

# Texas Law Review

## *See Also*

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### Response

#### The Myth of the Presumption of Innocence

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##### I. Introduction

Do we have a presumption of innocence in this country? Of course we do. After all, we instruct criminal juries on it, often during jury selection, and then at the outset of the case and during final instructions before deliberations. Take this example, delivered by a judge at a criminal trial in Illinois: “Under the law, the Defendant is presumed to be innocent of the charges against him. This presumption remains with the Defendant throughout the case and is not overcome until in your deliberations you are convinced beyond a reasonable doubt that the Defendant is guilty.”<sup>1</sup>

Perhaps the presumption also reflects something more even, a larger commitment enshrined in a range of due process and other constitutional rulings designed to protect against wrongful convictions. The defense lawyer in the same trial quoted above said in his closings:

[A]s [the defendant] sits here right now, he is presumed innocent of these charges. That is the corner stone of our system of justice. The best system in the world. That is a presumption that remains with him unless and until the State can prove him guilty beyond a reasonable doubt. That’s the lynchpin in the system of justice.<sup>2</sup>

Our constitutional criminal procedure is animated by that commitment,

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1. Transcript of Record at 13, *People v. Gonzalez*, No. 94 CF 1365 (Ill. Cir. Ct. June 12, 1995).

2. Transcript of Record at 124, *People v. Gonzalez*, No. 94 CF 1365 (Ill. Cir. Ct. June 16, 1995).

or so says the U.S. Supreme Court. As Justice Sandra Day O'Connor wrote, "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."<sup>3</sup>

Then again, Justice O'Connor's language comes from a concurring opinion that was decisive in *Herrera v. Collins*<sup>4</sup>, a ruling that did *not* recognize, except hypothetically, a due process claim of actual innocence.<sup>5</sup> In that ruling, the plurality emphasized that in America "the trial is the paramount event for determining the guilt or innocence of the defendant."<sup>6</sup> The result at trial is to be final, whether accurate or not. Criminal trials are governed by a wide range of constitutional criminal procedure rules, as are criminal investigations. Few of those rules, however, relate to the *accuracy* of investigations or convictions. And the Illinois trial that I quoted from is a case in which an innocent person was in fact convicted, despite the lofty admonitions to the jury, due to an eyewitness misidentification and a false confession statement.<sup>7</sup> The defendant was later exonerated by DNA tests after serving over twenty years in prison.<sup>8</sup> We now know that "the best system in the world" can make terrible mistakes.

What does it mean to say the American idea of justice revolves heavily around the presumption of innocence? That presumption certainly does not translate to anything very specific in our constitutional criminal procedure doctrine. As many have observed, it is a myth that the Constitution affords special protections to the innocent. How else is that particular idea of justice realized or apparent? Is our greatest fear that an innocent person might be wrongly convicted, or that the guilty might go free?

James Q. Whitman, in his deeply comparative new article, describes the American criminal justice system, in contrast with continental and inquisitorial systems, as more focused on the danger of innocent persons being arrested.<sup>9</sup> In this Response, I respond by questioning the comparison on both sides of the equation, not to disagree with its utility or its contours, but because I admire the project and seek to elaborate here on Whitman's deep concern with unpacking the status of the presumption of innocence and that of mercy in our country and on the Continent.

The American presumption of innocence is more of an ideal than real.<sup>10</sup>

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3. *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring).

4. 506 U.S. 390, 420 (1993) (O'Connor, J., concurring).

5. *Id.* at 417.

6. *Id.* at 416.

7. See *Angel Gonzalez*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/angel-gonzalez> [<https://perma.cc/9QU9-SEGH>].

8. *Id.*

9. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEXAS L. REV. 933, 933 (2016).

