

VIRGINIA LAW REVIEW

VOLUME 104

JUNE 2018

NUMBER 4

ARTICLES

THE PRESUMPTION OF CIVIL INNOCENCE

*Hon. J. Harvie Wilkinson III**

The presumption of innocence represents a political and moral consensus that criminal defendants should not be subject to punishment until adjudicated guilty under a strict standard of proof. Although this concept has long been recognized as the hallmark of the criminal law, its potential application to civil proceedings has been largely neglected. Civil defendants enjoy no presumption of innocence. As a result, civil defendants are frequently subject to immense, unrecoverable costs prior to any real forecast or determination of liability. Legal blindness to these costs has produced a system in which civil plaintiffs enjoy tremendous procedural advantages at almost every stage of litigation, thereby virtually nullifying the presumption of innocence, which is grounded in practical and normative concerns.

As a practical matter, the presumption of innocence is designed to shield innocent defendants from the financial costs, personal disruptions, invasions of privacy, and general intrusions on individual dignity associated with litigation. As a philosophical matter, it is rooted in ideals of justice and liberty that have historically served to constrain the worst effects of state coercion. Finally, as a legal matter, the presumption intersects conceptually with various judicial doctrines, including due process, the law of personal jurisdiction, and

* Circuit Judge, United States Court of Appeals for the Fourth Circuit. I wish to express my appreciation to Yale Law School Professor Abbe Gluck for her most helpful comments on an earlier draft of this Article. I would also like to thank the members of the *Virginia Law Review* for their fine editorial suggestions. The views expressed herein are, of course, solely my own.

certain concepts familiar to the criminal law. All of these justifications for the criminal presumption apply with equal force to the civil system. A presumption of civil innocence is therefore essential to the development of a unifying conception of American law.

I. INTRODUCTION.....	590
II. THE PRESUMPTION OF CRIMINAL INNOCENCE.....	597
<i>A. History and Definition</i>	598
<i>B. Philosophical Justifications</i>	603
<i>C. Application in Criminal Procedure</i>	608
III. THE PRESUMPTION OF CIVIL INNOCENCE.....	612
<i>A. Philosophical Justifications and the Historical</i> <i>Presumption</i>	613
<i>B. The Advent of the Federal Rules</i>	621
<i>C. The Costs Imposed by the Modern Regime</i>	631
IV. TWENTY-FIRST CENTURY CIVIL PROCEDURE IN CONTEXT.....	643

I. INTRODUCTION

Law treats civil and criminal justice as differently as night and day. One system runs on one set of rules, the other on a very different track. Even if the Constitution does not provide a stark line of demarcation, the respective rules of federal civil and criminal procedure assuredly do. Yet it is often the very act and process of categorization that blinds us to linkages, in this case the lessons to be drawn from criminal law for the operation of our civil justice system.

The criminal justice system has one very basic thing to teach its civil counterpart: namely, that its presumption of innocence and its historic protection of human liberty applies to civil justice too. Not in every particular, of course, for there are differences between the two systems that cannot be overlooked or wished away. However, the underpinnings of the presumption of innocence in criminal law do not suddenly disappear when the conversation turns to civil justice. There is a larger congruence between the two systems than is commonly believed, and this Article will explore one—albeit one crucially important—area of overlap and congruity. Simply put, the presumption of innocence, so long a staple of our criminal law, must play a larger role in our concept of civil justice.

The sanctions at the command of the state in civil cases are no small matter. Any single sanction would be serious enough. Taken together, they are quite an arsenal. Like their criminal counterparts, civil defendants endure severe restrictions on personal liberty. Prior to any finding of culpability, the accused face the initial command of a summons, threat of a default judgment for nonresponsive behavior, intrusive discovery into sensitive business and personal records, and civil and criminal sanctions for contempt of court. And, upon judgment, they may face injunctions (a further infringement upon liberty), punitive damages (a form of punishment), or garnishment of wages. This list is illustrative only, but it is sufficient to emphasize that the kinship of the systems of civil and criminal justice systems is hardly obscure.

