



Memorandum

To: Students and Administrators
From: Secure/ Higher Ed LLC Staff
Re: What is the “Presumption of Innocence”?
Date: May 27, 15

The “presumption of innocence” is no doubt an important concept in a criminal trial. But the phrase is frequently misused by the media as having some type of universal application to American society at large. This is simply untrue: the “presumption of innocence” has little application outside a criminal trial.

According to the United States Supreme Court, the “presumption of innocence” is “an inaccurate, shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion....”¹ In other words, it is an assumption, applied only during a criminal trial, that the accused is innocent until the state proves otherwise beyond a reasonable doubt.

It is not a true “presumption”. A “presumption” according to Black’s Law Dictionary “is a rule of law ... by which finding of a basic fact gives rise to existence of a presumed fact.” Under the “presumption of innocence”, no fact is found: the defendant is merely assumed at trial to be innocent until proven guilty by the state.

Moreover, presumptions typically have a basis in fact, whereas the “presumption of innocence” has no such basis: most people on trial for crimes are in fact guilty of them.² Oddly enough, true statutory presumptions, based

¹ *Taylor v. Kentucky*, 436 U.S. at 483-84 n.12.

² Estimates of wrongful convictions vary significantly, ranging from a fraction of a percentage to less than 5%. See Virginia Hughes, *How Many People are Wrongly Convicted? Researchers Do the Math*, NATIONAL GEOGRAPHIC, April 28, 2014, available at <http://phenomena.nationalgeographic.com/2014/04/28/how-many-people-are-wrongly-convicted-researchers-do-the-math/>. Even using the most critical estimates of judicial system failures, it remains undeniable that a person standing trial is more likely than not to be guilty, not innocent. As Alan Dershowitz, noted criminal defense attorney and Harvard Law School professor has candidly noted, “I have learned that despite the constitutional presumption of innocence, the vast majority of criminal defendants are in fact guilty of the crimes with which they are charged. ... The Perry Mason image of the heroic defender of innocent victims of frame-ups or mistaken identification is television fiction.” ALAN DERSHOWITZ, *THE BEST DEFENSE* xiv (1983). While Dershowitz mentions a “constitutional presumption of innocence”, the phrase does not actually appear in the Constitution or the Bill of Rights, but, like many constitutional rights, is drawn from a United States Supreme Court interpretation of the Fifth Amendment. *Coffin v. U.S.*, 156 U.S. 432 (1895).



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on some kind of factual finding by the legislature, are commonly used to overcome the “presumption of innocence”.³

Furthermore, the “presumption of innocence” has virtually no application outside a criminal trial, even within the criminal justice system. In fact, in many other criminal proceedings leading up to the trial, the defendant is essentially presumed guilty. Otherwise, the defendant could not be indicted, arrested, or taken into custody – that cannot be done to an innocent person.

At a subsequent stage in the criminal process, the defendant may be required to post bail. But according to Black’s Law Dictionary, “the purpose of bail is to ensure the return of the accused at subsequent proceedings.” If a true presumption of innocence existed, how could the court require bail of defendants (even those accused of jumping bail), when by rule of law they are entirely innocent?

Furthermore, courts often deny bail to certain defendants who are a flight risk or likely to re-offend. If the “presumption of innocence” were applied throughout all criminal proceedings, then holding a defendant without bail awaiting trial would be an egregious violation of that defendant’s rights.

One need only review Judge Dupuis’ rationale for denying bail in the Aaron Hernandez case to see that a presumption of guilt rather than innocence can be applied in determining bail requests:

This gentleman, either by himself or with two other individuals that he requested come to the Commonwealth, basically, in a cold-blooded fashion, killed a person because that person disrespected him. If that’s true, and based upon presentation it seems to be, I’m not confident that type of individual would -- he obviously doesn’t adhere to societal rules. The idea that I can release him on a bracelet and he would comply with court rules is not something that I am willing to accept.

In rendering this decision, Judge Dupuis acknowledged that the case against Hernandez was solely circumstantial, but said that the evidence was “very, very strong.”

³ DUI laws apply such presumptions: one is presumed to be driving impaired if one’s blood alcohol level exceeds a certain percentage.



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Given that the presumption of innocence has a very narrow application in criminal procedure, it should come as little surprise that it has virtually no application outside of the criminal justice process. In some civil cases, a mere indictment (that is, an accusation by a prosecutor prior to conviction) gives rise to a presumption that the person indicted is liable.

In the employment context, absent some type of agreement to the contrary, an employer is generally free to deny employment to someone who has been accused but not convicted of a crime. This certainly makes sense. If an employee allegedly assaults another employee, the employer is not required to apply a “presumption of innocence” and give the accused continued access to the workplace and the victim until a conviction is obtained.

Similarly, in cases of child abuse and neglect, the child is frequently removed from a parent prior to a determination by a criminal court that the parent is guilty of those charges beyond a reasonable doubt. Courts also can restrict an accused prior to conviction through restraining orders or bans on certain activities.

The “presumption of innocence” does not operate as a mechanism by which an accused can inflict further damage on others or society prior to a conviction. While the “presumption of innocence” is an important concept *during* a criminal *trial*, it has little application elsewhere.