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THE "PRESUMPTION OF INNOCENCE" AS CONSTITUTIONAL DOCTRINE

William F. Fox, Jr.*

The American criminal law concept known as the "presumption of innocence" has been described variously as:

— "that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law."¹

— "a basic component of a fair trial."²

— "[an] assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful."³

— "not a presumption at all in the legal sense."⁴

As criminal law boilerplate, the presumption has been consistently invoked, but rarely analyzed. Until the last Supreme Court term, the pre-

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1. In re Winship, 397 U.S. 358, 363 (1970) (requiring the use of the reasonable doubt standard in all juvenile proceedings adjudicating acts which would be crimes if the juvenile were tried as an adult) (quoting Coffin v. United States, 156 U.S. 432 (1895)).

2. Estelle v. Williams, 425 U.S. 501, 503 (1976) (affirming the conviction of a defendant wearing prison clothes throughout the trial because the defense counsel failed to raise a timely objection to the clothing).


4. W. LaFave & A. Scott, Criminal Law § 8 (1972). A presumption is generally used to describe the situation in which "a party having the burden of producing evidence of fact A, introduces proof of fact B." Such proof then may permit the jury to presume or infer the existence of fact A. McCormick, supra note 3, at § 342. After this inference is established, presumption in the "legal sense" builds on this rudimentary concept by shifting the burden of producing evidence, as well as the burden of persuasion on the question to the adversary. Id. For a more complete discussion of this concept, see text accompanying notes 24-26, infra.

5. A fifty state survey has not been undertaken for this article, but a number of secondary sources indicate that the vast majority of states approve of the presumption of innocence instruction. McCormick, supra note 3, at § 342; 23A C.J.S. Criminal Law § 1221 (1961).
sumption could arguably be viewed as one of those incantations, much like the rule of twelve jurors dispensed with in *Williams v. Florida,* that borders on the mystical, but which serves no useful purpose and merely clutters our criminal jurisprudence with ritual rather than substance.7

The presumption of innocence rule has been criticized because it is not a true presumption and may confuse jurors, particularly those who later hear a much more detailed instruction on a bona fide evidentiary pre-

There appear to be only two American jurisdictions that hold that the presumption of innocence instruction need not be given. The Kentucky Supreme Court has held that failure to give the instruction is not reversible error, and in so holding has suggested that the presumption of innocence is a concept "too favorable to the defendant." *Swango v. Commonwealth,* 291 Ky. 690, 165 S.W.2d 182, 183 (1942). *See Mink v. Commonwealth,* 228 Ky. 674, 15 S.W.2d 463 (1929) (reasonable doubt instruction is all that is necessary in a prosecution for murder). At least two North Carolina cases contain similar language, but in both cases the trial court mentioned the presumption of innocence, although it refused to elaborate on its ruling as requested by the defendant. *State v. Tipton,* 8 N.C. App. 53, 173 S.E.2d 527, 529 (1970); *State v. Perry,* 226 N.C. 530, 39 S.E.2d 460, 464 (1946).

Failure to give the presumption instruction in federal jury trials has been held to be reversible error for some time, although the doctrine had never been required as a matter of constitutional law. *See Coffin v. United States,* 156 U.S. 432, 460-61 (1895). In that case the Supreme Court reversed the district court's conviction of a bank president on embezzlement charges because the court had refused to charge the jury as to the presumption of the officer's innocence. The Supreme Court held that in all federal criminal cases, it is error to refuse to charge on the presumption, even though the trial court fully and accurately charged on the doctrine of reasonable doubt. *Id.* at 456-61. This decision was made, however, without reaching the constitutional issues. In *United States v. Fernandez,* 496 F.2d 1294 (5th Cir. 1974), the Fifth Circuit reversed a conviction in which the defendant neither proffered a presumption instruction nor objected to its deletion. The court, without reaching the constitutional merits, concluded that the cumulative effect of the trial court's failure to give the instruction and prejudicial comments by the prosecutor warranted reversal under the federal plain error doctrine. *Id.* at 1299, 1302-03.

In *Estelle v. Williams,* 425 U.S. 501 (1976), the Supreme Court linked the wearing of prison clothing with the presumption of innocence because of the potential impact of the custodial garb on the jurors' judgment. The Court stated in dicta that such apparel violated a defendant's right to a fair trial of which the presumption of innocence was also part. *Id.* at 503-05. The holding of the case was much more narrow, however. The Court refused to overturn the conviction because of defense counsel's failure to make a contemporaneous objection to the defendant's attire. *Id.* at 512-13.