But somehow we have missed it. Perhaps we perceive the burdens on criminal defendants, and thus their need for protections, to be far greater because they face the greater loss of life or liberty as potential punishment. But it is the burden of *process*, not just of *outcome*, that should help calibrate protections in our justice system. Expanding regulation and extended discovery requests portend process obligations for the civilly accused. At some point, we must question the basis of our acceptance of such burdens. With *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*,² the Supreme Court took a modest, but hardly adequate, first step toward an overdue reevaluation.

These two cases are but the tip of the iceberg. The much larger submerged issue is whether our system of civil justice should explicitly embody a presumption of innocence. At long last, we are beginning to extend that presumption beyond the confines of the criminal justice system to embrace defendants of all stripes within its protections. Rather than offering incremental steps or piecemeal approaches, this Article tackles that project head-on. It seeks to transform the nascent presumption of innocence from a matter of judicial largesse in two Supreme Court decisions into an enshrined right belonging to criminal and civil defendants alike. This project is essential to the development of a unifying conception of American law.

I note *Twombly* and *Iqbal* only as battles in what will become a far larger future war. The intensity of the fighting over them presages what

¹ 550 U.S. 544 (2007).

² 556 U.S. 662 (2009).

lies ahead. The mention of *Twombly* and *Iqbal* to nonlawyers would induce glazed eyeballs. Inside the profession, however, the two cases have engendered impassioned debate.³ The decisions abandoned a highly relaxed pleading standard for civil litigation. Indeed, the prior standard embodied a presumption not of innocence but of guilt. How such a thing could exist in our land of liberty is perplexing, but it did. To escape liability, the defendant had to disprove charges of unlawful conduct presumed to be true. The reigning standard provided that a plaintiff's bare allegations would survive a defendant's motion to dismiss "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."⁴ The *Twombly* Court deposed this standard by instead requiring the plaintiff to make enough "[f]actual allegations . . . to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."⁵ Two years later, *Iqbal* made clear that a plausibility, rather than a possibility, standard did not apply just to complex antitrust complaints (the issue in *Twombly*) but trans-substantively to all civil litigation.⁶

These decisions have attracted wide, mostly negative, attention from courts and commentators alike.⁷ Each decision provoked spirited dissents. Justice Stevens accused the *Twombly* majority of "rewrit[ing] the Nation's civil procedure textbooks."⁸ In *Iqbal*, Justice Souter, who penned the *Twombly* opinion, tried desperately to limit its scope to those situations where the plaintiff was armed only with "naked legal conclusions" and the defendant's activities were "consistent with legal conduct."⁹

Critics in the academy have been no less aggressive.¹⁰ Indeed, after *Twombly* many legal commentators acted as if the Supreme Court had

³ See, e.g., Brian T. Fitzpatrick, *Twombly* and *Iqbal* Reconsidered, 87 Notre Dame L. Rev. 1621, 1621–22 (2012) (describing the scholarly debate engendered by the two cases as "withering").

⁴ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), abrogated by *Twombly*, 550 U.S. 544.

⁵ 550 U.S. at 555 (footnote omitted) (citations omitted).

⁶ See 556 U.S. at 684.

⁷ See Fitzpatrick, *supra* note 3, at 1622.

⁸ 550 U.S. at 579 (Stevens, J., dissenting).

⁹ 556 U.S. at 696–97 (Souter, J., dissenting).

¹⁰ See Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 Akron L. Rev. 1265, 1266 (2010).

“releas[ed] a live ferret amid the Federal Rules of Civil Procedure.”¹¹ One scholar accused the *Twombly* Court of “sid[ing] with the defendant, and . . . ignor[ing] the concerns of the private plaintiff.”¹² Another argued that “*Twombly* shrinks the domain of private plaintiffs and it does so without even a passing thought about what that will do to the overall level of antitrust enforcement.”¹³ A third claimed that *Twombly* undermines the very purpose of the modern rules of civil procedure:

Ultimately, *Twombly* raises the pleading bar to a point where it will inevitably screen out claims that could have been proven if given the chance. In doing so, the interests of protecting defendants against expensive discovery and managing burdensome caseloads were permitted to prevail over the interests of access and resolution on the merits that procedure’s original liberal ethos was designed to promote.¹⁴

