1989

The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence - A Brief Commentary

LeRoy Pernell
leroy.pernell@famu.edu

THE REIGN OF THE QUEEN OF HEARTS: THE DECLINING SIGNIFICANCE OF THE PRESUMPTION OF INNOCENCE — A BRIEF COMMENTARY

LEROY PERNELL*

'Let the jury consider their verdict' the King said...
'No, no!' said the Queen. 'Sentence first-verdict afterwards.'
— Lewis Carroll, Alice's Adventures in Wonderland

The Queen of Hearts's pronouncement on the expendability of trial before the imposition of penalty may strike some as substantially lacking in due process, but it nonetheless represents a philosophy that is becoming an accepted canon of modern american criminal procedure. The cherished concept of the presumption of innocence and the need for adjudication before sentence has eroded over the years. Taking its place is a growing belief that the safety of society depends on massive deprivation of liberty and property without predetermination of guilt. The notion of innocence has now become an inconvenient technicality as opposed to a valued principle.

Such was not always the case. Until the 1970's the presumption of innocence was "undoubted law, axiomatic and elementary, and its enforcement [was]... at the foundation of the administration of our criminal law."[1] So strong was the presumption, and so pervasive was its impact throughout the criminal justice system, that challenges to its application as inimicable with public safety were met with Blackstone's often quoted phrase, "that it is better that ten guilty persons escape ... than that one innocent suffer."[2]

Erosion of this fundamental principle took hold with force in the early 1970s when notions of preventive detention surfaced as part of the Nixon administration's attempts to control "criminals" before they committed crimes.[3] Critics claimed that preventive detention violated the principle

* Associate Professor of Law, Ohio State University. B.A., Franklin & Marshall College, 1971; J.D., Ohio State University, 1974.

[1] Coffin v. United States, 156 U.S. 432, 453 (1985).
[2] 4 W. BLACKSTONE, COMMENTARIES * 358.
[3] President Nixon first proposed preventive detention in his first "crime control" message to Congress in 1969. 27 CONG. Q. WEEKLY 238 (1969). Subsequently, the White House made the concept of preventive detention a prominent feature of a

of the presumption of innocence. Supporters responded by claiming that the principle of presumption of innocence, thought by scholars to be at the very foundation of law, was "simply a rule of evidence which allows the defendant to stand mute at trial . . . ."[4]

Further erosion of the presumption of innocence was evident by 1979 when Justice Rehnquist, writing for the Court in *Bell v. Wolfish*,[5] endorsed the Mitchell view that the presumption of innocence raised no protectable interest outside the trial itself.[6] As discussed below, it is ironic that in the years following *Wolfish*, even the adjudication process ultimately succumbs to the Queen of Hearts rule.

In 1984, Congress enacted the first federal preventive detention program with national application.[7] The appropriately titled (in an Orwellian sense) Bail Reform Act of 1984 paused momentarily to note that "[n]othing in [the act] shall be construed as modifying or limiting the presumption of innocence."[8] But as Justice Marshall pointed out, "[t]he very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence."[9]

In *United States v. Salerno*,[10] Justice Rehnquist divorced the presumption of innocence from considerations of detention. The legacy of this

---

"law and order" campaign headed by Attorney General John Mitchell. This campaign resulted in the District of Columbia Court Reform and Criminal Procedure Act. D.C. CODE ANN. §§ 231321-1331 (1981). The preventive detention provisions allowed for individuals charged with certain felonies to be detained for up to sixty days before trial in order to assure the community's safety. For a full discussion, *see* Borman, *The Selling of Preventive Detention 1970* 65 NW. U.L. REV. 879 (1971).

[4] Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1231 (1969).

[5] Bell v. Wolfish, 441 U.S. 520 (1979).

[6] *Wolfish* involved allegations of unconstitutional conditions brought about by subjecting presumptively innocent pre-trial detainees in Manhattan's Metropolitan Correctional Center to inhumane treatment. *Id.* at 523. The Court refused to accept the argument that the presumption of innocence required the acceptance of the Second Circuit's compelling necessity test announced in Detainees of the Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d. Cir. 1975). *Malcolm* had recognized that the presumption of innocence requires that compelling safety reasons must be shown to justify harsh detention conditions and deprivation of rights.

[7] 18 U.S.C. § 3142(e) (1982 & Supp. V 1987) provides:

> If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

[8] 18 U.S.C. § 3142(j) (1982 & Supp. V 1987).

[9] United States v. Salerno, 481 U.S. 739, 762-63 (1987) (Marshall, J., dissenting).

[10] 481 U.S. 739. Chief Justice Rehnquist, having disposed of the presumption of innocence in *Wolfish*, does not again refer directly to the presumption. Instead, in Queen of Hearts-like terms, he addresses the issue of whether or not preventive detention is *impermissible* punishment without trial (suggesting of course that there may be permissible punishment without trial). The answer to the question for the majority is simply to boldly assert that the placing of someone in jail indefinitely, because of a crime for which they have not been convicted, is not punishment but regulation!

dismissal of the presumption of innocence is not limited to detention issues. The presumption has dwindled and nearly disappeared in a wide range of contexts, including property forfeiture,[11] sex offense/child abuse prosecution,[12] and jury instructions.[13]

This article will examine the origin, history, and decline of the presumption of innocence in three contexts: (1) pretrial detention, (2) property forfeiture, and (3) trial stage — courtroom settings and jury instructions.

I. THE DEVELOPMENT OF THE PRESUMPTION OF INNOCENCE

If it suffices to accuse, what will become of the innocent?
— Emperor Julian

The presumption of innocence has been at the foundation of our judicial system dating back at least to the Roman empire.[14] In *Coffin v. United States*,[15] the United States Supreme Court traced the history of the presumption from the proclamations of Emperor Julian through its early applications in American jurisprudence. The French referred to the presumption of innocence in the French Declaration of Rights of Man and Citizen of 1789. Fortescue is noted as saying that "[O]ne would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally."[16] Lord Hale said "[I]t is better five guilty persons should escape unpunished than one innocent person should die."[17] Blackstone, quoted earlier, also compromises on the ratio of nonpunished guilty defendants to wrongly convicted innocents, at ten.[18]

Although the early references discussed the presumption of innocence in terms of adjudication at the trial stage, there were often inferences that the values contained therein extended throughout the criminal justice system. The Court in *Coffin* intimated that the expounders of the common law linked the presumption of innocence with concepts of human liberty and individual rights.[19] In perhaps the leading work on the presumption in the 19th century, Professor Thayer recounted its history. He noted that early recordings of the concept in this country linked it with