7. Sometime in the fourteenth century, the size of the jury at common law came to be fixed generally at twelve. *Id.* at 89. In *Williams,* the Court reviewed the sparse history of the rule of twelve jurors and found that most justifications for the rule "rest on little more than mystical or superstitious insights into the significance of '12.'" *Id.* at 88. Concededly, the idea behind the presumption of innocence is much more than myth or superstition, but having been so long with us and so rarely analyzed, it has become more a matter of rote and therefore lacking in significance. Of course, as a society we may want our trials to be partly ritualistic, as well as fact-finding occasions. For insight into the manner in which other societies regard the presumption of innocence, see Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases,* 77 YALE L.J. 880, 880-86 (1968).
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A stronger criticism, however, is that it loses virtually all independent significance when it is coupled with the much more fundamental reasonable doubt instruction. Because the presumption of innocence is given practical effect through the reasonable doubt standard, it can scarcely be said to possess any true weight of its own.9

Two recent criminal law codifications have dealt with these perceived defects in different ways. The Model Penal Code, promulgated in final form in 1962 and now serving as the basis for many state codifications, retains the concept of the presumption as supplementary to the reasonable doubt standard, but changes the crucial term from "presumption" to "assumption": "[i]n the absence of such proof [beyond a reasonable doubt], the innocence of the defendant is assumed."10 The drafters of one of the several variations of the proposed federal criminal code, by deleting the presumption of innocence instruction requirement, have suggested that the existing constitutional doctrine on the reasonable doubt standard renders

8. See text accompanying notes 24-31 infra. The confusion arises because jurors will likely assume that the presumption of innocence is a true presumption and will attempt to draw the same inference from it as from true evidentiary presumptions. In evidentiary presumptions, the inference of the existence of fact A is permitted to be drawn from the proof of fact B, because it is more likely to be true than not. See note 4 supra. No such inference can be drawn from an accused's presumption of innocence since it merely describes his right to do nothing until the prosecution has met its burdens of production and persuasion. Furthermore, jurors may be confused by the fact that true presumptions have a basis in fact, while the majority of defendants presumed to be innocent are found guilty. See LAFAVE & SCOTT, supra note 4, at § 8.

9. See text accompanying notes 42-51 infra.

The expression 'beyond a reasonable doubt' appears most often in the trial court's instructions to the jury, which is generally told: the defendant is presumed to be innocent; the mere fact that he has been charged with a crime is not to be taken as any evidence of his guilt; and the prosecution must prove, beyond a reasonable doubt, all the elements of the crime charged. While some courts have undertaken to define the term 'reasonable doubt,' other courts have thought that the words themselves are sufficiently clear not to require any embellishment. LAFAVE & SCOTT, supra note 4, at § 8 (emphasis added). Other commentators have resisted defining the term. See note 48 infra.

10. MODEL PENAL CODE § 1.12(1) (1962). The presumption of innocence is not a true presumption, but a device to protect the constitutional rights of an accused. See text accompanying note 39 infra. Such a device might confuse jurors who attempt to apply it in the same manner as a true presumption. See note 8 supra. This confusion can be avoided by correctly labeling the concept as an "assumption of innocence," which indicates that the accused has only an appearance, and not a likelihood of innocence. As McCormick states, this "describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful." MCCORMICK, supra note 3, at § 342. In addition, a true presumption has a basis in fact and thus the inference drawn is more likely to be true than not. See note 8 supra. The relabeling of the presumption of innocence, however, would have little substantive effect in that it would not change the burden on the prosecution to produce evidence sufficient to show a crime and to persuade the jury of the accused's guilt.
such an additional instruction superfluous. In contrast, the Supreme Court recently raised the presumption of innocence to constitutional dimension in *Taylor v. Kentucky* when it held that a criminal defendant's right to a fair trial is violated whenever the trial judge fails to give a requested presumption of innocence instruction.

The facts involved in the *Taylor* case were typical of the petty offense cases so common in our lower-level criminal courts. Taylor and an accomplice, who was tried separately, were accused of forcing their way into a friend's house where they allegedly struck him and fled with his billfold containing an estimated ten to fifteen dollars. Taylor was tried on a single count of second degree robbery in a jury trial, apparently completed in less than a day. The state's only witness was the victim. Taylor took the stand as the only defense witness and denied the victim's accusations, testifying that he was elsewhere at the time in question. The jury returned a verdict of guilty.

At first glance, the case appeared to be a simple swearing contest, with the jury basing its verdict on the credibility of the witnesses. There were, however, additional significant circumstances. The prosecutor made several statements during his opening and closing statements which suggested that Taylor's status as a defendant tended to establish his guilt. Moreover, the trial court rejected two jury instructions proffered by the defendant: that he was presumed to be innocent and that the indictment was not evidence to be considered against him. Although the judge instructed

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11. See *Senate Comm. on the Judiciary, Report on Proposed Rules of Criminal Procedure*, S. Rep. No. 605, 95th Cong., 1st Sess. 1135-40 (1977) [hereinafter cited as S. Rep. No. 605]. Subdivision (a)(5) of proposed Rule 25.1 places two restrictions on the use of presumptions. The first requires the court, before it may submit a presumption to the jury, to find that "there is sufficient evidence of the fact that gives rise to the presumption to support a reasonable belief as to the fact's existence beyond a reasonable doubt" and that the evidence as a whole does not preclude a reasonable juror from finding the presumed fact beyond a reasonable doubt. *Id.* at 1139. Having made these determinations, the second restriction requires the court to "then instruct the jury that the presumed fact must be established beyond a reasonable doubt." *Id.* The jury, however, may arrive at that judgment on the basis of the presumption above.

Since there is not "sufficient evidence of the fact that gives rise to [a] presumption [of innocence]" because the presumption is really an assumption, more likely false than true, the court should not instruct the jury as to a presumption of innocence. It should simply give the "beyond a reasonable doubt" instruction.

