§ 10 Innocence: A Presumption, a Principle, and a Status

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But thus: if powers divine beholds our human actions, as they do, I doubt not then but innocence shall make false accusation blush and tyranny tremble at patience.
William Shakespeare,
The Winter's Tale

'Could it be possible! This old saint has not heard in his forest that God is dead!'
Friedrich Nietzsche,
Thus Spoke Zarathustra

The essay begins with a brief examination of what presuming innocence traditionally means. As the author states, there are at least two different possible understandings of the same maxim: the first, more restricted, is an epistemological rule that requires prosecutors to prove beyond a reasonable doubt the facts contained in their accusations; the second, broader, is an axiological premise that limits what can reasonably be done in judicial procedures and by government officials.

This essay contends that the first notion is neither necessary nor sufficient for securing a fair criminal procedure. The second alternative, meanwhile, is not only more consistent with the type of truth a democratic state should be bound to pursue but also a natural consequence of applying the *nulla poena* principle.

The paper closes inquiring into the future of the presumption and suggesting that a system truly committed to defending its citizens' dignity should protect them from all unjustified punishments derived from criminal accusations, even beyond the four walls of a courtroom.

I. Introduction to the Concept of Innocence

The history of criminal procedure law is, to some extent, also the history of two competing goals: the search for objective facts and historical truths, on the one hand; and the limitation of power, on the other. While none of them implies the absolute denial of the other, there has always been debate over the right value that should be favoured in the design of our institutions and laws. Every modern system in the world is the result, at the end of the day, of a delicate balance between what is forbidden in the reconstruction of facts and what citizens must tolerate to this high end.

The presumption of innocence, it will be argued, is a perfect example of such tension. There is hardly no nation in the world where such rule isn't somehow recognized and no legal scholar who would deny its value within a liberal political state. However, such peaceful consensus starts weakening when we try to define what precisely we were all agreeing about. As with many other legal terms, the significance of the words was progressively obscured by its extended use in popular culture and the diverse evolution of meanings given to these vague concepts across nations.

The first goal pursued by this paper is, then, to offer a simple but exhaustive classification of these notions[1]. As I will argue in the next pages, almost all possible interpretations of what presuming innocence could mean tend to fall within one of the following two groups: either we are talking about an epistemological presumption or an axiological principle. To put it simply, doctrinal conceptualizations have mostly been construed around either a rule for better getting to an acceptable final decision or a moral principle under which the state is expected to act when dealing with individuals.

Agreeing on this preliminary distinction is essential for advancing the central claim of this paper, consistent of three minor premises: (i) the presumption of innocence is widely accepted as a ideal, but its content is still

1 Something similar was done in the seminal paper by Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11 Legal Theory 333. I, however, do not share such classification. As it will be shown, an epistemically driven understanding of the principle has both probatory and material implication. In the same manner, the value-based conception does, as a matter of fact, directly shape the way in which evidence is collected and judged. In other words, the relevant distinction is not about what the principle is, but what the goals pursued by its existence are. The scope and breadth of the presumption will not, after all, be defined by any intrinsic essence of the principle that must be discovered. What matters, rather, is whether nations have favoured the search of truths or the protection of the innocent defendants.

under dispute; (ii) the normative meaning of such a legal expectation isn't obvious, and should thus be shaped in order to advance certain interests; (iii) none of the existent meanings is necessary nor sufficient for securing the objectives theoretically being defended.

Finally, I will suggest a possible reading for the presumption that, while still in line with the two classical approaches, has a better potential for achieving the goals of criminal procedural law: attaining solid truths through a fair procedure, in order to punish those guilty of a wrongdoing without unduly affecting those who legally shouldn't be sanctioned.

II. An Epistemological Presumption

One possible way of beginning a review of the presumption of innocence is by presenting its minimal expression, that has its most salient exponent in the Anglo-American tradition. Although this basic understanding is chronologically newer and has its roots in the continental principle, there is an expositive virtue in setting first the basic elements of the concept and only after building the rest of the structure.