---

[11] *See infra* notes 65-87 and accompanying text.
[12] *See* Coy v. Iowa, 487 U.S. 1012 (1988); *infra* notes 101-110 and accompanying text.
[13] Kentucky v. Whorton, 441 U.S. 786 (1979).
[14] *See* A. MARCELLINUS, RERUM GESTARUM, Book 18.
[15] 156 U.S. 432 (1985).
[16] DELAUDIBUS LEGUM ANGLIAE (Amos' translation, Cambridge, 1825).
[17] 2 M. HALE, PLEAS OF THE CROWN 289.
[18] 4 W. BLACKSTONE, *supra* note 2.
[19] Coffin v. United States, 156 U.S. 432, 460 (1985).

the basic notion of the inherent honesty and innocence of man, assumed to exist until such time as the establishment of guilt beyond a reasonable doubt.[20] Despite the sources relied on by the Court in *Coffin* and the writings of Thayer, there was very little written about the nature of the presumption or its application outside the context of trial evidence. No notable expansion of the doctrine received prominent attention until the United States Supreme Court's decision in *Stack v. Boyle*.[21]

In *Stack*, the Court considered the habeas corpus petition of twelve persons charged with violations of the Smith Act. High bail ($50,000) was set solely because of the nature of the alleged, unproven offense. In granting the petitioners relief, the Court, per Chief Justice Vinson, stated: "[The] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, *the presumption of innocence secured only after centuries of struggle, would lose its meaning*."[22]

Chief Justice Vinson's pronouncement marked the first significant linking of the presumption of innocence to stages of the pretrial process.[23] In *Hudson v. Parker*,[24] decided one month before *Coffin*, the Court stated, "[A] person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment . . . ."[25] The *Stack* court relied on the principle that there must be a finding of guilt before punishment is imposed. In doing so, the Court reaffirmed the significance of the presumption of innocence. It found that the presumption was an expression of the basic belief in innocence as part of the nature of humankind.

In the years following *Stack*, courts were quick to reinforce the link between bail and the presumption of innocence. Indeed, lower courts extended the rationale of *Stack* to state criminal procedure. Such actions were based on the impact of pre-trial incarceration on the presumption of innocence. The impact was of constitutional significance because it

---

[20] "[I]n the eye of the law every man is honest and innocent, unless it be proved legally to the contrary." J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 551, 552 (1898) (quoting RECORDS OF MASS. iii, 434-35 (1657)).

[21] 342 U.S. 1 (1951).

[22] *Id.* at 4 (emphasis added).

[23] The Court was urged to adopt this approach by the petitioners, who relied on the notion that pre-trial incarceration was in effect punishment without conviction if based on any factor other than the guaranteeing of the defendant's reappearance. Thus the petitioners stated: "The purpose of the allowance of bail is to prevent the punishment of innocent persons as well as to secure the presence of the persons charged with trial at their trial." Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit at 7, Stack v. Boyle, 342 U.S. 1 (1951). This bonding of the presumption of innocence to any punishment raises the central issue posed by the Queen of Hearts herself.

[24] 156 U.S. 277 (1895).

[25] *Id.* at 285.

raised issues of basic due process, as well as the unresolved question of the application of the eighth amendment to the states.[26]

With few exceptions, the Supreme Court remained silent following *Stack* regarding the extent of the application of the presumption to matters outside the adjudication stage of the criminal process.[27] Lower courts, however, applied the *Stack* principles in a variety of contexts.[28]

Applications of the presumption of innocence to preadjudication stages were consistent with then-emerging analyses of the criminal process. Most notable among them is Professor Herbert Packer's 1968 study of the criminal justice system.[29] Professor Packer postulates that the ele-

---

[26] In Hunt v. Roth, 648 F.2d 1148, 1155 (8th Cir. 1981), the court reviewed the petitioner's habeas corpus and civil action challenging Nebraska's refusal to admit to bail defendants charged with sexual assault. Although the United States Supreme Court has never resolved the issue of whether the excessive bail clause of the eighth amendment was applicable to the states through fourteenth amendment incorporation, the *Hunt* court found that the interests reflected by bail were part of an ordered scheme of liberty and as such were fundamental to the American scheme of justice (in fact practically all courts have concluded that the excessive bail provision is applicable to the states for the same reason). Significantly, however, the court goes beyond mere incorporation to state: "The protection against excessive bail has a direct nexus to the presumption of innocence, *implicitly recognized within the fourteenth amendment*." *Id.* at 1156 (emphasis added).

[27] Justice Brennan, in a series of cases, has advocated over the years the recognition of the presumption of innocence as an important part of our criminal justice process outside the actual trial itself. In Ker v. California, 374 U.S. 23 (1963), Justice Brennan in his dissent disagreed with the majority's recognition of "noknock" entries as reasonable under the fourth amendment and in so doing stated:

> The excuse for failing to knock to announce the officer's mission where the occupants are oblivious to his presence can only be an automatic assumption that the suspect within will resist the officer's attempt to enter peacefully, or will frustrate the arrest .... *Such assumptions do obvious violence to the presumption of innocence.*

Id. at 56 (emphasis added).

In Dickey v. Florida, 398 U.S. 30 (1970), Justice Brennan, this time concurring, concluded that "the evils at which the clause [speedy trial clause of the sixth amendment] is directed are readily identified. It is intended to spare an accused those penalties and disabilities — incompatible with the presumption of innocence — that may spring from delay in the criminal process." *Id.* at 41 (Brennan, J., concurring).

In Paul v. Davis, 424 U.S. 693 (1976), Justice Brennan again took arms against punishment without verdict in his dissent. *Paul* involved the practice of Kentucky police chiefs circulating to merchants flyers containing the names of individuals suspected of shoplifting. Brennan noted:

> It is hard to conceive of a more devastating flouting of the presumption of innocence, that "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law' "

Id. at 725 n.12 (citations omitted).

[28] Lower courts considering the application of *Stack* have generally assumed that the "excessive bail" language meets the "part of an ordered scheme of liberty" test for selective incorporation. *See* Hunt v. Roth, 648 F.2d 1148, 1155 (8th Cir. 1981).

[29] H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

ments of the criminal justice system and its potential for change can best be understood by studying two models; the Due Process Model and the Crime Control Model. Each of these models is "an attempt to give operational content to a complex of values underlying the criminal law."[30]

Packer's Due Process Model rests on a set of values which reflect an assessment of the "efficacy of crime control devices."[31] They also reflect a realistic appraisal of the reliability of fact determinations of guilt throughout the process. The Due Process Model rejects the premise that accurate fact finding for purposes of protecting the innocent from unwarranted criminal justice involvement can be left to investigative and prosecutorial officials. Instead, the Model "substitutes for [this premise] a view of informal, nonadjudicative factfinding that stresses the possibility of error."[32] Because of the possibility of error from investigations conducted by persons with no interest in protecting the interests of the accused, the Due Process Model leads to "a rejection of informal factfinding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is . . . evaluated only after the accused has had a full opportunity to discredit the case against him."[33] Implicitly, the Due Process Model recognizes that fact finding prior to, and apart from the adjudication of guilt is a necessary part of the system.