13. There is no explanation in either the state or federal opinions as to the disposition of the accomplice's case.
15. *Id.* at 486-88.
16. *Id.* at 480-81. The requested instruction on the presumption of innocence stated: "The law presumes a defendant to be innocent of a crime. Thus a defendant, although accused, begins the trial with a 'clean slate.' That is, with no evidence
the jury regarding the reasonable doubt standard, the court's instructions consisted of five short paragraphs which took only about three minutes to recite.\(^\text{17}\)

On appeal to the state's intermediate appellate court, Taylor argued that the fourteenth amendment's due process clause required both the presumption of innocence and the "indictment-not-evidence" instructions. The court, nonetheless, affirmed the conviction on the basis of existing state case law, without discussing the federal constitutional issues.\(^\text{18}\) The Kentucky Supreme Court denied review.\(^\text{19}\) The United States Supreme

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\(^{17}\) The trial court's instructions included a perfunctory instruction on reasonable doubt:

\[\text{If upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term 'reasonable doubt' . . . means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty.}\]

\(^{18}\) Taylor v. Commonwealth, 551 SW.2d 813, 813-14 (Ky. 1977).

\(^{19}\) The denial of discretionary review by the Kentucky Supreme Court is apparently an unreported disposition.
Court, however, reversed the conviction, agreeing with Taylor that the “cumulative effect” of the circumstances of the case, including the absence of a presumption of innocence instruction, violated Taylor’s “due process guarantee of fundamental fairness.” In reaching this holding, the Court concluded that the presumption of innocence instruction, or an instruction which otherwise conveys the same sense as the presumption instruction, has a “purging effect” wholly apart from the reasonable doubt instruction. Justice Brennan concurred, stating that the instruction is “a basic component of a fair trial under our system of criminal justice.” Justice Stevens and Justice Rehnquist dissented, arguing that although the presumption instruction was desirable, its absence did not create constitutional error.

The Court might well have stayed its hand. The Taylor facts appear to be a poor setting for a landmark decision on any point of criminal law and especially inappropriate for an extended analysis of the presumption of innocence as a matter of constitutional dimension. Additionally, the Court’s opinion leaves much to be desired. It neither provides clear guidelines for future criminal jury instructions nor resolves with any precision the impact of the presumption doctrine. Additionally, in attempting to narrow its holding to the Taylor facts, the Court has created uncertainty as to the breadth of its constitutional mandate.

I. THE “PRESUMPTION OF INNOCENCE” AS A PRESUMPTION

The term “presumption of innocence” has always been a misnomer. Professors LaFave and Scott, echoing a long history of scholarly criticism, point out that it “is actually not a presumption at all in the legal sense... [it] is 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

20. 436 U.S. at 487. See id. at n.15. Because of this conclusion, the Court did not reach Taylor’s additional claim asserting the refusal to instruct the jury that an indictment is not evidence independently constituted reversible error. Id.

21. Id. at 486. Thus it operates as a means to protect a criminal defendant’s “constitutional right to be judged solely on the basis of proof adduced at trial.” Id.

In United States v. Thaxton, cited by the Supreme Court in Taylor, 436 U.S. at 485, the Court of Appeals for the Fifth Circuit discussed the purging effect of the presumption of innocence. 483 F.2d 1071 (5th Cir. 1973). In Taylor the Supreme Court noted that the purging function “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.” 436 U.S. at 485 (quoting 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).


23. 436 U.S. at 491-92 (Stevens and Rehnquist, JJ., dissenting).
with crime are convicted as guilty than are acquitted . . . ."24 A true presumption, as that term is used in the rules of evidence, is a valuable device in both civil and criminal litigation because it permits an inference to be drawn from a fact in evidence.25 True evidentiary presumptions often have been used in criminal jury trials. The Supreme Court has never categorically disapproved of their use, even though the device can inhibit both the allocation of the burden of proof — which in turn ultimately affects the reasonable doubt standard — and the defendant's usual prerogative to remain silent.26

The Supreme Court has examined a number of presumptions used in criminal litigation, considered their effect on the prosecution's burden of proof, and developed a test for determining their constitutionality. For instance, in United States v. Gainey,27 the Court upheld the use of a federal

24. LAFAVE & SCOTT, supra note 4, at § 8.
25. Taylor v. Kentucky, 436 U.S. 474, 484 n.12 (1978). See MCCORMICK, supra note 3, at § 342. See note 4 supra for a description of a true presumption. The term “presumption” is often used interchangeably with the term “inference.” Nevertheless, some courts appear to use “presumption” to refer to conclusions which must be drawn from certain other facts, and use the term “inference” to refer only to conclusions which may be drawn from such facts. See, e.g., Bray v. United States, 306 F.2d 743, 747-48 (D.C. Cir. 1962).
26. MCCORMICK, supra note 3, at § 344. McCormick notes that in criminal cases, even though its effect may be no more than that of a permissible inference:
   a presumption may be sufficient to take an otherwise defective prosecution case to the jury and ultimately result in a conviction that otherwise could not have occurred. Furthermore, the existence of a presumption as to a particular element of the crime may force the defendant to introduce proof in rebuttal . . . and thus force him to waive his constitutional right to remain silent.

