The Presumption of Innocence and Bail

Perhaps no legal principle at bail is as simultaneously important and misunderstood as the presumption of innocence. Technically speaking, the presumption of innocence is the fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence (Black's). Although it is not mentioned in the United States Constitution, its tie to the criminal burden of proof implicates the Due Process Clause.[1] The United States Supreme Court first discussed the principle as the "true origin" of the doctrine of reasonable doubt, writing in *Coffin v. United States* that "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."[2]

In *Coffin,* the Court traced the presumption's origins through sources attributing it to Deuteronomy, to the laws of Sparta and Athens, and to various provisions of Roman law. The essence of these earlier statements of law reflected ideas concerning not only the need for accusatory proof, but also that the construction of facts or laws must always be the "most merciful" or "milder" construction – often seen today in American legal notions of upholding defendant rights and appellate courts viewing evidence in the light most favorable to the accused. Moreover, the early statements included language re-articulated and published by Blackstone, who wrote, "It is better that ten guilty persons escape than that one innocent suffer." This statement, known as Blackstone's ratio, is a seminal statement of risk, which itself has obvious application to bail.[3] Bail scholars have said that the ideas behind this ratio reminds us always to embrace the risk of release, and never to do more than is necessary to accomplish one's lawful goals. The importance of the presumption of innocence has not waned, and the Court has expressly quoted the "axiomatic and elementary" language in just the last few years.

Though primarily associated with the principle that defendants should never have to prove their own innocence, the presumption of innocence both substantively and

[1] *See In Re Winship,* 397 U.S. 358, 362-64 (1970) ("The [reasonable doubt] 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.").
[2] 156 U.S. 432, 460, 453 (1895).
[3] In 1951, Justice Robert Jackson wrote as follows: "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them." *Stack v. Boyle,* 342 U.S. 1, 8 (1951) (concurrence).

as a symbol is believed to transcend the trial itself and to be seen as a way to advance defendants through the justice system, while criminal justice actors perform various justice-related activities "with no surmises based on the present situation of the accused."[4]

Misunderstanding of the presumption of innocence comes primarily from the fact that there are some people who do not believe that the presumption has anything to do with bail.[5] This belief, however, is mistaken, as the presumption of innocence has everything to do with the right to bail. Indeed, while explaining the right to bail in *Stack v. Boyle*, the Supreme Court wrote, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[6]

The belief that the presumption of innocence has nothing to do with bail comes principally from the fact that in *Bell v. Wolfish*, the Supreme Court also wrote that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,"[7] a line that has caused many to argue, incorrectly, that the previous quote from *Stack v. Boyle* has been essentially erased from bail jurisprudence. A closer look at *Wolfish*, however, illuminates the error.

Wolfish was a "conditions of confinement" case, with inmates complaining about various conditions (such as double bunking), rules (such as prohibitions on receiving certain books), and practices (such as procedures involving inmate searches) while being held in a detention facility. It was not a case concerning the right to bail, and in its opinion, the Supreme Court was clear about understanding the importance of its narrow focus. The Court wrote as follows:

> We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails. Neither respondents nor the courts below question that the

[4] *Taylor v. Kentucky*, 436 U.S. 478 (1978).
[5] Until now, it has not been so much of a "misunderstanding" as it has been an intentional attempt to chip away at one particular foundational aspect of bail reform in order to erode support for bail reform generally. For example, early in the current movement for pretrial justice, the commercial bail industry made the argument that there was no presumption of innocence at bail to preclude reduction in the use of money and otherwise to thwart improvements at bail, but they have just recently recognized their error and have now begun writing that commercial surety bonds tend to uphold the presumption.
[6] 342 U.S. 1, 4 (1951) (internal citation omitted).
[7] *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

> Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt. Nor do they doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest. Instead, what is at issue *when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged*, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point.[8]

The Court specifically cited to *Stack v. Boyle* in this quote, and also in a footnote found within this quote, in which the Court wrote: "In order to imprison a person prior to trial, the Government must comply with constitutional requirements and any applicable statutory provisions. Respondents do not allege that the Government failed to comply with the constitutional or statutory requisites to pretrial detention."[9]

Accordingly (and as verified through a reading of the briefs), the parties were not disputing whether the government could detain the prisoners, the government's purpose for detaining the prisoners, or even whether complete confinement was a legitimate means for limiting pretrial freedom. These issues would all necessarily implicate a right to bail (or release), excessive bail, statements contained in *Stack v. Boyle*, and the presumption of innocence.