The Crime Control Model, on the other hand, rests on "the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process."[34] The Model's emphasis on control necessitates the use of mechanisms designed to dragnet potential offenders and to introduce sanctions that serve public protection interests without any fastidious concerns over accuracy or false positives.[35]

In Packer's Due Process Model, the presumption of innocence serves as a bulwark against the imposition of any punishment oriented restrictions in the absence of the establishment of legal guilt (as opposed to factual guilt).[36] The Crime Control Model rejects the presumption of in-

---

[30] *Id.* at 154.
[31] *Id.* at 163.
[32] *Id.*
[33] *Id.* at 163-64.
[34] *Id.* at 158.
[35] Packer states: "The model in order to operate successfully, must produce a high rate of apprehension and conviction, and must do so in a context where the magnitudes being dealt with are very large and the resources for dealing with them are very limited." *Id.* at 159.
[36] By forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favorable outcome. In this sense, the presumption of innocence may be seen to operate as a kind of self-fulfilling prophecy. By opening up a procedural situation that permits the successful assertion of defenses having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment. *Id.* at 167.

nocence as a limitation upon the preadjudication stages. Instead it relies on the initial police and prosecutorial screening as an accurate indicator of probable and actual guilt. By doing so, it allows for the "presumption of [actual] guilt"[37] for all who are formally charged.

In 1968, the criminal process deck was stacked in favor of a rapidly growing Due Process Model.[38] This growth was a direct result of the constitutional revolution characterized by the United States Supreme Court's shaping of state as well as federal criminal procedure.[39] As pointed out by Packer, this reliance on judicial edicts for change was also one of the Model's greatest weaknesses.[40] Despite the inherent threats to the continuance of the Due Process Method foreseen by Packer, optimism remained high that the Due Process Model, with its reliance on the principle of presumptive innocence, would continue to grow and replace the concepts of the Crime Control Model.[41]

How then did the presumption of innocence fall from its high pedestal to its lowly status as a mere evidentiary principle? Some understanding of this may be had by examining the rise of the Queen of Hearts rule, in the post-Due Process Model era.

II. LOSS OF LIBERTY/LOSS OF INNOCENCE

> *[O]ur fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal.*
>
> — *Justice Thurgood Marshall*[42]

---

[37] "Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty." *Id.* at 160.

[38] *Id.* at 239.

[39] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

[40] Professor Packer prophetically states:

> Changes in attitude toward the criminal process or changes in personnel on the Court (which may come to the same thing) can slow or reverse the trend in two ways. First and more obviously, decisions can be overruled. . . . A second, subtler, and probably more serious, threat to the continued strengthening of the Due Process trend is that the justices will, out of diminished enthusiasm either for the principles involved or for the continued combat their vindication entails, cease or slacken their scrutiny of the criminal process as it operates in both state and federal criminal courts.

Id. at 240.

[41] *Id.* at 243. Packer foresaw that the due process renaissance would produce a "generation of scholars uniquely knowledgeable about and alert to the problems of the criminal process." He suggested that the persuasive value of their opinions could overcome the crime control pressures generated by the Queen of Hearts philosophy. *Id.*

[42] United States v. Salerno, 481 U.S. 739, 764 (1987) (Marshall, J., dissenting). *See also infra* note 68.

Anthony Salerno and Vincent Cafaro were indicted on charges of mail and wire fraud, extortion, criminal gambling, and RICO violations.[43] They were arrested on March 21, 1986, and despite the fact that they had not been convicted on these charges, the government moved to have the defendants detained under the preventive detention provisions of the Bail Reform Act of 1984,[44] alleging that they were a danger to the community and that no release conditions would reasonably assure the safety of the community.

The evidence against the defendants at their detention hearing consisted primarily of conversations intercepted by a court-ordered wiretap, allegedly supporting the contention, supposedly reserved for trial on the indictments, that Salerno was a mafia boss, that Cafaro was his "captain," and that the two were engaged in a conspiracy of extortion and murder.[45] The District Court granted the detention order, and the United States Court of Appeals for the Second Circuit reversed the lower court.[46]

Against this backdrop, the Supreme Court dealt the death hand to the notion of a pretrial presumption of innocence.[47] *Salerno* presented a facial attack upon the constitutionality of the preventive detention provisions. The defendants alleged that the provisions for preventive detention were a violation of both substantive due process and the eighth amendment's excessive bail clause.[48]

The majority viewed the defendants' argument regarding substantive due process as one which essentially claimed that the provision authorizes "impermissible punishment before trial."[49] Separating this claim from any relationship to the eighth amendment claim, the majority concluded that the total deprivation of liberty allowed by preventive detention was "regulatory" in nature and not punishment at all.[50]

---

[43] 481 U.S. at 743.

[44] 18 U.S.C. § 3142(e) (Supp. III 1984) (current version at 18 U.S.C. § 3142(e) (1988)).

[45] United States v. Salerno, 481 U.S. 739, 743 (1987).

[46] United States v. Salerno, 794 F.2d 64 (2d Cir. 1986).

[47] 481 U.S. 739 (1987).

[48] The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

[49] 481 U.S. at 746.

[50] Rehnquist states:

> [T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."

Id. at 746-47 (citations omitted).

The *Salerno* Court's quote above is from Schnall v. Martin, 467 U.S. 269 (1984) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). The *Salerno* Court apparently ignored the more extensive test stated in *Kennedy* for determining punishment:

While it might seem like a sleight of hand trick to explain that the jailing of an individual because of danger proven by wrongful conduct is anything but punishment, the majority nonetheless delegates the decision to the will of Congress.[51] Having declared that preventive detention is mere regulation, the Court moves on to find that such regulation is not excessive in relation to its purpose. The majority likewise disposes of the defendants' claim that the denial of bail is a violation of the eighth amendment.[52]

What the majority fails to mention is perhaps the most significant aspect of its decision — the impact on the presumption of innocence. Marshall, in vigorous dissent, states:

> The essence of this case may be found, ironically enough, in a provision of the Act to which the majority does not refer. Title 18 § U.S.C. 3142(j) (1982 ed., Supp. III) provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." But the pith and purpose of this statute is an abhorrent limitation of the presumption of innocence.[53]

The Rehnquist view ignores the essential point that both due process and the bail clause serve to protect "the invaluable guarantee afforded by the presumption of innocence."[54] As noted by Marshall, the sanctions

---

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy, 372 U.S. at 168-69 (emphasis in original).