Id.

Even though the Supreme Court has never disapproved of the use of evidentiary presumptions in criminal jury trials, the Court has disapproved their use in specific instances. See, e.g., Tot v. United States, 319 U.S. 463 (1943), in which the Court reversed a conviction under the Federal Firearms Act making it “unlawful for any person who has been convicted of a crime of violence . . . to receive any firearm . . . which has been shipped . . . in interstate commerce” and further providing that “the possession of a firearm . . . by any such person shall be presumptive evidence that such firearm was . . . received by such person in violation of this Act.” Federal Firearms Act of 1938, Pub. L. No. 75-785, ch. 850, § 902(f), 52 Stat. 1250, 1251 (repealed 1968). In holding this presumption to be a violation of due process, the Court noted that the prosecution had failed to prove a rational connection between the possession of a firearm by a person convicted of a crime of violence and the receipt by that person of the firearm in interstate commerce subsequent to the enactment of the Firearms Act. 319 U.S. at 466-68.

Evidentiary presumptions shift the burden of proof as well as affect the defendant's usual prerogative to stand mute under the presumption of innocence. See, e.g., 26 U.S.C. § 5601(b) (1976), which provides that the presence of a person at the site of a still, “shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury.” Id. Consequently, under this statute, the reasonable doubt standard is reversed: the defendant is effectively presumed guilty and must establish his innocence.

27. 380 U.S. 63 (1965).
statutory presumption that a defendant's unexplained presence at the site of an illegal still is sufficient, in and of itself, to convict that person of unlawful operation of the still.\textsuperscript{28} The presumption was upheld by the Court on several grounds, perhaps the most persuasive of which was the existence of the presumption in statutory form. The enactment of the statute and its accompanying legislative history constituted a congressional finding that such cases were nearly impossible to prosecute without the assistance of the presumption.\textsuperscript{29} Implicitly, the enactment constituted a legislative finding that the presumption had a solid basis in fact. In sustaining the \textit{Gainey} presumption, the Court asserted that similar presumptions could be utilized as long as there were a "rational connection" between the fact proved (presence at the still) and the ultimate fact presumed (operation of the still).\textsuperscript{30}

If \textit{Gainey}'s "rational connection" test were applied to the presumption of innocence, however, the presumption would probably be destroyed. First, there have never been any findings, either legislative or judicial, that the presumption of innocence has a basis in fact. Moreover, it has never been shown that prosecutions or defenses could not go forward without its assistance. Indeed, as noted, what little empirical evidence exists tends to undercut the presumption as a factual assertion, since most persons tried for serious offenses are found guilty.\textsuperscript{31} In addition, the presumption is a matter of negative inference rather than the positive inference drawn by a


\textsuperscript{29} 380 U.S. at 65.

\textsuperscript{30} Id. at 66-67. Evidentiary presumptions will be deemed to lack a "rational connection" between the fact proved and the ultimate fact presumed when it cannot be said "with substantial assurance" that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. United States, 395 U.S. 6, 36 (1969).

\textsuperscript{31} The President's Commission on Law Enforcement has found that of 177,000 persons formally charged with serious offenses in 1965, about 160,000 were convicted. An additional 9,000 cases were dismissed, and 8,000 were acquitted at trial. President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society 262-63 (Figure 5) (1967). See text accompanying note 24 supra and LaFave & Scott, supra note 4, at § 8. Professor Thayer, the first commentator to cast substantial doubt on the factual basis of the presumption, quoted a study by Maitland: "Law presumes that the prisoner is innocent until he is found guilty, but it were well to wager four to one that the jury will be satisfied of his guilt. In 1883 there were 11,347 persons found guilty against 2723 found not guilty." J. Thayer, A Preliminary Treatise on Evidence 647 (1896).
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*Gainey*-type presumption. In *Gainey*, presence led to an inference of operation; the presumption of innocence, by contrast, prohibits the drawing of any inferences from the defendant's remaining silent. Thus, the logical progression from basic fact to ultimate fact is not present in the presumption of innocence.

Moreover, if the presumption of innocence were a true presumption with actual evidentiary effect, it might well be used to invalidate long standing pretrial practices, such as bail and pretrial detention. If the presumption exists as a matter of evidence, under conventional practice the prosecutor would have to introduce sufficient evidence to rebut it. In other words, if the presumption constituted evidence of lack of guilt, the prosecutor would be forced to produce at least some evidence of guilt sufficient to overcome the presumption, or the defendant could not be handled prior to trial in any manner suggesting guilt. Since most prosecutors are loath to put on their entire case during the grand jury inquiry or at the preliminary hearing, defendants could conceivably invoke the presumption to circumvent bail requirements or pretrial custody. Of course, the Supreme Court has never gone this far. The District of Columbia pre-trial detention statute, for example, has been upheld as constitutional.32 Nothing in the *Taylor* opinion suggests that the presumption of innocence operates at any time in the criminal process outside the narrow context of the trial itself.