10. For the argument that the United States "narrowed" the principle of the presumption of

The presumption, such as it is, rarely applies in practice, as Whitman acknowledges, since our cases are overwhelmingly plea bargained in a way that provides far less adversarial truth finding than in ostensibly inquisitorial countries.<sup>11</sup> Observers have long described the oft recited “myth that a person is presumed to be innocent until proven guilty” following arrest.<sup>12</sup> Nor does the supposed and oft proclaimed focus in our constitutional criminal procedure on the question of guilt or innocence translate into rights protective as against wrongful convictions. We have yet to have the Supreme Court clearly recognize, for example, in the years since its ruling in *Herrera*, a right to claim innocence postconviction even in a death penalty case.<sup>13</sup> Constitutional trial rights are often constructed to permit denying relief to the guilty, but where it comes to excluding unreliable evidence that might lead to convictions of the innocent, or process-focused rules have little to say.<sup>14</sup> We may be quite focused on procedural rights and on notions of bargaining autonomy that permit mass pleas, and we might be tolerant of a system that places decision making about guilt or innocence largely in the hands of prosecutors, but our system is hard to describe as one with a meaningful tradition focused on presuming innocence. On the other hand, we may err in presuming guilt, making a legal fiction that we presume innocence all the more comforting. If one accepts that the presumption of innocence serves appearances far more than reality, it is not hard to see why our system is both harsh and unreceptive to claims of innocence. Nor is it hard to see why it is all the more important to look to other systems, including those in continental Europe for sources of new ideas.

Second, in this Response, I ask whether the relationship between

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innocence as more than a burden of proof, neglecting both French and English sources for the principle, see François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 141–49 (2010).

11. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

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

13. On the subsequent handling of this hypothetical *Herrera* actual innocence claim, and its continued recognition and expansion beyond just use in capital cases, but quite oddly only as an ongoing hypothetical, by the Court, see BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 223–24 (2011).

14. For just a small sampling of the literature, see, e.g., GARRETT, *supra* note 13, at 7–8; DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 180–205 (2012); GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 168–80 (2008); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1592–1613 (2005); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 141–47 (2008); Joseph D. Grano, Kirby, Biggers, and Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 722–25 (1974); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 146–47 (2011); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818–31 (2006).

appearance and reality may be changing, as the status of innocence has itself changed, including in response to a new generation of scientific research on the causes of wrongful convictions, and the lessons learned from remarkable examples of wrongful convictions, including in DNA exonerations. I look at the current role of the ideal of the presumption of innocence. The contrast Whitman powerfully makes may erode given the complexity of the evolution of criminal procedure on both sides of the Atlantic and around the world.

Today, there is the potential for a new kind of convergence, as systems on both sides of the Atlantic are responding to wrongful convictions with a rethinking of traditional procedural rules, including rules of finality that long resisted reopening convictions in a broad range of civil and common law-based criminal justice systems. Continental systems are increasingly receptive to claims of new evidence of innocence, in part because of lessons drawn from research on wrongful convictions in the United States. And in a reverse irony, it is more inquisitorial tools that are influencing efforts to make trials in the United States more reliable.

## II. A Legal Culture of Mercy

Continental disregard for procedural niceties, and instead a paternalistic obligation to protect defendants and dispense mercy, is a defining aspect of the continental tradition and Whitman makes a wonderful contribution by isolating it in this way.<sup>15</sup> A preoccupation with confessions, not just as evidence, but to garner mercy, also characterizes continental systems, in which judges offer leniency to reward a defendant that dutifully confesses to the State.<sup>16</sup> Whitman describes in his fascinating appendix on the Amanda Knox case how much Knox would have benefited had she not insisted on innocence and admitted guilt (and also the decidedly noninquisitorial ability of the cooperating defendant to choose to not testify or admit guilt).<sup>17</sup> In such cases, then, a focus on a particular type of truth finding, in which one's relationship to the authority of the State is paramount, is far more important than testing of the evidence.

## III. The Presumption of Innocence Ideal

When turning to this side of the Atlantic, the contrast in presuming innocence versus mercy becomes more muted. In the body of the article, Whitman relies on Herbert Packer's famous description of an American "ideology of a presumption of innocence,"<sup>18</sup> but that work is not only limited

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15. Whitman, *supra* note 9, at 934.

16. *Id.* at 992–93.

17. *Id.* at 989–90.