[51] The problem with the Court's analysis is pointed out by Marshall in dissent:

> The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation," and, magically, the Constitution no longer prohibits its imposition.

Salerno, 481 U.S. at 760 (Marshall, J., dissenting).

[52] The Court rejects the notion advanced since *Stack* that the reference to excessive bail presupposes an initial right to bail, or that pretrial release may not consider detention for reasons of future dangerousness. Relying on its earlier opinion in Carlson v. Landon, 342 U.S. 524 (1952), the Court concludes that "nothing in the text of the Bail Clause limits permissible government considerations solely to questions of flight." 481 U.S. at 754.

[53] *Id.* at 762-63.

[54] *Id.* at 763.

of preventive detention are not imposed on all who are dangerous, but only on those who are criminally charged. Thus it is the imprimatur of guilt flowing from the yet unproven indictment that is the trigger for detention. Why wait for trial when we can begin incarceration now?

The result in *Salerno* was not unforeshadowed. The groundwork for its disregard for the presumption of innocence is laid not only by *Wolfish* but also by a lower court case interpreting the earlier preventive detention provisions of the Omnibus Crime Control Act enacted for use in the District of Columbia.[55]

Nor was the rush to curtail liberty without conviction limited to cases of criminal prosecution. In *Schall v. Martin*,[56] relied on by the Court in *Salerno*, Rehnquist, writing for the majority, ignored the presumption of innocence implications of preventive detention of alleged juvenile delinquents.[57] Instead, Rehnquist viewed the issue as a balancing between legitimate interests of the state and what the Court determined to be the reduced liberty interest of juveniles.[58]

The legacy of *Salerno/Schall* is a total reordering not only of our concept of the significance of liberty, but also of our commitment to the importance of innocence. Blackstone's admonition "that it is better that ten guilty persons escape . . . than that one innocent suffer"[59] is replaced by the inverse adage that "it is better that ten innocent persons suffer, than that one guilty person escape."[60]

---

[55] Blunt v. United States, 322 A.2d 579 (App. D.C. 1974), upheld D.C. CODE ANN. § 23-1322 (1973) against a challenge based, *inter alia*, on the claim that detaining a person without bail abridges the presumption of innocence. The court joined detention based on danger implied by the unproven charge in with other pretrial conditions to find no particular pretrial infringement of the presumption.

[56] 467 U.S. 253 (1984).

[57] Delinquency refers, generally, to the commission of an offense that would be a crime if committed by an adult. In *Schall*, the juvenile was charged with delinquent acts that if charged against an adult would constitute first-degree robbery, second degree robbery, and criminal possession of a weapon. The juvenile was held for a total of fifteen days prior to adjudication because of the "danger" presented by the juvenile, as evidenced, *inter alia*, by the allegations in the complaints.

[58] Rehnquist postulates that juveniles have a different liberty interest than adults. He states: "juveniles, unlike adults, are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves." 467 U.S. at 265 (citations omitted).

But note that the Court had earlier determined that even a limited liberty interest was entitled to due process protection. *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

[59] *See supra* note 2.

[60] Professor Packer's Crime Control Model, *supra* notes 34-37 and accompanying text, would certainly accept this notion as representative of a fair price to be paid for increased apprehension of criminals.

The acolytes of this new credo respond to their critics with claims that the presumption of innocence has no place in what is purported to be a regulatory scheme not based on punishment. Such a view, in the context of detention, ignores the real nature of detention — be it jail or a juvenile detention center.

The very nature of jail/detention bespeaks punishment. Despite the illusory promise of the presumption of innocence,[61] the pre-trial detainee is subjected to "punishment" on the same order as any convicted felon.[62] Certainly such conditions would fit within the definition of punishment stated in *Kennedy v. Mendoza-Martinez*.[63] But more importantly, the nature of jail as a place of pre-trial confinement was, until *Salerno/Schall*, traditionally accorded special status because of its intertwined relationship with the presumption of innocence.[64]

---

[61] The premise of the presumption, now forgotten by the rule of the Queen of Hearts, as it pertained to those awaiting trial, was stated by Blackstone:

> Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law. But this imprisonment, as has been said, *is only for safe custody, and not for punishment*; therefore, in this dubious interval between commitment and trial, a prisoner ought to be used with the utmost humanity . . . .

[62] It is probably true that persons who have not yet been convicted of a crime are subjected to the worst aspects of the American correctional system. Unconvicted persons, as yet legally innocent, are almost invariably subjected to the tightest security . . . .

> This primary concern for security imposes regimentation, repeated searches, and close surveillance on detainees.

The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 24 (1967).

In Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass 1973), the court quotes the Final Report of the 42nd American Assembly (1972): "Local jails are even worse than prisons . . . . In them standards of humanity and decency are violated, and the presumption of innocence which is so basic to American justice is ignored." 360 F. Supp. at 684.

The grim truth of our system of pre-trial detention is graphically described by the court in Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971):

> confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette . . . .

Id. at 99.

[63] 372 U.S. 144 (1963).

[64] *See* Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974); McGinnis v. Royster, 410 U.S. 263, 273 (1973).

Like the Queen of Hearts, concerns over expediency and fear of crime have now reordered the Court's perception of liberty and the presumption of innocence. But the legacy of the Queen's reign is not limited to jail now, trial later. The hand dealt by the logical extension of the decline of the significance of the presumption of innocence now extends to loss of property as well as liberty.

III. Loss of Innocence/Loss of Property

> *If [the defendant] has no money to buy food or to pay for housing, he might waive his right to release on bail and go to jail, but he still could not employ counsel and his family would remain stripped of all means of support—without even the option of reporting to jail—though accused of no crime. That the mere fact of an indictment accompanied by the affidavit of a prosecutor can accomplish these results should shock the judicial conscience at least as much as does the assertion that the prosecution may pump the stomach of an accused person in order to obtain evidence.*
>
> *— Judge Alvin B. Rubin*[65]

The United States Constitution guarantees that no person may be deprived of life, liberty *or property*, without due process of law.[66] The traditional notion that the presumption of innocence served to insure that liberty would not be lost without due process also extended to loss of property. Thus, at common law a defendant did not face loss or restriction on use of his property, because of criminal wrongdoing, until after conviction.[67]

The reordering of our principles relating to the presumption of innocence, brought about by the *Schall/Salerno* doctrine, have not been limited to liberty. The concern for more effective law enforcement, coupled with the frustration over the shortcomings in the "war on drugs,"[68] has resulted

---

[65] United States v. Thier, 801 F.2d 1463, 1474 (5th Cir. 1986) (Rubin, J., concurring).