The common law tradition has always recognized a presumption of innocence in favour of the accused. The Supreme Court of the United States, in one of its most cited passages, has noted that 'The principle that there is a presumption of innocence in favour 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]. But precisely its self-evident nature is what complicates the debate in comparative terms, as it might signal that there are no doubts about what the rule encompasses.

The Constitution of the United States refers at no point to this rule. Rather, the presumption of innocence has been construed as a common law principle that has its normative support in the Fifth Amendment's Due Process Clause. The significance of this praetorian mandate was slowly shaped by courts to mean something quite different to what continental lawyers typically would assume it dictates. More specifically, the rule was shaped to refer to no more than a set of evidentiary rules and jury instructions; and, as such, to govern only during trial, having no bearing in pre-trial proceedings, at the sentencing stage or in any other interaction with public authorities. The implications of this view will be subsequently

2 *Coffin v United States*, 156 US 432 (1895).

examined but, before, it is convenient to comprehend the rationale behind such understanding.

At the core of the American mind one can find the defence of liberty, understood as a limit to the state's interreference with individual freedom or private property[3]. Many safeguards were laid to advance these objectives. Among them, probably the most relevant is the right to be judged by peers and members of one's own community, by an unanimity of citizens unaligned with governmental desires or, simply, the right of appearing before a jury prior to a criminal sentence[4].

In the Anglo-Saxon adversarial criminal procedure, most of the strict rules set by courts and legislatures are intended, therefore, to protect the jurors. It is undeniably true that Americans also care about defending innocents while advancing a fair sentence for those guilty. But, according to this model, those two objectives will be achieved if all necessary elements for a decision are carefully regulated to allow the factfinders to determine what has actually happened. So, in contrast to what is often attributed to accusatorial systems, here too the procedure intends to find material truth. The difference is that in this model, one gets to the truth only through a rigorous epistemological process designed to mitigate biases, mistakes, unfair prejudices, and distractions.

In this context, Americans incorporated the presumption of innocence, not necessarily as a right of the defendant but as a sound starting point for a prosecution, as a fair rule for interpreting evidence, as a default rule for the case of not getting to a definite conclusion, and as a guide that jurors must follow when making a tough call about another man's guilt. Or, in legal terms, what the presumption means is: (i) the prosecution needs to prove all affirmative facts contained in the accusation; (ii) the defendants can't be compelled to prove these facts; and (iii) in case where a reasonable

3 James Q Whitman, 'Equality in Criminal Law: The Two Divergent Western Roads' (1998) 1 Journal of Legal Analysis 119.

4 In fact, the right to a jury trial is so central for Americans that it was contained in the Declaration of Independence as one of the reasons for dissolving all political connection with the United Kingdom. In their words, while enumerating the wrongs against which they were fighting, one of them was: '(…) depriving us in many cases, of the benefit of Trial by Jury'.

doubt exists, there should be a verdict of no-guilt.[5] As it can be seen, this doesn't differ much from the *in dubio pro reo* continental standard[6].

Finally, as an instruction to the jury, the rule is said to indicate something else. It works as a prudential rule to set aside any preconception derived from the arrest, prior convictions or the indictment itself.[7] However, as noted by some scholars[8], the instruction as it is conceived seems to add little or nothing to the already existent requirement of proving facts beyond a reasonable doubt[9].

Because the central aim of the presumption is to set a rule to properly allocate blame during a trial, it is not hard to anticipate what is the time frame in which innocence must be inferred. Unlike what occurs in other nations, the presumption of innocence has no bearing in pre-trial proceedings nor during sentencing[10]. In fact, this limited understanding of when and who should presume innocence was extended by the Supreme Court of the United States to apply to older and juvenile offenders alike[11].

While the scope of the presumption might slightly differ from state to state, the understanding of the United States Supreme Court is, nonetheless, highly indicative of what is the most extended conception. In fact, some notorious local precedents have even disputed the rule as a presumption, understood as an inference rule deduced from a given premise[12]. According to this view, 'if innocence was in fact presumptive evidence throughout a trial, no conviction was possible'[13]. Furthermore, 'It is (said to be) not even a presumption in the popular sense of a thing which is more likely to be true than not, for statistically more people who are charged with crimes are convicted as guilty than are acquitted as innocent.'[14]

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5 See Antony Duff, 'Who Must Presume Whom to be Innocent of What?' (2013) 42 Netherlands Journal of Legal Philosophy 3.