18. Whitman, *supra* note 9, at 947 (quoting Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11 (1964)).

to description of an ideology that may be far more superficial than real, but it is a quite dated description that does not reflect how our constitutional criminal procedure and legal culture has evolved over the many decades since Packer wrote his classic article. Whitman also describes how while the U.S. approach may often be process based it is not necessarily interested in hearing new evidence of innocence after a trial.<sup>19</sup>

The past few decades have seen a remarkable movement “from status to contract” in criminal procedure, from adjudicating the status of a conviction, to contracting into guilt.<sup>20</sup> Even our supposedly far-reaching trial protections are not particularly focused on the problem of innocence. In the decades since Packer wrote, they have instead been focused more squarely on finality and on assuring convictions of the presumably guilty.

What is the presumption of innocence? Police, as a matter of good practice and sound sense, may presume suspects innocent; however, they may stop and question and arrest individuals based on suspicion and probable cause far short of weighty evidence of guilt.<sup>21</sup> As an initial and doctrinal matter, the presumption of innocence is just an appendage to the other more central jury instructions. The Court has sometimes put it loftily: “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.”<sup>22</sup> Despite that lofty rhetoric (dating back to 1895), the instruction is not a very important one, and it serves as just an extra reminder of sorts not to disregard the ultimate burden of proof that the prosecution bears.<sup>23</sup> It is an “inaccurate, shorthand description” of the rights of the accused, as the Court put it in *Taylor v. Kentucky*.<sup>24</sup> And it is not structural error for a trial judge to fail to instruct a jury on a presumption of innocence; as the Court has explained: “the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution.”<sup>25</sup> A failure to instruct on the beyond a reasonable doubt standard—now that would lead to automatic reversal.

As a result, is the presumption of innocence mere “rhetoric,” as William

19. Whitman, *supra* note 9, at 952–51.

20. *Id.* at 971 (citing Alan Cusack, *From Exculpatory to Inculpatory Justice: A History of Due Process in the Adversarial Trial*, 2 LAW, CRIME & HIST., no. 2, 2015, at 1, 20).

21. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that reasonable suspicion suffices for a stop and frisk short of arrest).

22. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

23. *E.g.*, 9 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2511 (James H. Chadbourne ed., rev. ed. 1981) (stating the instruction “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”).

24. 436 U.S. 478, 484 n.12 (1978).

25. *Kentucky v. Whorton*, 441 U.S. 786, 789–90 (1979) (holding that the instruction need not “be given in every criminal case”).

Laufer has argued, for example?<sup>26</sup> Perhaps, but more broadly conceived, judges and scholars link the idea of a presumption of innocence to rules that impose such a burden of proof on the prosecution, and more generally fair trial protections, and other procedural safeguards like the Fifth Amendment right to remain silent, a right to counsel, a right to a jury trial, and other constitutional criminal procedure protections. Yet the connection between those varied criminal procedure rules and ensuring against convictions of the innocent, can also be quite attenuated. The Supreme Court in *Bell v. Wolfish*,<sup>27</sup> to just give one example, while paying lip service to the notion that the presumption plays “an important role in our criminal justice system,” said it “has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”<sup>28</sup>

Our system may actually create more wrongful convictions than European systems, Whitman suggests.<sup>29</sup> That is a hard claim to assess, including because in European countries in which sentences are typically fairly short, one does not have people in prison for decades who have time to obtain and litigate new evidence of innocence. If true, though, then what does that say about our ideology of innocence? Is it really something that we believe in, if our fundamental concerns are concerns for the innocent, and yet we do little to protect against the conviction of the innocent? How can it be that trials are actually for “sorting the innocent from the guilty,” for us, when those that go to trial may be comparatively more often those that are trying to assert their innocence (perhaps paying a trial penalty as a result).<sup>30</sup> It is not just American sentences that shock Europeans, but also plea bargaining, as Whitman explains, since “full-scale trials have become vanishingly rare events,” except, perhaps ironically, in the capital cases that Europeans find especially shocking, and still more perversely, in the cases of those who irrationally (if sometimes truthfully) insist on their innocence.<sup>31</sup> American juvenile courts also strongly resemble a continental picture of courts in which confession evidence is prized in a paternal system that dispenses mercy, or not, informally. So what of our much-vaunted evidentiary protections?