Instead, the sole issue before the Court was whether, after incarceration, the actions leading to the prisoners' complaints could be considered punishment in violation of the Due Process Clause. And thus, the basis for the statement that the presumption of innocence has "no application" to a pretrial detainee was due to the fact that no right to bail issues were raised or considered.

Thus, while bail scholars have noted an apparent erosion of practical application of the presumption of innocence over the last several decades, the presumption nonetheless still has everything to do with bail, at least so far as ensuring a presumption of release, determining which classes of defendants are bailable or unbailable, and the constitutional and statutory rights flowing from that decision. And therefore, the language of *Wolfish* should in no way diminish the strong

[8] *Id.* at 533-34 (internal citations omitted) (emphasis added).
[9] *Id.* at 599 n. 15 (internal citations omitted).

statements concerning the right to bail found in *Stack v. Boyle* (and other state and federal cases that have quoted the presumption of innocence language of *Stack*).

Had the Court in *Wolfish* essentially erased the notion of a presumption of innocence at bail as articulated by the Court in *Stack v. Boyle*, there would have been no need for the 1984 Bail Reform Act specifically to express its intention not to modify or diminish the presumption. Had the Court in *Wolfish* essentially erased the notion of a presumption of innocence at bail as articulated by the Court in *Stack v. Boyle,* Justice Thurgood Marshall's dissent in *United States v. Salerno* – in which Marshall cited *Stack* and based his argument, in large part, on his view that the Bail Reform Act was an "abhorrent limitation on the presumption of innocence"[10] – would have been foolish. Indeed, had the Court in *Wolfish* essentially erased the notion of a presumption of innocence at bail as articulated by the Court in *Stack v. Boyle*, Justice Rehnquist could have precluded most of Marshall's dissent altogether by simply, and in one line, writing that the presumption did not apply.

Understanding a difference between an "application" of the presumption of innocence at bail versus its overarching role at bail is crucial.[11] People occasionally argue that the presumption of innocence cannot be applied to anything but the actual trial because, "if it did . . . the practices of arrest, presentment and pretrial detention for those found likely to flee, intimidate witnesses or jurors, or otherwise interfere with the trial would be impermissible."[12] For example, they argue, a finding of probable cause for arrest – specifically, that there are facts and circumstances sufficient to warrant a reasonably prudent person to believe a person has committed a crime – requires, to some degree, findings that the defendant is guilty. If we are to presume, instead, that the defendant is innocent, it conflicts with those findings, thus suggesting that something more than probable cause would be required for an arrest. Indeed, this argument is true, and thus the presumption of innocence cannot be "applied" at bail in the same way it is applied at trial. One will never win a legal dispute based on an argument that the judge did not properly "apply" the presumption of innocence when setting conditions, etc. In

[10] *United States v. Salerno*, 481 U.S. 739, 762-63 (1987).

[11] It appears that the American Bar Association Standards on Pretrial Release does understand the difference, as those Standards expressly state: "The strong presumption in favor of pretrial release is tied, in a philosophical if not a technical sense, to the presumption of innocence." ABA Standards Part I, general principles, at 36. Despite this more nuanced approach of thinking about the presumption, some courts have nonetheless used the presumption as a partial basis for deciding legal claims. *See, e.g., United States v. Sanchez Gomez*, No. 13-5056, D.C. No. 3:13-mj-03928-BLM-LAB-1 (9th Cir., May 31, 2017).

[12] Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371, 404 (1970) (summarizing argument of Attorney General John N. Mitchell). The fact that this argument came from the Attorney General should indicate, at least, that the issue is somewhat complex.

that sense, it is not like due process, for example, which protects a defendant's liberty interest and thus can be applied at bail and used to win claims and disputes.