6 François Quintard-Morénas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 American Journal of Comparative Law 107, 112.

7 *Kentucky v Whorton* 441 US 786, 789 (1979).

8 William F Fox Jr, 'The "Presumption of Innocence" as Constitutional Doctrine' (1979) 28 Catholic University Law Revie 253.

9 *In re Winship* 397 US 358 (1970).

10 See *Bell v Wolfish* 441 US 520 (1979).

11 *Schall v Martin* 467 US 253 (1984).

12 *Carr v State* 4 So 2d 887 (Miss 1942).

13 ibid.

14 ibid 156. See also *Dinkins v State* 29 Md App 577 (1976).

A first impression of the epistemological view could suggest that it always affords less protection to defendants than other models. But this is not necessarily true. For instance, both at the federal and local levels, there are rules that protect the defendant from appearing visibly shackled before the jury[15]. While at first this prohibition would seem to better accommodate an axiological-principle-model, a closer look reveals the opposite. Countries with a long tradition in humanistic philosophy and a deep-rooted principled conception of innocence, such as Italy[16] or Spain[17], reported an extended practice of presenting defendants handcuffed or wearing the clothes given to them while on pretrial detention[18].

The explanation to this seemingly counterintuitive contrast rests on the different goals pursued by these two systems. As an epistemic safeguard, it is clear that the jury could be influenced if a person is introduced to them for the first time as a criminal[19]. In the continental system, the classic idea was that professional judges could still be impartial, even in the face of inflammatory evidence or elements that were derogatory to the accused image. Small physical restrictions, although in tension with the respect that an innocent deserved, were then allowed in light of the overriding interest that safety within the court supposed.

So, in theory, the American conception of the presumption of innocence derives from a utilitarian and pragmatic vision, according to which such rule would better protect the jury, laying the foundation for an

15 See eg *Deck v Missouri* 544 US 622 (2005); *People v Roman*, 365 NYS 2d 527, 528 (NY 1975).

16 See Fair Trials Report, *Innocent until proven guilty? The presentation of suspects in criminal proceedings* (3 June 2019) <https://www.fairtrials.org/sites/default/files/publication_pdf/Fair-Trials-Innocent%20until-proven-guilty-The-presentation-of-suspects-in-criminal-proceedings_0.pdf> accessed 28 November 2021.

17 See Rights International Spain Report, *Sospechosos y medidas de contención: de la importancia que reviste cómo un sospechoso es presentado ante el tribunal, el público y los medios* (11 June 2019) <http://rightsinternationalspain.org/uploads/publicacion/eca5be7ba0dab99f85e605b4d73988d13a2077bb.pdf> accessed 28 November 2021.

18 This issue was not long ago addressed by the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

19 This rule seems to align with Federal Code of Evidence of the United States, Rule 403, according to which 'The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'

effective and fair trial. To an extent, some of the implications of assuming innocence have been proven to be epistemologically better. For instance, vast neuroscientific literature on biases has shown the worth of providing clear rules that help decisionmakers listen without a negative preconception of an accused[20].

However, this rationale with which the meaning of the presumption was construed fails in many other instances. First, as an epistemic rule that mandates for the prosecution to prove their affirmations, the rule is a double-edged sword. When combined with the classic common law distinction between offences and defences, many jurisdictions within the United States typically shift the burden of proof and expect the defendant to establish the elements of their defences.

The blurred line that distinguishes negative from affirmative elements creates a paradoxical state of affairs under which prosecutors don't need to prove moral guilt or the existence of a crime, as long as they can show that a criminal statute was violated[21]. So, while it is true that it is generally preferable to place the burden of proof on the person claiming a fact affirmatively, the normative concept of a crime, understood as the presence of certain required elements and the absence of others, complicates the distribution of burdens.