#### IV. Changing American Criminal Procedure

The traditional near irrelevance of innocence is changing, but not because Americans are rethinking the constitutional criminal procedure that is Whitman’s focus or which was Packer’s preoccupation in the heyday of

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26. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 404 (1995).

27. 441 U.S. 520 (1979).

28. *Id.* at 533.

29. Whitman, *supra* note 9, at 951.

30. *Id.* at 956 (quoting Akhil Reed Amar, *Foruth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994)).

31. *Id.* at 944.

the Warren Court's criminal procedure revolution. Instead, criminal procedure is changing less visibly, but surely, state by state and on the ground. For example, in the 1990s, just two states, Illinois and New York, had statutory rights to postconviction DNA testing.<sup>32</sup> Now every state and the federal government have such rules, typically combined with methods for claiming innocence based on newly discovered evidence of innocence.<sup>33</sup> Fourteen states have adopted legislation improving eyewitness identification procedures, and many others have adopted guidelines or policies designed to make eyewitness identifications more accurate.<sup>34</sup> More than twenty states require recording of at least some interrogations, by statute, or based on judicial rulings, or official policies.<sup>35</sup> Supreme Court Justices now openly discuss the problem of wrongful convictions, rather than blithely cite to the "unparalleled protections" that our innocence-presuming system offers.<sup>36</sup>

Perhaps it is telling that the changes are focused on identifying the guilty and avoiding convictions of the potentially actually innocent. The divide may be becoming neater in a more modern and informed focus on innocence, as we make more concrete a commitment to the presumption of innocence that has for so long been more aspirational than real. In contrast, attitudes towards mercy are changing only very slowly (although perhaps

32. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631, 1646–50, 1673–75 (2008).

33. THE INNOCENCE PROJECT, TODAY, ALL 50 STATES HAVE DNA ACCESS LAWS [http://www.innocenceproject.org/files/imported/dna\\_innocenceproject\\_website-4.pdf](http://www.innocenceproject.org/files/imported/dna_innocenceproject_website-4.pdf) [<https://perma.cc/VZ6G-UXRV>].

34. CONN. GEN. STAT. ANN. § 54-1p (West 2015); GA. CODE ANN. § 17-20-2 (West 2013); 725 ILL. COMP. STAT. ANN. 5/107A-5 (West 2006); MD. CODE ANN., PUB. SAFETY § 3-506 (LexisNexis 2011); N.C. GEN. STAT. § 15A-284.52 (2013); OHIO REV. CODE ANN. § 2933.83 (West 2015); TEX. CODE CRIM. PROC. ANN. art. 38.20 (West 2014); UTAH CODE ANN. § 77-8-4 (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 5581 (2015); VA. CODE ANN. § 19.2-390.02 (2008); VA CODE ANN. § 9.1-102.54 (2014); W. VA. CODE ANN. § 62-1E-1 (LexisNexis 2014); WIS. STAT. ANN. § 175.50 (West 2014); *see, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, MODEL POLICY: SHOWUPS, PHOTOGRAPHIC IDENTIFICATIONS, AND LINEUPS (2006), <http://dpa.ky.gov/NR/rdonlyres/BE390C82-E7DD-4A1E-8A3A-4702C5110CD1/0/InternationalAssocofChiefsofPolice.pdf> [<https://perma.cc/TY92-KUJG>]; Letter from John J. Farmer, Jr., Attorney Gen., State of N.J., to All County Prosecutors et al. (Apr. 18, 2001), <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> [<https://perma.cc/KGC7-JMRE>]; Stephen Saloom, *Improving Eyewitness Identification Procedures*, CALEA UPDATE MAG. (Oct. 2009), <http://www.calea.org/calea-update-magazine/issue-101/improving-eyewitness-identification-procedures> [<https://perma.cc/NSZ7-ACJ8>]; *see also* NEV. REV. STAT. ANN. § 171.1237 (West 2013); 3 R.I. GEN. LAWS § 12-1-16 (West 2013); 2010 Vt. Acts & Resolves 70.