Like-minded detractors accuse *Iqbal* of “[c]rash[ing] Rule 8 [p]leading [s]tandards on to [u]nconstitutional [s]hores.”¹⁵ Ultimately, according to these critics, *Twombly* and *Iqbal* have “destabilized the entire system of civil litigation.”¹⁶

It is remarkable that two rather technical decisions, whose practical effect is so difficult to gauge, unleashed such a torrent of criticism. There must be something else going on here. Attacks on *Twombly* and *Iqbal* reflect a broader contention that the Supreme Court’s civil procedure jurisprudence is moving in a markedly pro-defendant direction. For instance, both the Court’s Due Process Clause case law limiting personal jurisdiction¹⁷ and its forum non conveniens cases¹⁸

¹¹ Dahlia Lithwick, *The Attorney General Is a Very Busy Man*, *Slate* (Dec. 10, 2008, 7:12 PM), www.slate.com/articles/news_and_politics/supreme_court_dispatches/2008/12/the_attorney_general_is_a_very_busy_man.html [<https://perma.cc/89EG-GJ CZ>].

¹² Brian Thomas Fitzsimons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 *Rutgers L.J.* 199, 206 (2007).

¹³ Randal C. Picker, *Twombly*, *Leegin*, and the Reshaping of Antitrust, 2007 *Sup. Ct. Rev.* 161, 177.

¹⁴ A. Benjamin Spencer, *Plausibility Pleading*, 49 *B.C. L. Rev.* 431, 494 (2008).

¹⁵ Kenneth S. Klein, *Ashcroft v. Iqbal* Crashes Rule 8 Pleading Standards on to Unconstitutional Shores, 88 *Neb. L. Rev.* 261, 261 (2009).

¹⁶ Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 *Iowa L. Rev.* 821, 823 (2010).

¹⁷ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985).

have been denounced as “favoritism” and representative of an “excessive concern with protecting defendants through procedural safeguards.”¹⁹ The Court’s mid-1980s decisions on summary judgment have been characterized as “questionable pro-defendant outcomes.”²⁰ And the Supreme Court’s tightening of the standard for class certification in *Wal-Mart Stores, Inc. v. Dukes*²¹ has been described as “another demonstration of the Court’s willingness of late to place policy above principle in ways that restrict access to justice.”²²

But, of course, it is the defendant who stands accused. And, in our country, liberty demands that the accused possess rights that the accuser does not. Perhaps critics recognize that *Twombly* and *Iqbal*, along with other developments in the law of civil procedure, are harbingers of a different conception of civil justice, one that gives fuller account to the personal liberty of the civil defendant. Those cases establish a beachhead in territory long deprived of anything resembling a presumption of civil innocence. The Allies had a lot of fighting to do after June 6, 1944, but D-Day was the beginning. So too with *Twombly*, *Iqbal*, *Dukes*, and other recent advances. They herald a new day for American liberty by ushering in a renewed recognition of the presumption of innocence in the civil sphere.

That new day is sorely needed. The *ancien régime* gave short shrift to the interests of litigants who had never been adjudicated liable or even found likely to be adjudged culpable. Litigation—even when it ends in a judgment for the defendant—imposes tremendous costs at every stage. These burdens are more than just financial: civil defendants may face crippling reputational consequences and demoralizing dignitary harms. A medical malpractice²³ suit or a civil judgment for wrongful death²⁴

¹⁸ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

¹⁹ John Leubsdorf, *Constitutional Civil Procedure*, 63 *Tex. L. Rev.* 579, 608 (1984).

²⁰ Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 *Ohio St. L.J.* 95, 157 (1988); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

²¹ 564 U.S. 338 (2011).

²² A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 *B.U. L. Rev.* 441, 445 (2013).

²³ See, e.g., U.S. Dep’t of Health, Educ., & Welfare, *Medical Malpractice: Report of the Secretary’s Commission on Medical Malpractice 4* (1973) (“The malpractice problem is like a proliferation of cancerous cells which have spread throughout the health-care system. Its consequences, as noted by the President, are indeed profound.”).

inflicts far greater costs than a Class IV misdemeanor.²⁵ And university Title IX adjudications often impose lifelong stigmas on the accused absent any finding of guilt.²⁶ A presumption of civil innocence would require that a just system of procedure not casually shackle the coercive powers of courts on citizens. And, although this Article often emphasizes the rights of the accused, it is worth noting that dismissing unfounded and speculative suits earlier rather than later in the game would promote the expeditious and conscientious consideration of those remaining cases where plaintiffs may well deserve to prevail.