While the Supreme Court has never analyzed the presumption of innocence in light of the *Gainey* test, it has long recognized that the presumption of innocence does not work as a true presumption. In an 1895 opinion, *Coffin v. United States*,33 the Court used the presumption in a technical evidentiary sense as "an instrument of proof,"34 that is, as actual "evidence in favor of the accused."35 After scathing criticism by Professor Thayer,36 the Court abandoned the *Coffin* actual evidence concept only two years later in *Agnew v. United States*.37

33. 156 U.S. 432 (1895).
34. Id. at 459.
35. Id. at 460. The Court concluded that authorities supporting the view that the reasonable doubt instruction "entirely embodies" the presumption instruction were "few and unsatisfactory." Id. at 457.
36. THAYER, supra note 31, at 566-76. The *Taylor* Court read Thayer to distinguish the presumption from evidence, categorizing it instead as "a way of describing the prosecution's duty both to produce evidence of guilt and to convince the jury beyond a reasonable doubt." Taylor v. Kentucky, 436 U.S. at 484 n.12 (citing THAYER, supra note 3, at 560-63).
37. 165 U.S. 36, 51-52 (1897). In *Agnew*, the trial court instructed that:

The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with
Writing for the majority in *Taylor*, Justice Powell approved Thayer’s criticisms of *Coffin*. In a lengthy footnote, Justice Powell recognized that the presumption of innocence is not a “mandatory inference drawn from a fact in evidence”; rather it is merely “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 . . . .” Unfortunately, the majority’s analysis of the presumption did not address matters of evidence, and hence avoided the opportunity to eliminate the inaccurate use of the term. The Court hinted that the word “presumption” was misleading and impliedly approved the trend, initiated by the Model Penal Code, toward the use of the term “assumption.” It failed to lay the word “presumption” to rest, however, apparently because of its perceived “salutary effect upon lay jurors.”

II. THE PRESUMPTION OF INNOCENCE AS AN ADJUNCT OF THE REASONABLE DOUBT STANDARD

*Taylor’s* majority opinion suggests the Court’s agreement with the idea long advocated by legal scholars, that the reasonable doubt standard and

the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt.

*Id.* at 51. The defendant tendered an instruction that included as a final sentence: “This presumption [of innocence] is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy.” *Id.*

Without expressly overruling *Coffin*, the Supreme Court stated that “[t]he instruction given was quite correct and substantially covered the instruction refused, and as to the latter [the defendant’s tendered instruction] the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead.” *Id.* at 51-52. The *Agnew* Court regarded *Coffin* as distinguishable because the trial court in *Coffin* refused to give any presumption of innocence instruction. *Id.* at 52.


39. *Id.* In other words, the prosecution bears the burdens of production and persuasion as to the case-in-chief and must satisfy its burden by proof of guilt beyond a reasonable doubt. This was the message of *In re Winship*, 397 U.S. 358, 363 (1970), in which the Court recognized that the presumption of innocence can be given effect through the reasonable doubt standard. See generally text accompanying notes 42-55 infra.

40. Justice Powell pointed out that the presumption of innocence is “not technically a ‘presumption’” but rather is “better characterized as an ‘assumption’ that is indulged in the absence of contrary evidence.” 436 U.S. at 484 n.12. He then cited with approval a Mississippi case, *Carr v. State*, 192 Miss. 152, 156, 4 So. 2d 887, 888 (1944), one of the first opinions to speak of the “assumption” of innocence. Possibly, the Court was attempting to prevent future semantical problems. Nevertheless, if the Court recognized the use of “presumption” as “inaccurate,” it should not have sanctioned its use: above all, jury instructions should be accurate.

For a discussion of the potential impact on laypersons of each of the two words, see text accompanying notes 62-65 infra.

41. 436 U.S. at 484.
the presumption of innocence are logically similar concepts.\textsuperscript{42} The Court nonetheless required that a presumption instruction be given even when a reasonable doubt instruction is given, because lay jurors need whatever additional guidance the presumption instruction provides.\textsuperscript{43}

Taylor marks the first time the Court has drawn such a distinction. In In re Winship,\textsuperscript{44} the Supreme Court raised the reasonable doubt standard to a matter of constitutional due process. The Winship Court dealt with a New York juvenile proceeding in which the presiding judge had determined that the applicable standard of proof was a mere "preponderance" of the evidence, although the reasonable doubt standard would have been applied had the young man been tried as an adult. In reversing, the Supreme Court pointed out that the reasonable doubt standard is a matter of constitutional dimension because it is a "prime instrument for reducing the risk of convictions resting on factual error . . . ."\textsuperscript{45} Moreover, it is "indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"\textsuperscript{46} Thus, according to Winship, the reasonable doubt standard must be applied, irrespective of whether the trial is a bench or jury trial, and irrespective of whether the person accused is an adult or a juvenile.\textsuperscript{47} By contrast, the presumption of innocence was mentioned only once in Winship, and then only as a con-

