state court remedies. If counsel's failure to object had been deliberate, it would have constituted a waiver binding on the defendant in federal court and precluding a decision on the merits of his federal claim. 379 U.S. at 451. In *Estelle,* although evidence in the record indicated that counsel's failure to object was not a defense tactic (e.g., defendant

and dangerous doctrine that a basic due process safeguard, affecting the fairness and accuracy of the factfinding procedure, is a contingent right that does not even come into existence until it is affirmatively asserted."[88]

Counsel's objection properly has little bearing on the issue. The prejudicial effect on the defendant occurs as soon as the jurors see the defendant in his prison clothes. Even when counsel objects and his objection is sustained, the objection cannot erase the impact on the jurors of seeing the defendant, presumptively innocent, already in prison clothes. Although the defendant may have been detained solely because he could not afford bail, the jurors may assume that he was detained because he was dangerous or because he had a prior record.[89] Certainly they would be less likely to consider the defendant as a peer or equal after seeing him in prison clothes. Other dangers that might affect the accuracy of the factfinding process also exist. The defendant might choose not to testify on his own behalf, because he fears that the jurors would be less likely to believe his testimony, or simply because he does not wish to be paraded before the jurors while he is dressed in prison clothing.[90] These possibly deleterious results affect both the defendant whose counsel does not object as well as the defendant whose counsel does object. The vindication of the defendant's right should not rest on that criterion. Nevertheless, the Court clearly decided that because counsel's failure to object at trial negated any inference of compulsion by the state, defendant's rights were sufficiently protected.[91]

The Court justified this diluted standard for waiver by stating that the right was not the kind of fundamental right involved in *Johnson v. Zerbst.*[92] Justice Powell, in his concurring opinion, reinforced the idea that this right was less fundamental and designated it a "trial-type right" without ever defining the term.[93] Distinguishing a "trial-type right" from other constitutional

had asked for his clothes prior to trial, and counsel admitted that the only reason he did not make the motion was that he thought it would be futile), the Court assumed that it was a tactical maneuver and bound the defendant to a waiver without a hearing. 425 U.S. at 512-13.

88. 425 U.S. at 521 (Brennan, J., dissenting).
89. *Id.* at 518 (Brennan, J., dissenting).
90. *Id.* at 519 (Brennan, J., dissenting).
91. *Id.* at 512-13.
92. *Id.* at 508 n.3.
93. *Id.* at 514 (Powell, J., concurring).

rights is a dangerous practice. What rights are more "trial-type" than the right to counsel or the right to a jury trial?[94] Previously, the Court had "applied the *Johnson* criteria to assess the effectiveness of a waiver of other *trial rights* such as the right to confrontation, to a jury trial, and to a speedy trial, and the right to be free from twice being placed in jeopardy."[95] Was the Court in *Williams* signalling the demise of the application of the *Johnson* waiver standard to "trial-type" rights, or was it simply refusing to extend application of that standard to the presumption-of-innocence component of a fair trial? Either result would provide less protection for criminal defendants. The *Johnson* waiver standard is necessary to protect defendants from losing vital constitutional rights inadvertently. Violation of a defendant's presumption of innocence cannot be distinguished reasonably from other violations of the right to a fair trial. Yet the Court simply stated that this right was not as fundamental as others,[96] but gave no supporting explanation. Consequently, even though the Court stated that the presumption of innocence was a basic component of a fair trial, the standard used to find a waiver of that right weakened the defendant's ability to seek effective redress of the violation.

V. The Presumption of Innocence Outside the Bounds of Trial

The third context in which the application of the presumption of innocence has been challenged is its use outside the courtroom. Generally, it had been thought that the presumption of innocence applied to the treatment of the accused from the time of his arrest. The presumption of innocence traditionally meant that

> until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with

94. *Id.* at 527 (Brennan, J., dissenting).

95. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) (footnotes deleted) (emphasis added). It is ironic that in this area a "trial-type" right is said to be a less fundamental constitutional right while Supreme Court opinions concerning other "trial-type" rights have been given retroactive effect because those rights were considered so important to the accuracy of the factfinding process. *Id.* at 242.

96. 425 U.S. at 508 n.3.

> the probable outcome of the case, as if his guilt is an open question. . . .
>
> The presumption of innocence is really a direction to the authorities to ignore the presumption of guilt [the likely outcome] in their treatment of the suspect.[97]

In several cases, the Supreme Court supported the application of the presumption of innocence to the treatment of an arrestee.

In a 1951 decision, *Stack v. Boyle,*[98] the Supreme Court expressly recognized the application of the presumption of innocence beyond the bounds of trial. In *Boyle,* the petitioners moved to reduce bail,[99] claiming that it was excessive in violation of the eighth amendment.[100] Petitioners submitted statements concerning their prior criminal records, family relationships, and financial resources. The only proof offered by the government was a showing that four persons previously charged under the same federal statute had forfeited bond; no evidence, however, was presented connecting those four people to petitioners.[101] The Court found that bail had not been fixed properly and remanded the case[102] because the lower court had not taken into consideration the bail amount necessary to provide for the appearance of these individual petitioners.[103] "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[104] This statement indicated that the presumption of innocence was significant from the time of arrest and that it was important to the overall treatment of the accused. At the time *Boyle* was decided, the Court evidently believed that the presumption of innocence encompassed more than merely the allocation of burden of proof and the reasonable doubt standard at trial.

Another Supreme Court case, *McGinnis v. Royster,*[105] made reference to the presumption of innocence as it applied to a

97. Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1, 12 (1964).
98. 342 U.S. 1 (1951).
99. *Id.* at 3.
100. U.S. CONST. amend. VIII.
101. 342 U.S. at 3.
102. *Id.* at 7.
103. *Id.* at 5.
104. *Id.* at 4. Application of the presumption of innocence at pretrial stages can be traced to the Rhode Island Constitution of 1842 which stated that since every man is presumed innocent, "no act of severity which is not necessary to secure an accused person shall be permitted." Thaler, *supra* note 19, at 460 (quoting R.I. CONST. art. I, § 14 (1842)).
105. 410 U.S. 263 (1973).

pretrial detainee. In *McGinnis* petitioners challenged on equal protection grounds a New York statute[106] that had the *effect* of incarcerating those defendants detained in jail before trial for a longer period of time than those defendants released on bail pending trial. The statute prohibited the granting of "good time" to a pretrial detainee, who is kept in county jail; it allowed "good time" to be computed only after a defendant has been convicted and imprisoned in the state penitentiary. Good time, awarded for good behavior and efficient performance of one's duties during incarceration, could reduce a prisoner's sentence by up to ten days for every month served in prison.[107] Under the New York statute, although the length of a pretrial detainee's sentence is reduced both by the amount of time spent in pretrial incarceration and by any credit for good time earned after being transferred to the state penitentiary, a pretrial detainee could spend more time in incarceration than a bailed defendant serving the same sentence. This resulted because the pretrial detainee could not earn any good time credit during the months of his pretrial incarceration.

The Court found that the classification served a legitimate state purpose in that "good time" takes into consideration a prisoner's rehabilitative performance, which is an important part of the time spent at a state prison where a defendant, who had been on bail prior to conviction, would spend his entire sentence.[108] On the other hand, a county jail, where the pretrial detainee spends his pre-sentence incarceration, serves only as a detention center, with no rehabilitative programs, although the time spent there does count toward satisfactory completion of the sentence. Thus, no evaluation can be made of the prisoner's efficient and cooperative conduct, which, if favorable, might bring about an earlier release.[109] In its discussion of pretrial detention, the Court pointed out that it would not be appropriate for the state to undertake in the pretrial detention period programs to rehabilitate a pretrial detainee who is still clothed with the presumption of innocence.[110] Thus, the Court necessarily implied that the pretrial detainee was protected by the presumption of innocence and was not to be