Divided decisions like *Twombly* and *Iqbal* cannot, unfortunately, accomplish this goal by themselves. Left to stand alone, *Twombly* and *Iqbal* may be worn away in the face of dogged resistance. The Supreme Court cannot police every deviant lower court decision, and its pronouncements alone cannot change longstanding habits and preferences. Anchoring *Twombly* and *Iqbal* in the very bedrock of civil procedure—the Federal Rules—may help promote compliance by the lower courts and foster a wider cultural acceptance of civil innocence. But that, too, is not enough. The near-universal rule that the plaintiff, not the defendant, bears the burden of proof is also constructive, but insufficient. These discrete proposals represent important but ultimately insufficient steps toward establishing an explicit presumption of civil innocence. Ultimately, civil liberty will be vindicated only when that presumption is woven into our broader social fabric and understandings. That basic principle of liberty is at stake.

I do not of course advocate that the civil and criminal justice systems should become identical twins. I would not, for example, want to abandon the preponderance-of-the-evidence standard so prominent in civil litigation in favor of the reasonable doubt standard that guides

²⁴ See, e.g., Christie D’Zurilla, Bobbi Kristina Brown’s Partner, Nick Gordon, Ordered to Pay \$36 Million in Wrongful Death Lawsuit, L.A. Times (Nov. 17, 2016, 4:05 PM), <http://beta.latimes.com/entertainment/gossip/la-et-mg-nick-gordon-bobbi-kristina-brown-20161117-story.html> [<https://perma.cc/VWE8-RR4>] (reporting a \$36 million wrongful death judgment).

²⁵ See Diane DePietropaolo Price et al., Nat’l Ass’n of Criminal Defense Lawyers, Summary Injustice: A Look at Constitutional Deficiencies in South Carolina’s Summary Courts 7–9, 21 (2016) (describing the costs of misdemeanor prosecutions).

²⁶ See Jacob Gersen & Jeannie Suk, The Sex Bureaucracy, 104 Cal. L. Rev. 881, 935–46 (2016); Jed Rubenfeld, Mishandling Rape, N.Y. Times (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>.

criminal justice. My hope is rather that the recognition of a presumption of civil innocence will bring the two systems closer together. Just as the criminal justice system has much to teach the civil justice system through its presumption of innocence, so too would the recognition of civil innocence give us a renewed appreciation for the existence of those safeguards protecting the criminally accused. In other words, there is no reason the two systems cannot be dialogic, the upshot of which would be the need for interim protections of innocence as the litigation process in each system moves along and the presumption of innocence emerges in full regalia at the end.

The remainder of this Article proceeds as follows. Part II provides a brief overview of the presumption of innocence in the criminal justice system and explores its historical and philosophical foundations. Part III discusses how many of those same philosophical justifications underpin the civil justice system. In particular, it focuses on the development of Anglo-American federal civil procedure, with an eye toward how the presumption of innocence had once been featured in civil litigation but was overlooked in the middle years of the twentieth century. It discusses the infringements on personal liberty associated with litigating a case, focusing on the ease with which twentieth-century civil procedure allowed one party to harness the coercive power of the state against another prior to any probabilistic forecast of liability. Finally, Part IV examines how further developments in civil procedure may yet realize aspects of the presumption of civil innocence. It argues that the Federal Rules of Civil Procedure ought to be amended to explicitly incorporate a presumption of civil innocence. By augmenting this explicit presumption with additional amendments incorporating some of the Court's most salient interpretations of particular rules, and by taking advantage of the opportunities in the amendment process for public comment and enhanced democratic legitimacy, the Federal Rules may put the presumption of civil innocence upon a surer footing.