\begin{itemize}
\item 42. The Court stated that although the Coffin Court concluded the two concepts were "logically separate and distinct, . . . sharp scholarly criticism demonstrated the error of that view, . . . ." 436 U.S. at 483.
\item 43. Id. at 484-85. Professor Wigmore notes that the presumption of innocence requires the prosecution by evidence to convince the jury of the accused's guilt and conveys to the jury an "additional caution . . . to consider, in the material for their belief, nothing but the evidence, i.e., no surmises based on the present situation of the accused." J. Wigmore, Evidence § 2511 (3d ed. 1940) (emphasis in original), quoted in 436 U.S. at 484-85. Professor McCormick in his first edition does not go this far, stating merely that: "the standard instruction on the state's burden of [proof by reasonable doubt] amply covers these points. . . . The instruction on 'presumption of innocence' should, it seems, be regarded merely as a traditional but unnecessary amplification . . . ." C. McCormick, Law of Evidence § 309, at 649 (1954). In the second edition of McCormick, however, the authors rejected this argument, noting that "although the phrase is technically inaccurate and perhaps even misleading in the sense that it suggests that there is some inherent probability that the defendant is innocent, it should not be discarded." McCormick, supra note 3, at § 342.
\item 44. 397 U.S. 358 (1970).
\item 45. Id. at 363. The Court, agreeing with the dissenters in the lower court, noted that a criminal defendant "would be at a severe disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." Id. (quoting W. v. Family Court, 24 N.Y.2d 196, 205, 247 N.E.2d 253, 254, 299 N.Y.S.2d 414, 422 (1967)).
\item 46. Id. at 364 (quoting Dorsen & Reznick, In Re Gault and the Future of Juvenile Law, 1 Fam. L.Q. 1, 26 (1967)).
\item 47. The issue of typing the defendant as an adult or juvenile was disposed of in an earlier case, In re Gault, 387 U.S. 1 (1967), in which the Court required adherence to certain minimum due process guarantees in juvenile proceedings which would have resulted in
cept which is given “concrete substance” through the reasonable doubt standard. 48 Nowhere in Winship is there a suggestion that the presumption is an independent due process requirement. 49

By emphasizing the critical importance of the reasonable doubt standard in both jury and bench trials, Winship indicates that even trial judges need to be reminded that evidence in criminal proceedings must meet the reasonable doubt standard. Thus, the Winship opinion does not tie the reasonable doubt standard to jury instructions. Taylor, by contrast, appears to require the presumption of innocence instruction only in jury trials, in which laypersons need the additional admonition provided by a separate instruction on the presumption. By implicitly making a distinction between jury and bench trials, the Court appears to suggest that although both concepts evoke constitutional doctrine, the presumption is less important because it is only an instructional device for laypersons, whereas the reasonable doubt standard governs the deliberations of both juries and judges sitting alone.

48. 397 U.S. at 363. The Court echoed its earlier emphasis on the presumption’s importance: “The 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.’” Id. (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

It is somewhat ironic that the standard itself is so heavily emphasized by both Court and commentators, considering that many of the same commentators have consistently refused to standardize the definition of reasonable doubt. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition. The Model Penal Code, for example, has strenuously resisted a definition.

49. At least one recent major criminal codification effort, the long-disputed S. 1437, 95th Cong., 1st Sess., 123 Cong. Rec. S6833-41 (1977), apparently interprets Winship on its face and completely dispenses with the presumption of innocence. See note 11 supra. The proposed bill eliminates the presumption with little discussion; the Committee Report simply states: “Current federal law is simple, direct, and constitutional in dimension. The prosecution has the burden of persuasion as to each element of the offense and it must carry that burden of proof beyond a reasonable doubt.” S. Rep. No. 605, supra note 11, at 1135. The Committee Report contains no further discussion of the reasonable doubt standard and does not elaborate on all the reasons for dispensing with the presumption. The Committee presumably read Winship as requiring the reasonable doubt instruction alone and as recognizing that additional language on the presumption of innocence would cause confusion concerning the methods for instructions on other evidentiary presumptions.
The *Taylor* Court did not expressly recognize this discrepancy, however, and the decision can be criticized because of this omission. If the presumption of innocence is now of constitutional dimension and is inadequately protected by the reasonable doubt standard, it would seem that the Court will later have to face a juvenile proceeding in which the record is silent as to the judge's consideration of the presumption of innocence. A ruling requiring the presumption of innocence instruction would risk the reopening of a sizeable number of juvenile proceedings for reconsideration under the *Taylor* rule. This concern would be magnified if *Taylor* is to be applied retroactively, as was the Court's ruling in *Winship*.

The Court may have avoided this problem by stating that the peculiar facts of the *Taylor* case dictated its holding. Thus, the Court's holding may not be extended. If, however, the uniqueness of the case is the sole reason for the Court's treatment, it could have reversed the state court decision without a lengthy discussion of the nature of the presumption of innocence. A per curiam or perhaps even a summary reversal might have been more appropriate.

This is not to say, of course, that the presumption of innocence/reasonable doubt standard is not important and necessary. Indeed, the rule that a person may be convicted of a crime only upon evidence adduced at an

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50. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the Supreme Court made retroactive an earlier reasonable doubt decision, Mullaney v. Wilbur, 421 U.S. 684 (1975), in which the burden of persuasion shifted to the defendant to prove that the lack of malice in a homicide prosecution impaired the constitutionally-mandated requirement that the prosecution prove its case beyond a reasonable doubt. *Winship* was held to be retroactive in Ivan V. v. City of New York, 407 U.S. 203 (1972) (per curiam). In both cases, the test the Court formulated for applying retroactivity was whether the constitutional error "substantially impairs [the trial's] truth-finding function . . . ." *Id.* at 205. Because the presumption of innocence is directly related to the reasonable doubt standard, it is not improbable that the *Taylor* decision meets the test for retroactivity, since the Court held that the omission of the presumption instruction might have misled the jury. A significant number of cases will not be affected however, since most jurisdictions give the instruction. See note 5 supra.