[66] U.S. CONST. amend. XIV (emphasis added).

[67] *See* 4 W. BLACKSTONE, COMMENTARIES, 380-85. Although the law of deodand allowed for the confiscation of property demonstrated to be the instrument of a man's death, regardless of whether the owner had been convicted of the killing. O.W. HOLMES, THE COMMON LAW 73 (M.Howe ed. 1963). *See generally* Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493 (1986).

[68] Professor Wisotsky comments:

In his original declaration of War on Drugs, President Reagan an-

in the adoption of procedures for the wholesale seizing and freezing of assets and property belonging to those accused, as well as convicted of crime.[69]

Forfeiture of property is relatively new to the American criminal process.[70] In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO)[71] which included provisions for the seizure of property of those indicted and convicted of "pattern of racketeering activity"[72] and the Continuing Criminal Enterprise statute (hereinafter CCE)[73] which included property forfeiture provisions for virtually any federal drug offense.[74] Forfeiture covered all property, profits, or assets derived directly or indirectly from the illegal enterprise.[75] Despite the breadth of the language, initial seizures under these provisions

---

nounced a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture, and the exclusionary rule. He succeeded in almost respect. The Administration's march toward a tougher set of investigative and prosecutorial powers drew much of its energy from the widespread belief that the criminal justice system was treating drug traffickers with excessive leniency.

Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights* 38 HASTINGS L.J. 889, 895 (1987).

[69] The notion of prejudgment forfeiture in general is not new. In a civil case, Fuentes v. Shevin, 407 U.S. 67 (1972), the Court approved of a procedure for the prejudgment seizure of property where the magistrate permitting the seizure made a review of the application and determined that there was probable cause to believe that the asset would be disposed of if not seized. This process differs significantly from that provided for by the RICO and CCE forfeiture procedures discussed *infra* at notes 71-74 and accompanying text, in that the criminal forfeiture and restraining order processes may be maintained solely on the existence of the indictment without conviction.

[70] Prior to 1970, forfeiture was not a significant feature of the criminal process. *But see* Confiscation Act of 1862, 12 Stat. 589 (1862), *repealed by*, Act of March 4, 1909, ch. 321, 35 Stat. 1153 (providing for the seizure of confederate property).

[71] 18 U.S.C. §§ 1961-1968 (1988).

[72] 18 U.S.C. § 1963(a) (1988). "Pattern of racketeering activity" is defined as "at least two acts of racketeering activity [as defined by 18 § U.S.C. 1961(1) (1988)] one of which occurred after the effective date [of RICO] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. 1961(5) (1988).

[73] 21 U.S.C. § 848(a) (1982).

[74] 21 U.S.C. § 853(a) (1982).

[75] RICO provides for forfeiture of:

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

were few and the effect was thought to be insubstantial.[76] The inconvenience of trial and the presumption of innocence posed a frustrating barrier to law enforcement. An alternative to post conviction property seizure was desperately sought, and an answer was found in The Comprehensive Forfeiture Act of 1984 (hereinafter CFA).[77]

The essence of property ownership is the ability to use it. If the ability of a defendant to use his or her assets is restricted or denied, then the difference between outright seizure and such restrictions becomes practically non-existent. Such are the effects of the CFA. The Act expanded the power of federal courts to enter temporary restraining orders both before and after indictment.[78] Thus, without conviction, the defendant faces the prospect of loss of effective use of property based solely on the existence of unproven charges, or in the case of 18 U.S.C. § 1963 (d)(1)(B), without even the courtesy of a formal charge.

---

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, form racketeering activity or unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a) (1988).

CCE similarly provides:

Any person convicted of a violation of this subchapter . . . shall forfeit to the United States irrespective of any provision of State law -

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . . .

21 U.S.C. § 853(a) (Supp. V 1987).

[76] Congressional concern was expressed as follows:

Unlike civil forfeitures, in which the government's seizure of the asset occurs at or soon after the commencement of the forfeiture action, in criminal forfeitures, the assets generally remain in the custody of the defendant until the time of his conviction . . . . Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.

Currently, the only mechanism available to the government to prevent such actions is the authority to obtain a restraining order and this statutory authority is limited to the post-indictment period. Thus, even if the government is aware that a person is disposing of his property in anticipation of the filing of criminal charges . . . it has no specific authority under the RICO or CCE statutes to obtain an appropriate protective order. Furthermore, even if the government is able to obtain a restraining order, should the defendant choose to defy it, he can effectively prevent the forfeiture of his property and face only the possibility of contempt sanctions for his defiance of the court's order. The important economic impact of imposing the sanction of forfeiture against the defendant is thus lost.

Report No. 98-225 at 195-96

[77] Pub. L. No. 98-473, 98 Stat. 2040-57 (1970).

[78] CFA added the following provisions to RICO:

Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory perfor-

While supporters of seizure before conviction might suggest that prejudgment forfeiture has some precedent,[79] that does not explain the abandonment of the presumption of innocence in a criminal prosecution where guilt is implied, for forfeiture purposes, solely from the indictment. Yet in two recent cases, the United States Supreme Court did indeed abandon the presumption once again; this time without so much as an acknowledgement of its existence.[80]

In *Caplin & Drysdale*, the Court faced the issue of whether in a prosecution under CCE, a defendant may be prohibited from using funds earmarked for forfeiture to pay attorney fees.[81] Defendant argued, unsuccessfully, that such funds were exempt from the act or, if they were not, that his sixth amendment right to counsel was undermined.

In *Monsanto* also, the defendant faced prosecution under CCE. Like the defendant in *Caplin & Drysdale*, Monsanto was subject to a restraining order prohibiting him from using funds for counsel, among other things. Monsanto sought an order unfreezing assets for counsel use only.[82]

---

mance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if after notice to persons appearing to have an interest in the property and opportunity for a hearing the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is entered;

18 U.S.C. 1963(d)(1) (1988). CFA added identical language to CCE 21 U.S.C. Sec. 853(e) (Supp. V. 1987).

[79] *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (holding that prejudgment seizure of property was authorized where a hearing was held by a magistrate and a determination was made that the property would be disposed of prior to judgment if not seized).

[80] Caplin & Drysdale, Chartered v. United States, ___ U.S. ___, 109 S. Ct. 2646 (1989); United States v. Monsanto, ___ U.S. ___, 109 S. Ct. 2657 (1989).