Nevertheless, the presumption of innocence is still applicable to bail in exactly the way described by the Court in *Stack.* It is intimately related to the right to bail – that is, why, in America, we allow pretrial release to begin with. It is more philosophical than practical, but it is no less important, and people working in the field should never shy from articulating the presumption of innocence as a principle reflected in our American release and detention system. Indeed, faced with the argument that the presumption of innocence did not "apply" at bail, constitutional scholar Laurence Tribe wrote as follows:

> This argument completely ignores the basic rationale underlying the decision in *Stack.* To secure the public interest in preventing certain forms of conduct, we have established a system of sanctions calculated to deter outlawed behavior. That system cannot function at all if the threatened sanctions are not effectively imposed, and various restraints on liberty, from arrest to detention, may at times be needed to provide assurance that a reliable trial can be held. Moreover, society may justly demand this assurance even if the defendant is innocent. Apart from the restraints needed to provide this basic assurance, however, a person awaiting trial has as great a right to liberty as any other citizen.
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> Viewed in this perspective, the presumption of innocence of which the Supreme Court spoke in *Stack v. Boyle* represents far more than a rule of evidence. It represents a commitment to the proposition that a man who stands accused of a crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings pending against him – deprivations which do not rest on any assumption of guilt – may be squared with this basic postulate of dignity and equality.[13]

Tribe's argument of broader perspective from which to view the presumption of innocence aligns with the Court's statement in *Bell* that its decision was not concerned "with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails." That decision – the broader decision of whether a defendant had any right to liberty to begin with, is the

[13] *Id.* (internal footnotes omitted).

decision that triggers consideration of the presumption of innocence. Technically, the presumption of innocence cannot be "applied" at bail, but it is an overarching principle that explains the existence of bail and that continually guides us through bail decision making.

Nevertheless, despite our generally inability technically to "apply" the presumption of innocence at bail, the presumption can tip the scales when courts are faced with difficult constitutional questions. For example, in *United States v. Scott*,[14] a panel of the Ninth Circuit Court of Appeals used the presumption of innocence to refute the government's assertion that the defendant waived his Fourth Amendment rights against unreasonable searches based on an assumption that he was at higher risk to commit more crimes than any other member of the public "without an individualized determination to that effect." As noted by the panel, "That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence."[15]

Finally, anyone who argues that *Wolfish* necessarily erased the notion of a presumption of innocence at bail as articulated by the Court in *Stack v. Boyle* should realize that their own state courts may nonetheless still find that argument unpersuasive. For example, in *People v. Hoover*, a 2005 opinion (issued 25 years after *Wolfish*), the Colorado Court of Appeals wrote: "The excessive bail clauses safeguard the right to pretrial bail that, in turn, protects the right to prepare a defense and the presumption of innocence."[16] *Hoover*, in turn, cites to *L.O.W. v. District Court*,[17] in which the Colorado Supreme Court – again post-*Wolfish* – quoted the *Stack* language in full while discussing both the federal and Colorado Excessive Bail Clauses.

As explained by the Court in *Taylor v. Kentucky*, the phrase "presumption of innocence" is somewhat inaccurate in that there is no true presumption – that is, no mandatory inference to be drawn from evidence. Instead, "it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence."[18] Moreover, and as noted previously, the words "presumption of innocence" themselves are found nowhere in the United States Constitution, although the phrase is linked to the 5th, 14th, and 6th Amendments to the Constitution. *Taylor*

[14] 450 F.3d 863, 874 (9th Cir. 2005).
[15] *Id.*
[16] No. 04CA1794, found at http://www.cobar.org/opinions/opinion.cfm?opinionid=5058&courtid=1.
[17] 623 P.2d 1253, 1256 (1981).
[18] *Taylor v Kentucky*, 436 U.S. 478, 483 n. 12 (1978).

suggests an appropriate way of looking at the presumption as "a special and additional caution" to consider beyond the notion that the government must ultimately prove guilt. As noted previously, it is the idea that "no surmises based on the present situation of the accused"[19] should interfere with the jury's determination. Applying this concept to bail, then, the presumption of innocence is like an aura surrounding the defendant, which prompts us to set aside our potentially negative surmises based on the current arrest and confinement as we determine the important question of release or detention.

[19] *Id.* at 485 (quoting 9 J. Wigmore, Evidence § 2511, at 407 (3d ed. 1940)).