51. The majority stated: "We hold that on the facts of this case the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial . . . ." 436 U.S. at 490. The facts apparently most persuasive to the Court in its decision to reverse were the trial court's failure to give the requested instructions, the skeletal instructions it did choose to give, and the prosecution's closing argument in which he inferred as to the defendant's guilt based on his stature as a criminal defendant. See *id.* at 486-87. The Court found that there was a "genuine danger that the jury would convict petitioner on the basis of these extraneous considerations, rather than on the evidence introduced at trial." *Id.* at 488.

In his concurrence, Justice Brennan views the *Taylor* case as not limited to its facts. Rather, he concludes that the presumption of innocence instruction is constitutionally mandated whenever requested by a criminal defendant. *Id.* at 490-91. By contrast, the two dissenters, Justices Stevens and Rehnquist, are unable to discern any constitutional error, although they concede that *Taylor* "was by no means a perfect trial." *Id.* at 492.
open trial, in which he or she may fully participate, is one of the hallmarks of our legal system.\textsuperscript{52} Nothing in this article should be taken as an assertion that these protections should be obliterated. Rather, the point is merely that a jury instruction on the presumption of innocence adds nothing to these other protections. It is unnecessarily duplicative if some instruction is given on the reasonable doubt standard and, without clarification, it could confuse jurors during their deliberations since true presumptions simply do not work in the same manner as the presumption of innocence.

III. THE “PRESUMPTION OF INNOCENCE” AS A JURY INSTRUCTION

The majority opinion in \textit{Taylor} asserted on several occasions that the primary function of the presumption of innocence concept is to serve as an admonition to lay jurors. The Court emphasized that the instruction serves a “special purpose”\textsuperscript{53} beyond that covered by a reasonable doubt instruction: “While the legal scholar may understand that the presumption of innocence and the prosecutor’s burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from [the presumption of innocence instruction].”\textsuperscript{54} This assertion is apparently grounded on a supposition of Wigmore’s that the instruction serves a special and perhaps useful purpose beyond the reasonable doubt standard, “in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.”\textsuperscript{55} These speculative conclusions are extremely thin material on which to fashion a constitutional doctrine. Both the Court’s and Wigmore’s language may be characterized as “fireside equities” — those judge-made rules that are the product of instinctive reactions to issues in lieu of proper fact-finding.\textsuperscript{56} In \textit{Taylor}, the Court uses Wigmore’s speculation as a sub-

\textsuperscript{52} See, e.g., G. Fletcher, Rethinking Criminal Law 524-52 (1978). Professor Fletcher’s thesis is that the protection of the defendant arises from proper handling of the various burdens of persuasion involved in criminal trials and that the focus of any discussion in this area should be on the allocations of the burden of persuasion.
\textsuperscript{53} 436 U.S. at 488.
\textsuperscript{54} Id. at 484.
\textsuperscript{55} Id. at 485 (quoting J. Wigmore, Evidence § 2511 (3d ed. 1940)).
\textsuperscript{56} One writer who addresses himself to the “fireside equities” is Dr. Paul E. Meehl, a clinical psychologist. Dr. Meehl’s message is simple: “in thinking about law as a mode of social control, adopt a healthy skepticism toward the fireside inductions, subjecting them to test by statistical methods applied to data collected in the field situation . . . .” Meehl, Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist, in T. Tapp & F. Levine, Law, Justice and the Individual in Society: Psychological and Legal Issues 28 (1977).
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stitute for a comprehensive discussion of the more basic issues that arise in jury instruction. Wigmore merely suggests that the presumption instruction can provide an additional "hint" that the arrest and indictment are not evidence. The Court raises this "hint" to the level of a constitutional command without the slightest empirical analysis of whether jurors generally are guided by court instructions.

Jury instructions have long been one of the most troublesome yet least analyzed factors in our system of criminal jurisprudence. Defective or improperly refused jury instructions are frequently grounds for reversal of convictions. Nevertheless, there has been little work undertaken to examine jury instructions in light of what other academic disciplines know about human behavior. Psychologists, for example, have analyzed the capacity of a listener to absorb large quantities of orally recited, technical material. Likewise, there is a growing body of information on the manner in which groups of persons make collective decisions. Neither the courts nor the academic bar, however, has fully assimilated this data. Instructions, and even specific phrasing of parts of instructions, have often been deemed indispensable without a hard look at whether jurors pay any attention to them.


58. One of the few empirical studies testing juror understanding of instructions is described in Strawn & Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478 (1976) (finding that the use of legal jargon, such as "material allegation," "information," "demeanor," tended to confuse jurors). Recent use of social science information has been directed more toward manipulation of jury verdicts than the seeking of objective information on juror behavior. See, e.g., McConahay, Mullin & Frederick, The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little, 41 LAW & CONTEMP. PROBS. 205 (1977); Zeisel & Diamond, The Jury Selection in the Mitchell-Stans Conspiracy Trial, 1976 AM. BAR FOUNDATION RESEARCH J. 151 (1975). A salutary development which provides some hope for the future is the relatively new funding of law-directed empirical research projects by the National Science Foundation. See, e.g., The Effects of Videotape Testimony in Jury Trials: Studies on Juror Decision Making, Information, Retention, and Emotional Arousal, 1975 B.Y.U.L. REV. 331.