[81] The devastating impact of these provisions has been perhaps most evident in their use to freeze and effectively dispose of the defendant's funds otherwise available for attorney fees. This issue is beyond the scope of this article. For a discussion of the issue, see Blakey, *Forfeiture of Legal Fees: Who Stands to Lose?*, 36 EMORY L.J. 781 (1987); Brickey, *Forfeiture of Attorneys' Fees: On Defining "What" and "When" and Distinguishing "Ought" form "Is"*, 36 EMORY L.J. 761 (1987).

[82] The Court, in its opinions, found that the plain meaning of the Act did not exempt or allow for the exemption of attorney fees from restrained funds. Additionally the Court found that once probable cause of likely conviction has been demonstrated, the trial court is without power to "unfreeze" funds for counsel use. *Monsanto*, ___ U.S. ___, 109 S. Ct. 2657 (1989).

In neither case did the Court mention the impact of the presumption of innocence on the question of pre-trial restraint of property. However the impact of the Court's conclusions is significant. The defendant, in essence, loses the ability to use his property because of the unproven-by-trial conclusion of probable guilt.

While the Supreme Court was reluctant to speak specifically about the presumption of innocence, several lower courts have not been so reticent. In *In Re Forfeiture Hearing as to Caplin & Drysdale*,[83] the defendants challenged, *inter alia*,[84] pretrial forfeiture of property. The defendant theorized that the presumption of innocence forbade such interference. Faced squarely with the issue, the Fourth Circuit rejected the recognition of the presumption as having a limiting effect on pretrial forfeiture, and instead opted for the *Salerno/Schall* (i.e. Rehnquist) view that "the presumption of innocence is of undoubted importance in assigning the burden of proof at trial, but . . . is not a grant of immunity from pretrial inconvenience."[85] Similarly, the Third Circuit in *United States v. Long*,[86] (decided prior to the 1984 amendments) refused to recognize that the presumption of innocence had any application to pretrial forfeiture.[87]

If the presumption of innocence does not protect liberty or property prior to conviction, then when and what does the presumption protect? The Rehnquist court has relegated the presumption to the role of an evidentiary rule that springs into existence only at the adjudication. Even here, however, the Queen of Hearts is not silent.

IV. THE PRESUMPTION OF INNOCENCE AND ADJUDICATION OF GUILT

> *[T]he presumption of innocence "is a basic component of a fair trial . . . And a fair trial, after all, is what the Due Process Clause of the Fourteenth Amendment above all else guarantees.*
>
> *— Justice Potter Stewart*[88]

---

[83] 837 F.2d 637 (4th Cir. 1988).

[84] The defendants also challenged the application of the Comprehensive Forfeiture Act of 1984 to funds which the defendant sought to use for payment of attorney fees.

[85] *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 643 (4th Cir. 1988). The court's analysis of the restriction on use of assets (including in this case for the payment of attorney's fee for trial) is reminiscent of the *Salerno* notion that detention without bail is merely a "regulation" and not an impermissible loss of liberty.

[86] 654 F.2d 911 (3d Cir. 1981).

[87] The court states: "An order restraining the transfer of property, that may be subject to forfeiture, does not taint a defendant's presumption of innocence in violation of the Constitution." *Long*, 654 F. Supp. at 916 n.8 (citing Bell v. Wolfish, 441 U.S. 520 (1970)).

[88] Kentucky v. Whorton, 441 U.S. 786, 790 (1978) (Stewart, J., dissenting).

In the wake of *Salerno/Schall*, the role of the presumption of innocence is as uncertain at trial as it is at any pretrial stage. Nowhere is this more evident than where the court must determine the impact of the courtroom setting on the jury.

In *Estelle v. Williams*,[89] the Court concerned itself with the impact of requiring prison dress at trial.[90] The Court responded in the traditional manner by taking a Due Process Model view of the presumption of innocence. As such, the Court suggests that the presumption was an integral part of the right to a fair trial.[91] The Court recognizes that factors such as prison dress and appearance were pretrial circumstances which might adversely affect the fact-finding process.[92]

In finding that the practice of allowing the jury to view the defendant while the latter was in prison clothes violated the due process concept of the presumption of innocence, the Court held that due process required that an essential state purpose must exist in order to justify a suggestive courtroom setting. Implicit in the Court's finding is acceptance of the idea that the presumption of innocence, even at trial, may be limited. Such a suggestion leaves open the door for the entry of the Queen of Hearts principle.[93]

In 1986, the Court made use of this opening in *Holbrook v. Flynn*,[94] by upholding a conviction where the defendant was tried while four uniformed troopers sat guard conspicuously behind him. In so doing, the court stated that: "[w]henever a courtroom arrangement is challenged as inherently prejudicial . . . the question must be whether 'an unacceptable risk is presented of impermissible factors coming into play.' "[95] The uncertainty surrounding when an "unacceptable risk" exists creates a slippery slope down which it is easy to slide into a quagmire of suggestive courtroom setups that, while arguably meeting important governmental interests, directly and indirectly suggest guilt before trial.

---

[89] 425 U.S. 501 (1975).

[90] The defendant's appearance at trial in prison garb was the result of pretrial detention and his inability to post bond. This classic example of the effect of pretrial detention on adjudication raises significant questions concerning the accuracy of the Rehnquist view that pretrial detention raises only issues of regulation and does not involve trial rights. *See also* Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970).

[91] "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle*, 425 U.S. at 503.

[92] "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact finding process. In the administration of justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.*

[93] Earlier, in Illinois v. Allen, 397 U.S. 337 (1970), the Court recognized that where the defendant, through his own contumacious actions, creates the need for courtroom officers to shackle and gag him, due process is not offended because of the essential state interest and responsibility to assure a fair and orderly trial.

[94] 475 U.S. 560 (1986).

[95] *Id.* at 570.

Such is the problem created, in particular, by the rash of child witness protection provisions recently enacted in many jurisdictions. Within recent years, forces for effective law enforcement have aligned with child protection interests to focus on more efficient (i.e. producing a greater rate of conviction) methods of bringing to trial those charged with child abuse and/or sexual assault on children. This attention comes in the wake of the recognition of the alarming rate of sexual abuse of children in particular.[96]

Contemporaneous with the desire for more convictions is the greater acceptance of the notion that the participation of the child in a criminal prosecution presents an issue of "special vulnerability [for] very young children who, as both victims of crime and witnesses in the judicial process, face a double ordeal."[97] Faced with this "trauma induced by [the child's] involvement in the legal system,"[98] nationwide legislative enactments and proposals have come into being designed to shield the child from courtroom trauma stemming from both being present in a courtroom and from being in the presence of the defendant.[99]

---

[96] In 1975 it was estimated that at least 100,000 children were sexually abused annually. UNITED STATES DEPARTMENT OF JUSTICE, REPORTS OF THE NATIONAL JUVENILE JUSTICE ASSESSMENT CENTERS: A PRELIMINARY NATIONAL ASSESSMENT OF CHILD ABUSE AND NEGLECT AND THE JUVENILE JUSTICE SYSTEM 10 (1980).