It is sad, really, that acceptance of something so basic, indeed civilized, as a presumption of innocence in a legal proceeding should be so controversial. But that is where we are. For too long, the civil litigation system has been treated as a means for two feuding parties to hash out their disagreement before a neutral third-party arbiter. But this conception largely ignores the fact that the system allows one of those parties the ability to set in motion, through the judiciary, highly intrusive

public powers against other litigants who are dragged through court proceedings against their will without any probabilistic or even plausible showing of wrongdoing. Explicit recognition of a presumption of civil innocence will help to temper the subliminal sense to which, unfortunately, we are all sometimes prone—that the truth lies in the accusation. Civil practice has changed dramatically in the eighty years since the Federal Rules of Civil Procedure were first promulgated. It should come as no surprise that our doctrines will have to adjust if they are to continue to fulfill the Rules’ transcendent command that they be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”²⁷

II. THE PRESUMPTION OF CRIMINAL INNOCENCE

Lawyers today are most familiar with the presumption of innocence as a criminal law concept. The criminal justice system pits the defendant directly against the power of the state to impose the judgment of the people upon the defendant’s criminal conduct. With reputation, liberty, and at times even life on the line, every legal and moral precept counsels caution in bringing down the hammer of justice on a criminal defendant. Civil litigation, which typically features a private plaintiff as well as a defendant and no risk to life or limb, may at first seem to involve lower stakes and hence to be a more “civil” arena.

However, the court system was not always so starkly divided between criminal and civil matters. Going back to ancient history, parties asked the state to intervene and right some wrong committed by another.²⁸ Whether that claim was an affront arising out of some relationship between the parties—resembling our civil injuries—or an affront to civilized society—today codified as crimes—mattered less than the fact that the party sought the state’s aid in bringing the situation to a just resolution. The principle that the power of the state should not fall onto the accused party without a demonstration of guilt originated early in this system.²⁹

²⁷ Fed. R. Civ. P. 1.

²⁸ See Carol S. Steiker, Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 *Geo. L.J.* 775, 782 (1997).

²⁹ See Rinat Kitai, Presuming Innocence, 55 *Okla. L. Rev.* 257, 260–63 (2002).

Today the system is divided between criminal and civil litigation, and the rights and duties of the respective parties vary considerably depending on the forum. The presumption of innocence as applied to criminal law cannot simply be transplanted wholesale into the civil system. However, the principle underlying the presumption—that the state’s power cannot simply be deployed against someone without showing just cause, thereby presuming the party “innocent” *ab initio*—applies equally to both. It thus behooves us to examine first the history, development, and philosophical bases of the principle as we are most familiar with it, in the criminal justice system, before turning to its application in the civil context.

A. History and Definition

The presumption of innocence has a lengthy historical pedigree. Of course, it is impossible to describe one prototypical ancient legal regime. Historical legal systems have varied considerably. Some bore the hallmarks of totalitarianism: minimal inquiry followed by maximum punishment. However, many recognized the grave inherent danger of assigning guilt by accusation. A French jurist, Johannes Monachus, seems to have coined the maxim around the turn of the fourteenth century: “a person is presumed innocent until proven guilty (*item quilbet presumitur innocens nisi probetur nocens*),”³⁰ but the presumption’s roots lay in Genesis. When Adam ate the forbidden fruit, God’s punishment was not immediate. Rather, God summoned Adam, who in turn passed the blame to Eve. If God could not presume the guilt of Adam, then mortal authorities cannot presume the guilt of any person accused of a crime.³¹ Another continental jurist had made this biblical connection even earlier in the middle of the twelfth century (without arriving at the concise phraseology of Monachus), drawing as well on the rule in Deuteronomy that a man may not be condemned by the word of only a single witness.³² Elsewhere, the famous medieval Jewish scholar Moses Maimonides interpreted the admonition in Exodus that

³⁰ Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 *Jurist* 106, 115 (2003).

³¹ *Id.* at 113–15.

³² *Id.* at 113.

“the innocent and righteous slay thou not” as an admonishment against executing an accused person absent overwhelming evidence of guilt.³³

The Bible cannot claim to be the sole originator of the presumption, however. It arguably can be found at work in the nearly 4,000-year-old Babylonian Code of Hammurabi, in which an accuser could be put to death if he did not prove the crime he charged.³⁴ Roman law, too, required the accuser to provide evidence of the defendant’s crime.³⁵ The Roman and Judeo-Christian legal traditions in this area were complementary. The code of the Byzantine Emperor Justinian, a Christian, required that criminal accusations be “shown to be true by undoubted testimony clearer than light.”³⁶ That rule comports with both biblical and Roman conventions.