106. N.Y. CORREC. LAW § 230(3) (McKinney 1968) (repealed 1970).
107. 410 U.S. at 266-67.
108. *Id.* at 270-71.
109. *Id.* at 272-73.
110. *Id.* at 273.

treated in a way that would contradict the presumption.[111]

In *Bell v. Wolfish,* however, the Court ignored this statement in *McGinnis* and invalidated the application of the doctrine outside the courtroom. The Court stated that the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials and may serve as part of a jury instruction, but that it has "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[112]

Wolfish involved the right of pretrial detainees to challenge the conditions of their confinement. The detainees protested the following conditions: double-bunks in cells designed for single occupancy; a rule that denied detainees the right to receive books and magazines from sources other than the publisher; a rule that denied detainees the right to receive packages except one at Christmas; unannounced searches of the cells during which the inmates were prohibited from the area; and body cavity searches conducted after every contact visit with an outsider. The Court found that the due process clause and not the eighth amendment provided the basis upon which to examine the challenged conditions.[113] The eighth amendment, which prohibits cruel and unusual punishment, is applicable *only* after the defendant has been convicted in accordance with due process of law; at that point the state acquires the power to punish so long as the punishment is not "cruel and unusual."[114] The due process clause, however, provides protection for the pretrial detainee.[115]

The Court found that the presumption of innocence was not the source of a substantive right that required the use of a compelling-necessity standard to determine whether the challenged conditions satisfied due process;[116] many lower courts had found that it did.[117] The Supreme Court said that the detainee's

111. *See* Baker v. McCollan, 99 S. Ct. 2689 (1979) (Stevens, J., dissenting).

112. 99 S. Ct. at 1871.

113. *Id.* at 1871-72 & n.16. *Accord,* Norris v. Frame, 585 F.2d 1183 (3d Cir. 1978); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976); Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd,* 456 F.2d 854 (6th Cir. 1972).

114. 99 S. Ct. at 1871-72 & n.16.

115. *Id.* at 1872 & n.17.

116. *Id.* at 1870.

117. Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978); Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Rhem v. Malcolm, 527 F.2d 1041 (2d Cir. 1975); Detainees of Brooklyn

right to be free from punishment[118] was at issue, and that this right did not warrant a compelling-necessity standard[119] because it did not rise to the level of those fundamental rights involved in cases that had required that standard.[120]

The Court's initial inquiry was whether the challenged condition amounted to punishment.[121] Absent a showing of expressed intent to punish on the part of the prison officials, the determination turned on whether the condition was rationally justified by the purpose proposed and whether the condition appeared excessive in relation to the purpose.[122] The Court recognized two legitimate government interests for these challenged prison conditions. The first was that recognized by most lower courts, namely, to ensure the accused's presence at trial.[123] The other legitimate interest was the need to manage the institution in which a detainee is incarcerated.[124] In this area, the Court accorded "virtually unlimited deference to detention officials' justifications for particular impositions."[125] The Court consistently had been reluctant to involve the judiciary in the area of prison administration,[126] but its deference in *Wolfish* was excessive; the Court mentioned de-

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House of Detention v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974). *Contra,* Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976).

In *Campbell v. McGruder,* the court discussed important reasons why the presumption of innocence required a standard of compelling necessity and why it should continue to protect defendants held in pretrial detention. First, the court mentioned the possibility of mistake in the arrest. Second, the court stated that if the presumption of innocence was to be respected by judge and jury in the courtroom it must be treated as an "article of faith" by all of society outside the courtroom. 580 F.2d at 529 n.14.

118. 99 S. Ct. at 1871.

119. *Id.*

120. The Court listed the following cases which involved fundamental rights requiring the compelling-necessity standard: Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923). 99 S. Ct. at 1871.

121. 99 S. Ct. at 1872.

122. *Id.* at 1873-74.