35. *See* Brandon L. Garrett, *Contaminated Confession Revisited*, 101 VA. L. REV. 395, 417–18 n.96–98 (2015).

36. *E.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., dissenting) (discussing death row exonerations and noting "the evidence that the death penalty has been wrongly imposed (whether or not it was carried out), is striking"); *Kansas v. Marsh*, 548 U.S. 163, 207–11 (2006) (Souter, J., dissenting) (noting DNA exonerations in death penalty cases constitute "a new body of fact"); *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) ("[I]n recent years a disturbing number of inmates on death row have been exonerated. . . includ[ing] at least one mentally retarded person [Earl Washington, Jr.] who unwittingly confessed to a crime that he did not commit.").

also becoming more empirically informed by data on recidivism, for example). We are not seeing a sharp change in clemency and pardon exercise, as Whitman describes, nor a loosening of restrictions on habeas corpus, which is derived from a prerogative power grounded in similar sources.<sup>37</sup>

## V. Changing Continental Procedure

One of the strengths of Whitman's piece is in its panoramic scope, examining modernizing forces on both sides of the Atlantic and how they have pushed criminal justice systems in different directions. The thread twists a bit when one turns to a range of recent developments on the Continent, perhaps influenced, to be sure, by developments in the United States, such as the work by the burgeoning and increasingly international "innocence movement."<sup>38</sup> For example, Dutch legislators and judges have adopted revised standards for review of claims of innocence postconviction, in response to several high-profile wrongful convictions.<sup>39</sup> In France, a Parliamentary Committee of Inquiry in 2005 investigated a high-profile possible wrongful conviction case and made recommendations, resulting in the adoption of reforms including videotaping of police interrogations.<sup>40</sup> The Criminal Cases Review Commission, created in the United Kingdom to administratively investigate possible "unsafe" convictions, was the model for similar agencies recently created in Scotland and in Norway.<sup>41</sup>

37. Whitman, *supra* note 9, at 935.

38. I argue as much in detail in a work in progress. Brandon L. Garrett, *Toward an International Right to Claim Innocence*, 105 CALIF. L. REV. (forthcoming 2017).

39. Gordon Darroch, *Peter van Koppen on Miscarriages of Justice: 'Dutch Judges Need to Be More Critical'*, AMSTERDAM HERALD (June 9, 2012), <http://amsterdamherald.com/index.php/allneuos-list/346-20120609-courts-lucia-de-berk-breda-six-schiedam-stabbing-netherlands> [<https://perma.cc/BA4R-K9BJ>]; Mark Godsey, *In Netherlands, New Evidence Shows Innocence in Hilversum Showbiz Murder case*, WRONGFUL CONVICTIONS BLOG (July 9, 2014), <http://wrongfulconvictionsblog.org/2014/07/09/in-netherlands-new-evidence-shows-innocence-in-hilversum-showbiz-murder-case/> [<https://perma.cc/23WF-GT98>] (describing the 2012 adoption of Article 461 of the Dutch Code of Criminal Procedure).

40. Christiane Besnier, *Présentation: Le phénomène Outreau [Presentation: The Outreau Phenomenon]*, 55 DROIT ET CULTURES 11 (2008) (Fr.), <http://droitcultures.revues.org/299?lang=en> [<https://perma.cc/4G2P-23ML>]; Pascale Robert-Diard, *L'inspection des services judiciaires écarte toute faute disciplinaire dans le dossier d'Outreau*, LE MONDE (June 10, 2006, 12:44 PM) (Fr.), [http://www.lemonde.fr/societe/article/2006/06/10/m-sarkozy-se-dit-stupefait-du-rapport-de-l-inspection-judiciaire\\_781828\\_3224.html](http://www.lemonde.fr/societe/article/2006/06/10/m-sarkozy-se-dit-stupefait-du-rapport-de-l-inspection-judiciaire_781828_3224.html) [<https://perma.cc/YNR3-Y27N>].