From these veritably ancient foundations, the presumption emerged in the English common law probably around the same time it entered the continental civil law. The thirteenth-century English jurist Henry de Bracton wrote that “it is presumed respecting every person that he is a good man, until the contrary is proved” (“*de quolibet homine præsumitur, quod sit bonus homo, donec probetur in contrarium*”).³⁷ The principle occupied a place not just in the courts, but in the mores of popular culture, as demonstrated “by its use in various plays and farces” and in a book of proverbs.³⁸ Often, the idea was communicated in terms of how many guilty people may be left unpunished in order to avoid punishing a single innocent person. As a fifteenth-century English judge wrote, “Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally.”³⁹ William Blackstone in his

³³ Alexander Volokh, *n* Guilty Men, 146 U. Pa. L. Rev. 173, 178 (1997).

³⁴ See Code of Hammurabi § 3, *in* Robert Francis Harper, *The Code of Hammurabi, King of Babylon* 11 (1904); François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 Am. J. Comp. L. 107, 110–11 (2010).

³⁵ See Quintard-Morénas, *supra* note 34, at 111–12.

³⁶ Code Just. 4.19.25, *in* 13 S.P. Scott, *The Civil Law* 3, 36 (2d ed. 1932); Quintard-Morénas, *supra* note 34, at 111–12, 111 n.25.

³⁷ 3 Henrici de Bracton, *De Legibus et Consuetudinibus Angliæ* [On the Laws and Customs of England] 250–51 (Travers Twiss ed., Kraus Reprint Ltd 1964) (1880); Quintard-Morénas, *supra* note 34, at 124.

³⁸ Quintard-Morénas, *supra* note 34, at 124.

³⁹ John Fortescue, *De Laudibus Legum Angliæ* [In Praise of the Laws of England] 94 (Francis Gregor trans., Cincinnati, Robert Clarke & Co. 1874) (c. 1470); Volokh, *supra* note 33, at 182; see also 2 Matthew Hale, *Historia Placitorum Coronæ* [The History of the Pleas

Commentaries on the Laws of England assigned the number of guilty persons who are to go free at ten,⁴⁰ and owing to his influence and fame, ten-to-one has become known as the Blackstone ratio.⁴¹

And, from England, the presumption came to America. As early as 1866, the Supreme Court recognized that “the presumptions of innocence, . . . under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable.”⁴² Near the end of the nineteenth century, the Court proclaimed in *Coffin v. United States* that the presumption “is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”⁴³ The Court looked to case law, history, and treatises, drawing not just upon American law and English antecedents, but also Roman law.⁴⁴ The conclusion was “that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation.”⁴⁵ And regardless of the precise character of its historical expressions, the presumption of innocence has assumed worldwide significance in the modern legal firmament. It is endorsed, in at least some form, by the majority of judicial systems.⁴⁶ It can be found in the United Nations Declaration of Human Rights⁴⁷ in addition to the European Convention

of the Crown] *288 (Philadelphia, Robert H. Small 1st Am. ed. 1847) (expressing that “it is better five guilty persons should escape unpunished, than one innocent person should die”).

⁴⁰ See 4 William Blackstone, *Commentaries* *352 (“[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”).

⁴¹ See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 *Harv. L. Rev.* 1065, 1077–81 (2015); William S. Laufer, *The Rhetoric of Innocence*, 70 *Wash. L. Rev.* 329, 333 n.17 (1995); Volokh, *supra* note 33, at 174; see also James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 *Yale L.J.* 185, 187 (1897) (“They all mean the same thing, differing simply in emphasis—namely, that it is better to run risks in the way of letting the guilty go, than of convicting the innocent.”).

⁴² *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 328 (1866).

⁴³ 156 U.S. 432, 453 (1895).

⁴⁴ See *id.* at 454–59. *Coffin*’s historical account has been subject to both subtraction and addition. See, e.g., Pennington, *supra* note 30, at 108 (“[*Coffin*’s] analysis is a dazzling display of legal history—even if most of it is wrong.”).