From a pragmatic point of view, presuming innocence is not even the best methodical assumption to help establish what actually happened in each case. In crimes such as inexplicable wealth and illicit enrichment, once probable cause is established, public officials are typically asked to explain the origin of their fortune against the presumption of innocence and the *nemo tenetur* principle[22]. The reason for this inverted burden of proof is, precisely, the difficulty of asking a prosecutor to prove beyond reasonable doubt the source of someone else's money. Additionally, the

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20 See eg Vicki S Helgeson and Kelly G Shaver, 'Presumption of Innocence: Congruence Bias Induced and Overcome' (1990) 20 Journal of Applied Social Psychology 276; Danielle M Young, Justin D Levinson & Scott Sinnett, 'Innocent until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence' (2014) 9 PLOS ONE 1.

21 See Glanville Williams, 'Offences and defences' (1982) 2 Legal Studies 233; Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Columbia Law Review 199; George P Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases' (1968) 77 Yale Law Journal 880.

22 See Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders*, Final Report prepared for the US Department of Justice, 31 October 2012 (Order Number: 2010F_10078).

interest in fighting corruption and the relatively easy demand on the defendant seem to back up the model. But, once one considers this assertion closely, it is possible to note that many other crimes have the same structure. Would it be reasonable, then, to ask defendants to explain what has happened whenever it is easier for them to do so or is it, on the contrary, that there must be another good reason for not putting the burden on the accused?

Moreover, if the presumption is designed merely as an evidentiary rule and meant to govern during trial, it's hard not to mention an additional factor that seriously limits its scope[23]. Roughly 97% of federal criminal convictions and 94% of State sentences are obtained through plea bargains[24]. This is, if not indicative of an inconsistency, at least a sign of the inconvenience of the significance given to the presumption.

Finally, it must be noted that there is no inextricable connection between the common law system and this axiological rule. While it is true that, in its origins, the adversarial model and an empiricist mindset had a big influence in the craft of the rule, many countries within the same tradition have departed from this restrictive reading. Such is the case, for example, of countries like Ireland[25] and Canada[26].

III. An Axiological Principle

As a principle, assuming innocence within a procedure means something quite different. From an axiological perspective, the rule refers to a value that must be pursued and defended by all public officials while dealing with a criminal accusation. The principle, then, projects itself in many other rules within the procedure and sometimes even out of the courtroom. But before moving forward and in order to avoid misunderstandings, the close connection between the two concepts must be first addressed.

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23 Robert Schehr, 'Standard of Proof, Presumption of Innocence, and Plea Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-Trial Criminal Procedure' (2017) 55 California Western Law Review 51.

24 Clark Neily, 'Prosecutors are packing prisons by coercing plea deals, and it's totally legal' (2021) NBC News <https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201> accessed 29 November 2021.

25 *PO'C v The Director of Public Prosecutions* [2000] 3 IR 87, 103.

26 *R v Pearson* [1992] 3 SCR 665, 683.

To speak about these diverse epistemic and axiological faces is not to say that they are two absolutely different, unconnected things; on the contrary, it is almost impossible to disentangle one from the other. Any system that recognizes an epistemic presumption of innocence must, to a certain extent, derive its existence from a moral value, according to which innocence must be somehow protected. On the other hand, every nation that believes that people must be treated as if they were innocent until proven guilty has tailored epistemic rules, like *in dubio pro reo*, to give efficacy to this more abstract mandate.

Indeed, the interrelation between the two forms of rules has existed from the beginning and has had enormous impact on later debates. For instance, the common law rule of evidence derives from Blackstone's well-known formulation: 'it is better that ten guilty persons escape than that one innocent suffers'[27]. So, even in countries like the US, where the evidentiary perspective predominates, there is still a close tie between such rules and a particular ideal of justice. In fact, the tensions between the two can be seen in many judicial cases where the scope of the rule was under debate. Particularly from the time when there was a vivid debate about the significance of innocence, some notorious precedents acknowledged this latter perspective in their dissents.

In *United States v Rabinowitz*[28], for example, the Supreme Court had to decide whether a search and seizure was valid, although performed without a valid warrant. In that case, Justice Frankfurter, dissenting, said:

> By the Bill of Rights, the founders of this country subordinated police action to legal restraints not in order to convenience the guilty, but to protect the innocent. Nor did they provide that only the innocent may appeal to these safeguards. They knew too well that the successful prosecution of the guilty does not require jeopardy to the innocent.