59. See, e.g., W. Kolesnik, EDUCATION PSYCHOLOGY 236-65 (1963). In the chapter on efficient learning, Kolesnik discusses and cites most of the major learning theory experiments.


61. The general rule requires that the defendant object to instructions that he deems improper, but under the doctrine of "plain error" the court has the obligation to instruct correctly in certain instances even if the defendant proffers no instruction or fails to object to the erroneous language. See United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395 (1947); Screws v. United States, 325 U.S. 91 (1945); United States v. Heavlow, 468 F.2d 842 (3d Cir. 1972); 5 L. Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 30:55, 30:56 (1967). If courts preferred a more systematic method for juror decision-making,
Besides the Court's lack of analysis concerning the actual impact of presumption of innocence instructions, the Taylor opinion may be criticized for its lack of guidance on how such instructions should be given in future trials. Although the Court considered the presumption necessary in order that the jury decide the case on the basis of evidence given at trial rather than on pre-trial matters, such as custody, indictment, and suspicion, the Court failed to suggest language appropriate for achieving this purpose. The Court apparently did not require the retention of the phrase "presumption of innocence." Indeed, it conceded that the presumption of innocence is more accurately characterized as an "assumption" rather than a true "presumption." Nevertheless, the Court went on to describe the defendant's proffered instruction, which incorporated the phrase "presumption of innocence," as being "well suited" to perform the "purging function." Thus, the Court was not clear regarding the terminology to be employed. A switch from "presumed" to "assumed" may eliminate possible confusion with subsequent instructions on evidentiary presumptions, but it is highly unlikely that lay persons will perceive any distinction between the two terms since their dictionary definitions are similar. Possibly, the Court approved the term "assumption," not because it is preferable to "presumption," but because approval of the term may eliminate further litigation of the Taylor issue in those states that have adopted the Model Penal Code.

In basing its holding almost exclusively on the presumption of innocence concept, the Court did not reach Taylor's further claims regarding the trial court's refusal to give an "indictment-not-evidence" instruction. they could encourage more frequent use of the special verdict. Although there appears to be no constitutional barrier to the use of jury interrogatories, one circuit has held that the use of a special verdict was prejudicial error, in part because the Federal Rules of Criminal Procedure nowhere expressly recognize the mechanism. United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

62. 436 U.S. at 484 n.12.
63. Id. at 488 n.16. For the full requested instruction, see note 16 supra.
64. For example, one major dictionary defines "assume" as "to take for granted, to accept as true until proof to the contrary is furnished; . . . " "Presume" is defined as "to take for granted, or without proof; to suppose as fact . . . " WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 114, 1425 (2d ed. 1962). Nuances of meaning are not readily apparent. For a proposal which would throw the "presume/assume" issue into even greater confusion, see Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 YALE L.J. 165 (1969).
65. For a detailed compilation of state criminal codes, most of which were grounded at least in part on the Model Penal Code, see Note, Justification: The Impact of the Model Penal Code on Statutory Reform, 75 COLUM. L. REV. 914, 914-15 & nn. 2-3 (1975).
66. 436 U.S. at 487 n.15. See note 20 supra. The proposed indictment-not-evidence instruction is quoted in note 16 supra.
Ironically, this instruction comes much closer\textsuperscript{67} to meeting the Court's main concern — that juries should not rely on collateral matters — than does the presumption of innocence instruction.

The important issues in \textit{Taylor} deserve more analysis than the \textit{Taylor} Court provided. By its failure to endorse unambiguous and precise language and its failure to disapprove unacceptable formulations, the Court probably insured two results. First, by discerning a constitutional error in \textit{Taylor}, the Court may have discouraged further inquiry into the practical usefulness of the presumption, which, in turn, could stifle needed research on the overall efficacy of jury instructions. Secondly, many cautious trial judges will retain the classic presumption of innocence instruction, although the Court appears to invite alteration.\textsuperscript{68} Therefore, the phrase, presumption of innocence, with all its inaccuracies, will probably remain as a part of our judicial jargon for the foreseeable future. As a result, jurors will continue to hear the instruction, and remain subject to confusion regarding its content and the unique purpose it serves.

\textsuperscript{67} Although the indictment-not-evidence instruction does not mention arrest, custody, or suspicion, it directly mandates to the jury that it cannot convict on matters other than the evidence introduced at trial. \textit{See note 16 supra.}

\textsuperscript{68} Because the Senate criminal codification, S. 1467, 95th Cong., 1st Sess. (1977), discussed in notes 11 & 49 supra, has not yet become law, its decision to dispense with the presumption of innocence instruction and retain the "beyond a reasonable doubt" instruction may be changed. Its drafters can simply incorporate \textit{Taylor} in the criminal code revision. At the least, the federal drafters are on notice that they may not totally dispense with a presumption/assumption of innocence admonition.