⁴⁵ *Coffin*, 156 U.S. at 456 (quoting *McKinley’s Case*, 33 *St. Tr.* 275, 506 (1817) (HCJT) (Lord Gillies, dissenting)).

⁴⁶ See Kitai, *supra* note 29, at 260; Larry Laudan, *The Presumption of Innocence: Material or Probatory?*, 11 *Legal Theory* 333, 333 (2005).

⁴⁷ G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, art. 11 (Dec. 10, 1948).

for the Protection of Human Rights.⁴⁸ It retains enduring importance in the American legal scheme. The Supreme Court has recognized it as “a basic component of a fair trial.”⁴⁹ One modern commentator has even remarked that “there are few maxims that have a greater resonance in Anglo-American, common law jurisprudence.”⁵⁰

But what does it *mean* to be presumed innocent? The Court in *Coffin* thought of the presumption as “evidence in favor of the accused” or “one of the instruments of proof,” whereas the reasonable-doubt standard represents “the condition of mind produced by the proof resulting from the evidence.”⁵¹ But the Court turned away from that formulation in the 1970s. At the beginning of that decade, the Court referred to the reasonable-doubt standard as “concrete substance for the presumption of innocence.”⁵² In 1976, the Court added that the presumption required that courts “be alert to factors that may undermine the fairness of the fact-finding process.”⁵³ Finally, three years later in *Bell v. Wolfish*, the Court elaborated that “[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial.”⁵⁴ Gradually, the Court came to see the presumption of innocence as essentially an allocation of the burden of proof to the government, with specific rules such as the reasonable-doubt standard serving as manifestations or applications of the presumption in practice.

This reflects Professor James Bradley Thayer’s critique of *Coffin*.⁵⁵ The presumption is not a rule of evidence, Thayer stressed.⁵⁶ Rather, “it is merely one form of phrase for what is included in the statement that an accused person is not to be prejudiced at his trial by having been charged with crime and held in custody, or by any mere suspicions,

⁴⁸ Pennington, *supra* note 30, at 106.

⁴⁹ *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

⁵⁰ Pennington, *supra* note 30, at 106.

⁵¹ *Coffin*, 156 U.S. at 460.

⁵² *In re Winship*, 397 U.S. 358, 363 (1970).

⁵³ *Estelle*, 425 U.S. at 503.

⁵⁴ 441 U.S. 520, 533 (1979).

⁵⁵ See generally James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* app. B at 551–76 (Boston, Little, Brown, & Company 1898) (providing Thayer’s view on the presumption of innocence in criminal cases).

⁵⁶ See *id.* at 560–63.

however grave.”⁵⁷ The reasonable-doubt standard is “a supplementary proposition as to the weight of evidence” that accompanies what is essentially an allocation of the burden to the government.⁵⁸ Crucially, Thayer’s definition recognized that a “mere presumption” does not come packaged with a standard for weighing the evidence.⁵⁹ The evidentiary standard is a related, but separate, legal device, which determines how “strong” the presumption is in its application.⁶⁰ In criminal cases, the presumption of innocence can be overcome only by proving guilt beyond a reasonable doubt, which, though short of absolute certainty, is the strongest standard of proof in Anglo-American law.⁶¹ In coupling the reasonable-doubt standard with the presumption of innocence, the American system has created a powerful bulwark against government intrusions on individual liberty.

I believe that Thayer’s formulation of the presumption, which the Supreme Court has in essence endorsed, is too narrow. The presumption does not lay dormant before the *final* judgment. It acts as well to limit the unjust imposition of costs and restrictions *before* the ultimate determination of guilt. That does not mean that *Wolfish* was wrongly decided. Far from it. In that case, the Court faced claims that the conditions of detention of criminal defendants before trial were unconstitutional. The unanimous Court framed the “inquiry [as] whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”⁶² Because there is probable cause to believe that the defendant has committed a crime, the defendant may suffer an infringement of his liberty by being detained, but he cannot suffer “punishment” until adjudicated guilty.⁶³ This is an implicit recognition by the Court that the state must justify its

⁵⁷ Id. at 565.

⁵⁸ Id. at 558.

⁵⁹ See id. at 576.

⁶⁰ See id.

⁶¹ See *McKinley’s Case*, 33 St. Tr. 275, 506 (1817) (HCJT) (Lord Gillies, dissenting) (“I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty.”).