Some years later, in *United States v Salerno*[29], the Court had to analyse the constitutionality of a statute that allowed pretrial detentions of people considered dangerous to their communities. In that case, it was Justice Marshall who dissented and expressed:

> Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we

27 William Blackstone, *Commentaries on the Laws of England* (4th edn, Clarendon 1723–1780) 352 (book 4 ch 27).
28 *United States v Rabinowitz* 339 US 56, 82 (1950).
29 *United States v Salerno* 481 US 739, 767 (1987).

> believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

So, as it can be seen, the epistemic rule certainly derives from an axiological commitment and, thus, it would not be accurate to say that a nation recognizes one single face of innocence. Rather, the distinction serves as a tool to see when a system prioritizes one aspect over the other and to judge the consistency of a given interpretation with the objectives it claims to advance.

From the point of view introduced in the previous subtitle, innocence is a sound starting point to begin a dialectic process in which whomever claims a fact has the burden of proving it and where innocence wins in the absence of clear proof of criminal guilt. Here the principle has some additional implications. The principle of innocence is an ethical agreement done by citizens that resembles a Ulysses Pact. Public officials are bound to treat people as if they were innocent until there is a final sentence, not necessarily because this is a way of arriving at a better truth, but because it is the best way of doing it. We limit ourselves not because of the reward, but because we are far more fearful of the dangers of acting unrestrained.

This vision derives from specific theories of punishment and citizenship. On the one hand, it is believed that only one type of sanction is legitimate, and that is the one legally applied by the state after a fair procedure in which responsibilities were determined. Treating people with respect and granting them all the rights that any other citizen has is precisely the way in which the system builds its legitimacy, transforming the final sentence into something inherently different from other uses of force or even simple vengeance. Therefore, when the principle is ignored, the failure is not one of truth but one of moral legitimacy of the sovereign. The main idea behind this value is that a fair procedure is the one that better secures the protection of the innocent and the punishment of the guilty. To achieve this, just like in the other conception, it is paramount to achieve solid factual findings.

But two other things must also be done. First, one of the goals of a criminal process is to adjudicate an evil to a person, either because of deterrence, retribution or a combination of both. When too much suffering is anticipated along the way, the final decision loses both discursive and factual force. So, protecting defendants across all different stages of a procedure is, in a way, a precautionary measure that secures the object of

the trial, i.e., the legal suffering of a wrongdoing[30]. Second, the principle also serves as conceptual framework for deciding what kind of restrictions can be reasonably imposed on persons not yet guilty.

Some scholars have noted that pretrial detentions and other preliminary restrictions are only justified in the context of a democratic society where we all have a certain duty of tolerance in order to achieve a greater good, such as the resolution of criminal cases. All limitations to liberty, then, have to be examined in the light of what is proportional and reasonable to ask from an innocent man. So, for instance, it is arguably justifiable to ask one person, innocent or guilty, to tolerate a brief detention while a legal search is being conducted at her place. In contrast, it is hardly acceptable to restrict the freedom of anyone during an investigation that takes a couple years[31]. In short, what this formulation expects from government officials is not solely that they assume innocence in case of doubt – i.e., *in dubio pro reo* – but that they minimize all unjustified harm until there is a judicial determination of criminal responsibility – i.e., *nulla poena sine iudicio* –.

This latter conception seems to find a better consistency between the objectives it intends to promote and what it actually achieves. To begin with, the rule portrays itself as an ethical one and, as such, there are multiple theoretical positions from where it is safe to conclude that the standard is in fact just. For instance, in a Rawlsian sense, it is undoubtably a fair and sensible idea to preclude any suffering until we can be certain that a person deserves it. It is possible to assume that even without knowing which role one will have in a given procedure, no one should oppose to a prohibition that protects the innocent, defers legitimate punishment to a later stage and still gets to solve criminal controversies effectively.