[97] NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY & PROTECTION, preface to PROTECTING CHILD VICTIM/WITNESSES (1986).

[98] *Id.*

[99] By 1985 a majority of the states had passed new laws or amended old provisions to allow for protection of child witnesses in sexual abuse cases. *See* 5 ABA JUV. & CHILD WELFARE L. REP., No. 2, 27 (1986). The legislative enactments attempted so far fall generally into the following categories:

A. Statutes Permitting The Use of Child Out of Court Statements
Examples:
Kansas — KAN. STAT. ANN. § 60.460(dd) (1983)
Washington — WASH. REV. CODE ANN. § 9A.44:120 (1985)
See State v. Myatt, 237 Kan. 17, 697 P.2d 836 (1985); State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984).

B. *Videotaped Depositions and Close-Circuit Television*
Examples:
California — CAL. PENAL CODE § .1347 (West 1989)
New York — N.Y. CRIM. PROC. § 65.00 to 65.30 (McKinney 1988)
Ohio — OHIO REV. CODE ANN. § 2907.41 (Baldwin 1988)
See State v. Vess, 157 Ariz. 236, 756 P.2d 333 (Ct. App. 1988); State v. Bass, 221 N.J. Super. 466, 535 A.2d 1 (1987); Miller v. State, 517 N.E.2d 64 (Ind. 1987).

C. Modification of Rules Pertaining to Child Competency
Examples:
Iowa — IOWA R. EVID. 601 (Child presumed competent)
Missouri — MO. ANN. STAT. § 491.060(2) (Vernon 1985) (child competent without prior qualification)
Tennessee — TENN. CODE ANN. § 24-1-101 (1988) (child victim of sexual offense is competent witness)

While these "protections" have generated numerous challenges,[100] seldom have courts considered the effect of such measures on the presumption of innocence. The Supreme Court passed up an opportunity to do so recently in *Coy v. Iowa*.[101]

In *Coy*, the defendant was convicted of lascivious acts with a child, after a jury trial in which, pursuant to Iowa law,[102] a screen[103] was placed between the defendant and the two children who were complaining witnesses. The defendant objected and strenuously argued that his sixth amendment right to a face-to-face confrontation with his accusers was denied. The defendant also argued that his due process right to a fair trial was denied because his presumption of innocence was adversely affected by the suggestion to the jury that he was dangerous to the children and therefore probably guilty.

In a 6-2 decision,[104] the Court concluded that the Iowa procedure violated the traditional notion of confrontation.[105] However, the Court ducked the question of whether the equally traditional presumption of innocence was also diminished. The Court found that it was unnecessary to reach that issue.[106]

By refusing to resolve this issue, the Court avoided the problem of having to reconcile its pronouncements in *Estelle* with the limiting no-

---

[100] The challenges to the child protection provisions have largely centered around evidentiary rules against the admission of hearsay and the sixth amendment right of confrontation. Thus courts have voided convictions in cases where a child's out of court utterance did not fall within the traditional hearsay exceptions; *see* Cassidy v. State, 74 Md. App. 1, 536 A.2d 666 (1988), cert. denied, 312 Md. 602, 541 A.2d 965; People v. Sexton, 162 Ill. App.3d 607, 515 N.E.2d 1359 (1987); State v. Hudnell, 293 S.C. 97, 359 S.E.2d 59 (1987); and even prior to Coy v. Iowa, 487 U.S. 1012 (1988), have held that the sixth amendment right to face-toface confrontation of an accuser prohibited the use of videotape, depositions, and screens between child and defendant, without at least some showing that such devices are necessary in the particular case. *See* State v. Vess, 157 Ariz. 236, 756 P.2d 333 (Ct. App. 1988); State v. Lindner, 142 Wis. 2d 783, 419 N.W.2d 352 (Ct. App. 1987).

[101] 487 U.S. 1012 (1988).

[102] IOWA CODE § 910A.14 (1987).

[103] The device was described as "a frame with a substance on it which makes it possible for the defendant to see the witness but the witness does not see the defendant." (Appellant's Jurisdictional Statement p.4). The apparent purpose of the screen was to make the complaining witnesses "feel less uneasy in giving their testimony." 487 U.S. at ___, 108 S. Ct. at 2799. However, in order for the device to work, the courtroom lights had to be dimmed and bright lights had to be "focused directly on the structure." (Appellant's Jurisdictional Statement p.4), causing the trial judge to note that "[t]he thing does cause sort of a dramatic emphasis . . . ." *Id.*

[104] Kennedy took no part in the decision. O'Connor and White concurred with the finding that the confrontation clause was violated but noted that in their view such rights were not absolute. 487 U.S. at ___, 108 S. Ct. at 2803 (O'Conner, J., concurring). Interestingly, the Chief Justice and Blackmun dissented after concluding that neither the confrontation clause or the due process clause was violated.

[105] *Id.*

[106] *Id.*

tions of *Salerno/Schall*. Additionally, the Court did not have to decide the difficult question of whether the presumption of innocence, even if recognized as applicable to the trial setting, could be balanced and perhaps diminished by perceived necessity or state interest.

The parties framed the issue as one of determining whether the procedure in question was inherently prejudicial, relying on the Court's position in *Holbrook*. Implied in this position is the notion that a violation of the presumption of innocence at trial creates inherent prejudice offensive to the due process notion of fair trial. Inherent prejudice is defined as anything likely to compromise the defendant's constitutional right "to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial."[107]

In this context the appellant asserted that the Iowa procedure "[l]ike Hester Prynnes's scarlet "A" . . . was a constant reminder that appellant was accused and presumed guilty of a loathsome crime."[108] Given this inherent prejudice, the question properly might be raised whether any "essential need" could ever balance the diminution of the presumption of innocence consistent with due process. Interestingly, the appellant, relying on *Holbrook*, was willing to accept the notion that diminution of the presumption could be balanced by essential need,[109] but maintained that such was not shown in *Coy*.[110]

Without resolution of this question, the rule of the Queen of Hearts is unlimited. If essential need can reduce the presumption of innocence in the instance of child witnesses, could not essential need also be shown for protecting a wide range of potential witness/victims "at risk," such as adult women, the elderly, or victims of physical violence? Indeed, is there any category of victims that would not justify the diminishing of the presumption of innocence in favor of the protection of the victim (or in fact society) from further harm (all without conviction)?

The suggestion that such questions do not raise significant presumption of innocence issues is not particularly shocking if it is realized that the death of the presumption of innocence at the trial itself was already foretold ten years earlier.