123. *Id.* at 1874. The following cases recognized that assuring presence at trial is the sole legitimate purpose of pretrial detention: Norris v. Frame, 585 F.2d 1183 (3d Cir. 1978); Miller v. Carson, 563 F.2d 741 (5th Cir. 1977); Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd,* 456 F.2d 854 (6th Cir. 1972).

124. 99 S. Ct. at 1874.

125. *Id.* at 1886 (Marshall, J., dissenting).

126. *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974).

ferring to the judgment of administration officials twelve times throughout the opinion.[127]

The Court also ignored the use of the doctrine of the least restrictive alternative, which maintains that when government action impinges upon the exercise of fundamental constitutional rights or liberties, government must choose the least restrictive alternative.[128] The rule that prisoners could receive books only from publishers infringed upon the prisoners' first amendment rights. The prison administrators justified the ban on the basis of security and the burden that would be placed on administration if they had to check for contraband in every book each inmate received. The administrators, however, could have chosen a less restrictive means of accomplishing their purpose. For example, they could have limited the number of books that a prisoner could receive each month, and/or used electronic devices to detect contraband in the bindings.[129] The administrators' rule was one rational response, "[b]ut our precedents . . . require some consideration of less restrictive alternatives."[130] Similarly, the other challenged practices could have been administered in a way that satisfied prison security requirements but imposed a lesser burden on the prisoners' rights. The Court said, however, that "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional."[131]

After *Wolfish* it is hard to imagine conditions that could be found to constitute a violation of a detainee's due process rights.[132] The weakness of the standard is most evident in the

127. 99 S. Ct. at 1889 n.5 (Marshall, J., dissenting).

128. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dunn v. Blumstein, 405 U.S. 330 (1973); Shelton v. Tucker, 364 U.S. 479 (1960).

129. *See* 99 S. Ct. at 1892 (Marshall, J., dissenting).

130. *Id.*

131. *Id.* at 1876 n.25. The Court cited two cases in support, Vance v. Bradley, 99 S. Ct. 939 (1979), and Dandridge v. Williams, 397 U.S. 471 (1970). The Court stated in both cases only that the classifications drawn did not have to be mathematically perfect to meet a constitutional challenge. 99 S. Ct. at 949; 397 U.S. at 485.

132. In a recent federal district court case in New Jersey, Valentine v. Englehardt, 474 F. Supp. 294 (D.N.J. 1979), the court did find a constitutional violation in the rule that children could not visit the inmates at the Passaic County Jail. The circumstances of the case, however, indicate a rare opportunity to apply the *Wolfish* standard and still be able to find the practice unconstitutional. The sheriff openly admitted that the rule was necessary in the best interests of the children rather than because of security reasons. Applying *Wolfish,* the court said that the issue was whether the rule constituted punishment. Absent an intent to punish expressed by the administrative officials, the determina-

Court's justification for security reasons of body cavity searches after contact visits,[133] even though the inmates were required to wear one-piece jumpsuits that zipped down the front and the visits took place in a continuously monitored glass enclosed room.[134] Moreover, the prison officials had proof of only one instance in which contraband had been found during a body cavity search.[135] In effect, pretrial detainees, despite their presumed innocence, can be subjected to the same conditions as convicted inmates. The government conceded that " 'restrictions on the possession of personal property' . . . 'serve the legitimate purpose of punishment' with respect to convicted inmates as well as the security purposes relied on in the present context of pretrial detainees."[136] This result is inconsistent with this country's traditional view of the presumption of innocence. A citizen is arrested on the basis of probable cause, a standard much lower than the proof beyond a reasonable doubt necessary for conviction. Nevertheless, *Wolfish* subjects that same citizen, often for no reason other than his inability to post bond for bail, to be treated as if he were convicted and sentenced.[137] He is subjected to the very

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tion turned on whether a legitimate government interest was involved. The court found no legitimate goal in the jailer's personal judgment that it was in the best interests of the children to prohibit them from the jail. Had defendants in this case justified the rule on the basis of jail security, the court would probably have deferred to their judgment on the basis of *Wolfish*.