It could be argued that a rule about values that seem to be fair does not need to offer much more. But still, the principle of innocence has a further virtue: its utilitarian worth. As an epistemological rule of adjudication, I have tried to explain that the presumption is not consistent. Sometimes it works and sometimes it doesn't. But as an axiological mandate, the rule often serves properly its functions. Criminal procedures guided by this principle are, as a matter of fact, better prepared for protecting individuals from unjustifiable suffering than those that neglect such standard. At the

30 See Claus Roxin and Bernd Schünemann, *Derecho Procesal Penal* (Mario F Amoretti and Darío N Rolón tr, 29th edn, Didot 2019) 146.

31 ibid; Klaus Volk, *Curso fundamental de Derecho Procesal penal* (Alberto Nanzer and others tr, 7th edn, Hammurabi 2010) 79.

same time, government officers also legitimate themselves by procedures in which people are treated with respect and agency along the way. In this sense, several empirical studies have shown that humans are more willing to accept adverse decisions when they are seen as the result of a process in which they were treated with dignity[32].

The proper scope of protection of this ethical rule, insofar as we are talking about a legal requirement that correlates with a defendant's right, needs to be defined. Accordingly, it would seem narrow and arbitrary to limit its application only to behaviours within a criminal trial or conducts of judicial actors. For instance, the European Court of Human Rights has said that the principle forbids premature expressions of guilt, by the trial court or by any other public officials[33], although statements by judges are subject to a stricter scrutiny than those by other investigative authorities or politicians[34]. Suspicions can be voiced, of course, as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation[35]. Once an acquittal has been made, however, the voicing of suspicions is incompatible with the presumption[36].

Also, the Court has said that the rule binds not only judges or courts but also other public authorities[37], like police officials[38], the President of the Republic[39], the Prime Minister or the Minister of the Interior[40], the Minister of Justice[41], the President of the Parliament[42], prosecutors[43], and other prosecution officials, such as an investigator.[44] In short, as axiological

32 Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 Journal of the American Judges Association 217.

33 *Allenet De Ribemont v France* Ap no 15175/89 (ECtHR, 10 February 1995); *Nešťák v Slovakia* App no 65559/01 (ECtHR, 27 February 2007).

34 *Pandy v Belgium* App no 13583/02 (ECtHR, 21 September 2006).

35 *Sekanina v Austria* App no 13126/87 (ECtHR, 25 August 1993).

36 *Asan Rushiti v Austria* App no 28389/95 (ECtHR, 21 March 2000); *O v Norway* App no 29327/95 (ECtHR, 11 February 2003); *Geerings v The Netherlands* App no 30810/03 (ECtHR, 1 March 2007); *Paraponiaris v Greece* App no 42132/06 (ECtHR, 25 September 2008).

37 *Allenet De Ribemont v France* App no 15175/89 (ECtHR, 10 February 1995); *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000); *Petyo Petkov v Bulgaria* App no 32130/03 (ECtHR, 7 January 2010).

38 *Allenet De Ribemont v France* App no 15175/89 (ECtHR, 10 February 1995).

39 *Peša v Croatia* App no 40523/08 (ECtHR, 8 April 2010).

40 *Gutsanovi v Bulgaria* App no 34529/10 (ECtHR, 15 October 2013).

41 *Konstas v Greece* App no 53466/07 (ECtHR, 24 May 2011).

42 *Butkevičius v Lithuania* App no 48297/99 (ECtHR, 26 March 2002).

43 *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000).

44 *Khuzhin et al v Russia* App no 13470/02 (ECtHR, 23 October 2008).

principle, presuming innocence is an ethical standard that can be expected from any individual acting in her political capacity and that must be zealously defended during the different stages of an accusation. This is how states construe their legitimacy, protect the object of a criminal trial, and advance justice.

IV. A Protected Status

The presumption or principle of innocence may be limited to a set of objective rules for arriving at solid truths. Or, as it was previously argued, it could also be understood as a broader standard of behaviour for public officials. Both interpretations have their merits and their limitations. Some of the inconveniences and virtues of the first were already presented in the previous pages, while only positive things were said of the second one. I will now develop some kind of critique of the principled version of innocence, which will also inspire a different reading of the same maxim.