41. Criminal Procedure (Scotland) Act, 1995, c. 46, § 194B(1), <http://www.legislation.gov.uk/ukpga/1995/46/contents> [<https://perma.cc/E6V5-876L>]; Lissa Griffin, *International Perspectives on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153, 1154 (2013); see SARAH ARMSTRONG ET AL., SCOTTISH CTR. FOR CRIME & JUSTICE RESEARCH, SCOTTISH CRIMINAL CASES REVIEW COMMISSION 10TH ANNIVERSARY RESEARCH (2009), <http://www.sccjr.ac.uk/publications/scottish-criminal-cases-review-commission-10th-anniversary-research/> [<https://perma.cc/S5SJ-VEQX>]; Norwegian Crim. Cases Rev. Commission, *Frontpage*, KOMMISJONEN FOR GJENOPPTAKELSE AV STRAFFESAKER (Nor.), <http://www.gjenopptakelse.no/index.php?id=163> [<https://perma.cc/X767-X6SK>]; Crim. Cases Rev.

Perhaps we are entering a new period of convergence.<sup>42</sup> Across many different types of legal systems, one can observe an increasing openness to claims of innocence and to improvements in the accuracy of criminal investigations. Since the continental process is a “long, routinized, bureaucratic process,” as Whitman describes, there is less need to attach finality to a trial, and such systems may be more open to improvement.<sup>43</sup> Indeed, Christopher Slobogin and others have argued that in the U.S. we should be more open to inquisitorial models regarding accuracy in criminal adjudication.<sup>44</sup> The influence runs both ways, though, because the U.S. innocence movement and research on wrongful convictions in the U.S. has had an outsized impact globally.

## VI. Conclusion

If we have in America, a “generally accepted ideology of a presumption of innocence,”<sup>45</sup> it has often been more lip service than an actual protection for the innocent. Being presumed innocent is largely superfluous, in the Supreme Court’s own estimation, an add-on jury instruction at best, even if, in theory, the presumption inspires broader approaches towards criminal procedure centering on a mythological day in court ideal. Hopefully, we are now experiencing a reorientation towards both fairness and mercy in this country—combined with a more serious engagement with the presumption of innocence beyond the day-in-court myth. Death penalty cases, ironically, are “trials of mercy,” as Rachel Barkow has developed.<sup>46</sup> And today, mercy is far more commonly the outcome at death penalty trials.<sup>47</sup> Should trials of mercy occur more broadly? As mandatory and rigid sentences are reconsidered, we will need to think more deeply about what mercy means and how to implement it.

Like any other story that a legal culture relies upon, the attachment to an idealized day in court, or a criminal trial with all of the procedural trappings

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Commission, *Introducing the Commission*, KOMMISJONEN FOR GJENOPPTAKELSE AV STRAFFESAKER (Nor.), <http://www.gjenopptakelse.no/index.php?id=166> [https://perma.cc/969B-DT8T].

42. Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT’L & COMP. L. 409, 436–37 (2013).

43. Whitman, *supra* note 9, at 959.

44. Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 700–01 (2014); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM & MARY L. REV. (forthcoming 2016).

45. Whitman, *supra* note 9, at 947 (quoting Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11 (1964)).

46. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1147 (2009).

47. Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. (forthcoming 2017).

aspiring to protect the innocent defendant, has beneficial purposes. The current American and international focus on developing new tools to remedy wrongful convictions draws on the ideal of a presumption of innocence. In a double irony, the tools being relied upon in that effort share a distinctly inquisitorial flavor to the extent that they call for more judicial screening of, for example, eyewitness and confession evidence. American and continental systems of justice may have different ideologies and attitudes towards both process and substance, but real problems have a way of focusing one on practical and common, workable solutions. If the traditional attachment to avoiding wrongful convictions can gravitate systems towards more accurate rules, then the presumption of innocence may take on the status of a useful myth. Perhaps each generation must seek to live up to the ideal of the presumption of innocence as best it can. Nor is there anything necessarily inconsistent in pursuing both fairness and accuracy in criminal justice; why must we choose one or the other? In the years ahead, there is much that we can do to make the presumption of innocence far more than the vestigial “inaccurate, shorthand description”<sup>48</sup> of a right that it has so often served as in the past, and instead a “corner stone” of criminal justice.

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48. *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978).