133. 99 S. Ct. at 1884-85.

134. *Id.* at 1894 (Marshall, J., dissenting).

135. *Id.* at 1884. The Court observed, however, that this "may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." *Id.* at 1894-95 (footnote omitted).

136. *Id.* at 1901 n.25 (Stevens, J., dissenting) (quoting United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 153 (S.D.N.Y. 1977) (quoting Respondents' Post-Trial Memorandum at 212 n.**)).

137. It would be well to compare in this area the criminal system of the civil-law countries. The 1950 European Convention on Human Rights recognized the presumption of innocence; however, the civil-law countries put their belief in the presumption into practice in a manner substantially more meaningful than in the United States. Pretrial detention, despite the likelihood of guilt, is always an exceptional measure in civil-law countries. Summonses are used rather than arrest warrants whenever possible. To arrest a suspect, it must be shown to the court that guilt is highly probable, the offense is major, the danger of flight is present, and/or a threat of evidence tampering exists. Bail statutes are on the books, but they rarely are used. If the criteria are met, the suspect is arrested and detained. The governments seldom release a suspect once the criteria are established. G. MUELLER & F. LE POOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 14-23, 93-94 (1960); Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience,* 26 BUFFALO L. REV. 361, 370 (1977).

same conditions that are applied to convicts as punishment, even though the Court has stated that pretrial detainees may not be punished. Thus, *Wolfish* leaves the pretrial detainee with little means to challenge his jail conditions in the federal courts.[138]

VI. CONCLUSION

The importance and scope of the presumption of innocence in the criminal justice system have been greatly diminished in the federal system. The Court has restricted the principle's application solely to the trial stage in limited, yet undefined, circumstances that depend on the facts of each particular case and the discretion of each particular judge. Relief from this diminished individual protection may still be available, however, for defendants in the state criminal system. State courts may use their own constitutions to more fully protect pretrial detainees and criminal defendants. Justice Stewart suggested in *Kentucky v. Whorton* that the Kentucky court on remand consider the question of harmless error *as a matter of state law* concerning the requirement of giving the requested instruction on the presumption of innocence.[139] State courts may also be persuaded to find that the presumption of innocence, a necessary element of due process, requires the use of the compelling-necessity standard when deciding the rights of pretrial detainees during their confinement.

As Justice Brennan wrote,

> state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are

138. Houchins v. KQED, Inc., 438 U.S. 1 (1978), makes the plight of the pretrial detainee seem even bleaker. The Court held that (1) neither the first amendment nor the fourteenth amendment mandates a right of access to government information or sources of government information within governmental control, and (2) the news media has no constitutional right of access to a county jail over and above that of other persons. The case arose when a broadcasting company was denied access to a county jail after the suicide of an inmate. This denial was upheld by the Supreme Court. In a strong dissent, Justice Stevens stated that the official prison policy of concealing knowledge from the public by arbitrarily cutting off the flow of information is a violation of freedoms of speech and of the press. Justice Stevens pointed out that some of the inmates were pretrial detainees, unconvicted and entitled to the presumption of innocence. He said society had a special interest in ensuring these citizens treatment in accord with their status. *Id.* at 37-38 (Stevens, J., dissenting). When this case is considered with *Wolfish*, it becomes apparent that not only does the detainee have little hope of successfully challenging his jail conditions in the federal courts, but also he has little reason to look to the press to bring inhumane conditions to the attention of the public.

139. 99 S. Ct. 2091 (Stewart, J., dissenting).

> found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.[140]

Justice Brennan's admonition may be even more important today. The holdings of the primary cases discussed in this note have deprived people of important individual rights; however, these rights may still be restored in the state arena through expansive use of state constitutions.

Marsha L. W. Reingen

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140. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).