It is not surprising that almost every nation has been ambivalent about the scope of application of the axiological concept. The general assumption is that this is an expectation designed to bind primarily public servants. However, there is a growing tendency to recognize some kind of validity of the presumption as applied to private parties under certain circumstances[45]. Such ambivalence can be explained looking at the high costs that opting for one or the other alternative could carry out. Both imposing the presumption upon every citizen or solely to State officials could be highly unwise.

On the one hand, a narrow reading of the principle, under which only government officials were required to treat defendants as if they were innocent, would render the presumption void. For instance, if the media were allowed to openly treat someone as a criminal before a final sentence has been rendered, many cases would see the main harm irreparably anticipated while, at least in some judges' minds, the *onus probandi* would be likely inverted.

When a person is being subject to a criminal investigation, one of the biggest dangers they face is being irreparably damaged in their reputation. Thus, we should all aim to preserve the honour of any defendant until we can be certain that we aren't inflicting an unjustified punishment upon

45 See eg *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016); *Rupa v Romania* (no 1) App no 58478/00 (ECtHR, 16 December 2008).

someone who is not guilty. This legitimate expectation extends to every subject and particularly to those with a high capacity to harm, such as huge tech companies, the media, and business organizations. Little would it help to protect someone from an anticipated public punitive reaction if we let individuals be displayed as criminals or censored from certain forums.

In the same line of ideas, we must address the effect on jurors and judges that a distorted image can produce. By giving our back to defendants in the name of individual freedoms, we might get to the point in which no institutional safeguard could correct the negative bias and prejudice that could arise from a wide campaign against someone. Inasmuch as we would like to believe that humans are completely rational[46], the truth is that we don't have any way of guaranteeing a fair process to any defendant that has been presented as a felon to her community.

On the other hand, such ethical standard imposed on all individuals would be far from desirable. To begin with, its enforcement would demand a huge bureaucracy regulating almost every aspect of life. Even if this issue could be sorted out, the rule would still be impractical and undesirable. Many daily decisions are made on the basis of personal preferences and priorities. Some of these choices might even be influenced by criteria that, if expressed by members of the public sector, would not be permitted. So, while a Ministry can't hire people solely based on their race or ethnicity, citizens are allowed to choose their intimate partners based on these factors.

Moreover, when talking about criminal accusations, there is a further reason for rejecting this extensive alternative. The reason for labelling certain restrictions as discrimination is that they rest on differences which don't have a functional explanation. To put it differently, we believe it can't be tolerated that someone is precluded from teaching at a public school based on their height[47], because we believe this distinction is irra-

46 Multiple studies have shown the limitations of the rational decisionmaker model. See eg Daniel Kahneman 'A Perspective on Judgment and Choice: Mapping Bounded Rationality' (2003) 58 American Psychologist 697; James E Smith and Thomas Kida 'Heuristics and Biases: Expertise and Task Realism in Auditing' (1991) 109 Psychological Bulletin 472; Jonathan St. B.T. Evans 'In two minds: dual-process accounts of reasoning' (2003) 7 TRENDS in Cognitive Sciences 454; Amos Tversky and Daniel Kahneman 'Judgment under Uncertainty: Heuristics and Biases' in Dirk Wendt and Charles Vlek (eds), *Utility, Probability, and Human Decision Making* (Springer 1975) 141–162.

47 Supreme Court of Argentina *Arenzon, Gabriel Darío v Nación Argentina* (Fallos 306:400).

tional and it can only be a sign of prejudice or of bad animus. But the same requirement would be perfectly accepted if it was set by a basketball coach. Something similar happens when someone has been accused of a felony. Compared to unaccused citizens, the probability of the alleged misconduct having actually taken place is elevated and thus a suspicion arises that a similar conduct could occur in the future. To illustrate this point: it would be insensate to ask all parents to ignore an accusation of sexual misbehaviour when hiring a babysitter until a final verdict has been offered.