---

[107] Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

[108] Appellant's Brief, p. 16.

[109] *Id.*

[110] The existence of trial trauma for all child witnesses is disputed as a generalized matter. *See* Hochheiser v. Superior Court, 208 Cal. Rptr. 273, 161 Cal. App. 3d 777 (1984). *See also* Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 174-75 (1985); D. Runyan, *Impact of Legal Intervention on Sexually Abused Children* (paper presented to National Family Violence Research Symposium (July 7, 1987)).

In *Kentucky v. Whorton*,[111] the Court in 1978 considered whether the jury need, as a matter of constitutional law, be told that the presumption of innocence existed.[112] Despite the apparent direction of *Taylor*, decided just twelve months earlier, the Court in *Whorton* declared that the failure to give an instruction to the jury on the presumption of innocence was just one factor to be considered in the overall totality of the circumstances, and that "the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution."[113]

The presumption of innocence has certainly traveled a long road from the proclamation of *Coffin* that the presumption is "undoubted law" the enforcement of which "lies at the foundation" of our criminal law, to *Whorton*'s relegation of the presumption to constitutional insignificance. It may be a longer road yet to understand what, if anything, the presumption means on the day of trial.[114]

The unanswered question in *Coy* is just a glimpse into the future. It is but one example of issues within the trial process itself that give ample opportunity for abandoning the traditional value of the presumption of innocence in favor of the radically more restrictive view forged by the Court. While this article does not propose to be an exhaustive examination of the current posture of the presumption of innocence at the trial stage itself, it does serve as a background for noting that the concept of diminished presumption cannot, and is not, confined to the pretrial process.

V. CONCLUSION

Packer wrote in 1968 that the criminal process then in existence followed "fairly closely the dictates of the Crime Control Model."[115] Professor Packer believed, however, that the path of constitutional reform would

---

[111] 441 U.S. 786 (1979).

[112] In Taylor v. Kentucky, 436 U.S. 478 (1978), the Court appeared to recognize that due process required that a jury be instructed on the presumption of innocence. The Court considered the trial court's failure to grant a defense request that an instruction to the jury on the presumption of innocence be given. *Id.* at 485-86. Additionally, the prosecutor engaged in remarks of dubious propriety including suggestions that the jury infer guilt from the indictment and Taylor's status as a defendant. *Id.* at 486-88. The Court went on to find that the defendant was denied fair trial because of the failure to instruct the jury on the presumption. *Id.* at 490.

[113] 441 U.S. at 789.

[114] In *Taylor*, the Court took on the question of whether the presumption of innocence was subsumed by the burden on the state to prove guilt beyond a reasonable doubt. The Court stated, in response to the state's position that an instruction on the presumption is not needed where an instruction on guilt beyond a reasonable doubt is given, "even if the instruction on reasonable doubt had been more clearly stated, the Commonwealth's argument ignores both the special purpose of a presumption-of-innocence instruction and the particular need for such an instruction in this case." 436 U.S. at 488.

[115] H. PACKER, *supra* note 29, at 239.

result in the firm establishment of a Due Process Model; a model characterized by a "judicialization" of each stage, and an enhanced capacity on the part of defendants to challenge and defend at each stage.[116]

In the approximately twenty years that have passed since his prediction, there has indeed been change, but not the change that Packer foresaw. Instead, what has occurred, at least in the context of the presumption of innocence, is the reverse of Packer's proposed evolution. Like Alice stepping through the looking glass, the current concept of the presumption of innocence reflects not the time honored value of Blackstone's one innocent man, but instead holds forth the image of unpunished crime. Our judicial system appears now willing to sacrifice the well being of the innocent to insure the punishment of the guilty. Our impatience with due process as time consuming and inefficient has led to acceptance of guilt by accusation.

It took only the smallest of cracks in our traditional concept of innocence for the entire body of the presumption to crumble. The result has been to cast the meaning of the presumption into doubt and uncertainty.[117]

From a constitutional standpoint, the presumption of innocence has been relegated to an evidentiary rule barely distinguishable from the prosecution's burden of proving guilt beyond a reasonable doubt.[118] As

---

[116] *Id.*

[117] While it appears clear that the diminishing of the presumption of innocence has received constitutional sanction primarily in the period following Stack v. Boyle, 342 U.S. 1 (1951), the recognition of its shadowy nature at common law was noted in several early texts. In *Ten Years a Police Judge* (1884), an unknown author stated:

> The whole course of criminal procedure, from inception to close, is designed to shut out presumptions of innocence and invite presumptions of guilt. The secrecy of complaintmaking at the magistrate's office, the mysterious inquisition of the grand jury room, the publicity of the arrest, the commitment to the lock-up, the demand of bail, the delay of trial, the enforced silence of defence till prosecution has done its worst, are all so many steps and strokes to blacken the accused before he is permitted to open his mouth with a syllable of evidence to break the force of the damaging array of circumstances. To suppose that the presumption of innocence, which unbiassed [sic] nature prompts, is not before this time choked and strangled to death is an absurdity too gross to dispute.

9 J. WIGMORE, EVIDENCE 2511 (Chadbourn rev. 1981) (quoting ANONYMOUS, TEN YEARS A POLICE JUDGE, 207 (1884)), and C. MCCORMICK, EVIDENCE 805-06 (2d ed. 1972).

[118] In *Taylor*, the U.S. Supreme Court noted that the Kentucky Court of Appeals held that a defendant was not entitled to an instruction on the presumption of innocence "as long as the trial court instructs the jury on reasonable doubt." 436 U.S. 482, 483 (1978) (quoting State v. Taylor, 551 S.W.2d 813, 814 (1977)). The U.S. Supreme Court rejected the Kentucky Court's view, noting that scholars such as Wigmore, McCormick, and Thayer warned against abandoning the use of a separate instruction on the presumption of innocence because, in the words of Wigmore:

> [I]n a criminal case the term [presumption of innocence] does convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, 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.

Taylor v. Kentucky, 436 U.S. 478, 484-85 (1978) (quoting J. WIGMORE, *supra* note 117).

such it may legitimately be asked whether there is any value in continuing to pay lip service to what has essentially become an extinct notion.

Although this commentary on the fate of the presumption of innocence has looked at only three areas — pretrial detention, forfeiture of property, and trial setting — those three areas have formed the foundation of our traditional notion of due process. The cards are therefore plain to read, that a fundamental change in the notion of constitutional protection of the presumption of innocence has been wrought. Lewis Carroll's White Queen (presumably a sister of the Queen of Hearts) perhaps sums up the philosophy in her dialogue with Alice:

> *[T]here's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.*
>
> — *Lewis Carroll, Through The Looking Glass*