One way of thinking innocence and defining who should presume it and how to enforce it is by examining the *nulla poena sine iudicio* prohibition and its implications. The mainstream reading suggests that no state punishment can legally be imposed until a final decision on the merits has been taken and criminal responsibility has been established through a fair trial. But, as I propose reading this maxim, governments should guarantee that no one suffers an unjustified consequence derived from a judicial proceeding until guilt has been finally determined. State officials have a primary duty of enforcing the law and punishing those who don't abide. But, as a collateral responsibility, when a judicial procedure has been put in motion to determine guilt and establish the appropriate reaction, they have to be certain that no one is harming another based on these allegations, that no punishment is anticipated until the time is ready and that people are treated with dignity and respect during all process. For ages, innocents have seen their rights unjustifiably limited due to the effects of criminal accusations and a very soft protection was awarded by the presumption of innocence. But especially at a time at which the information spreads as fast and extensively as it does today, the risks of criminal investigations are as alarming inside courtrooms as they are outside.

Just like in the case of discriminatory acts against other suspect categories, here too governments should do a serious effort to protect people from the unnecessary consequences of the procedures they have triggered. And also like in the case of discrimination, here too the obligation originates in a past state act or omission. People can still, of course, assume whatever they prefer; but after the judiciary has taken the conflict in its hands and decided that they are the only authority to allocate punishment for that conduct, there needs to be some safeguards that protect those innocent of the crime under investigation.

When legal innocence is conceived as a status and defendants as a suspect category, the role of governments shifts dramatically. Now, not only one can expect to be treated respectfully in court and can demand prosecutors to prove facts beyond a reasonable doubt, but also a legitimate interest

arises on every defendant to demand the cease of certain acts that restrict their rights based solely on their procedural situation. Of course, such right would not be absolute and should compete with other legitimate interest that may have bearing on each case. For instance, in the case of the babysitter, it could be argued that there is an overriding interest in protecting a child from an abhorrent crime and that, if found not guilty, the person can reapply later for the same opportunity. On the other extreme, if a bus driver is fired from his job based on an investigation for tax fraud, his rights as an innocent man should be defended by the same authority that is subjecting them to doubt. In the absence of solid reasons for advancing a sanction that could be delivered after a final verdict has been reached and in the face of a clear disconnection between the limitation and the crime, only prejudice can be inferred from such a resolution.

The principle should be construed to limit most forms of anticipated punishment derived from public accusations. As a general rule, people should be treated as if they were innocent in most instances and scenarios, only having to accept a very limited number of restrictions derived from their procedural situation and justified by legitimate interests.

Federal and State Legislatures should make laws protecting innocent people and defining what reasonable limitations individuals can suffer when dealing with an accusation. But the central element is separating preventive from retaliatory measures. People should have a judicial remedy to limit the former and resist the latter. No private punishment should be allowed solely as a derivation of a criminal investigation, and protective actions should be subject to a heightened scrutiny under which reasonableness, necessity and the protected interests are analysed.

V. Conclusion

As an epistemological rule, by itself, the presumption of innocence is not necessarily the best mean for achieving a better truth. As it was stated, the existence of such inference must be based on an underlying value component that justifies its widespread adherence. But, once this ethical factor is acknowledged, it gets harder to sustain its limited actual scope. My main thesis is that any given definition of the standard is purely contingent and could therefore be broadened. In the same lines of ideas, for example, George Fletcher explains:

> By becoming aware of linguistic and philosophical differences, we can generate a sense of our historical contingency. We could have evolved in a different way. The way things are is the way they must be. And if we can

> understand the roots of our resistance to change perhaps reforms become thinkable. This is the subversive potential of comparative law.[48]

Being aware of the existence of two kinds of legal presumptions of innocence may well serve this function. For example, an American may discover that its understanding of innocence is not inextricably linked to any common law requirement or that such rule is not the one that affords the best protection to its citizens. A European might also ask herself if the principle in which they believe is actually protecting the full range of conducts that they wanted to defend or if there are enough good reasons for limiting the ethical requirement as they had. Revisiting a legal concept, particularly from a comparative perspective, doesn't necessarily imply that the concept must be reshaped. Rather, it represents an opportunity to think again about its significance while trying to keep it as it is, offering new and better arguments, or to propose slight modifications to advance the goals that were theoretically behind its adoption.

48 George P Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 American Journal of Comparative Law 683, 700.