⁶² *Wolfish*, 441 U.S. at 535.

⁶³ See id. at 535–37.

imposition of burdens on the defendant throughout the criminal process, not just during the weighing of evidence at the end of trial.

As discussed in more detail below, the presumption of innocence is fundamentally a principle of individual liberty. Blackstone's principle, with its explicit weighing of the value of wrongful convictions against that of erroneous acquittals, demonstrates how the presumption may be extrapolated from the individual case to the statistics of society.⁶⁴ But regardless of whether Blackstone's principle is a useful maxim in its own right—some scholars have thoughtfully critiqued it⁶⁵—the presumption itself centers at every stage and at all times on the relationship between the state and the individuals on whom the state's coercive power acts through the vehicle of courts and law.

B. Philosophical Justifications

The history of the presumption of innocence reflects certain philosophical considerations. These justifications typically sound in libertarian conceptions of individual autonomy and opposition to state coercion. Both courts and scholars have “repeatedly affirmed that an individual's liberty interest [is] valued over society's interest in obtaining a conviction.”⁶⁶ The presumption of innocence, which reflects this priority, essentially represents a presumption of *liberty*: it preserves an individual's right to continue to enjoy his freedom until a conviction has been obtained.⁶⁷ Although the presumption is embodied in law, it is law that recognizes freedom as a natural right. The presumption thus represents a normative “commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom

⁶⁴ See Epps, *supra* note 41, at 1094 (claiming that a proper analysis of the Blackstone principle is one that addresses its impact not merely on the individual, but rather on the criminal justice system as a whole).

⁶⁵ See, e.g., *id.* at 1067; Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* 1–4 (2006) (arguing that acquitting the guilty and condemning the innocent may be equally negative outcomes epistemically).

⁶⁶ Laufer, *supra* note 41, at 332–33.

⁶⁷ Cf. *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978) (describing the presumption of innocence as “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’”).

and respect as an innocent member of the community.”⁶⁸ The presumption ensures that an individual’s personal liberty will be disrupted only if the government has demonstrated its case beyond a certain threshold. As the threat to the defendant’s liberty becomes more serious—from the investigative process to the jury deliberation—the standard of proof rises higher. The presumption is the same, but as the costs to the defendant become more onerous, so too does the state’s burden in justifying those costs.

Along similar lines, the presumption finds support in robust conceptions of human dignity.⁶⁹ As one scholar argues, the presumption of innocence “rests on a deontological moral theory, which prohibits sacrificing the individual for the sake of general utility, viewing her as an end in and of herself.”⁷⁰ In other words, a human being is worthy simply by being human. The presumption recognizes that social concerns with efficiency or crime prevention⁷¹ are insufficient to warrant penalizing an individual without first requiring her accuser to prove his case in court. Whether the presumption enjoys empirical support from a utilitarian standpoint is irrelevant from this perspective:

The presumption retains force not as a *factual* judgment, but as a *normative* one—as a judgment that society *ought* to *speak* of accused men as innocent, and *treat* them as innocent, until they have been properly convicted after all they have to offer in their defense has been carefully weighed. The suspicion that many are *in fact* guilty need not undermine either this normative conclusion or its symbolic expression through trial procedure⁷²

The presumption thus arises from a specific rule-based *morality*. That approach may seem somewhat passé in contemporary legal culture, but it is an accurate description of much of the reasoning and instinct supporting the presumption of criminal innocence: it is morally unjust

⁶⁸ Laurence H. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 404 (1970).

⁶⁹ See Kitai, *supra* note 29, at 283–84; Liat Levanon, Sexual History Evidence in Cases of Sexual Assault: A Critical Re-Evaluation, 62 U. Toronto L.J. 609, 633 (2012).

⁷⁰ Kitai, *supra* note 29, at 282.

⁷¹ See *id.* at 269–70.

⁷² Laurence H. Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1371 (1971).

for the state, as the representative of the people, to impose costs on a defendant before the applicable procedure has been followed and the applicable burden of proof has been met.

This solicitude for individual autonomy is complemented by a suspicion of state coercion. The criminal process presents countless opportunities for prosecutorial overreach, which the presumption operates to reduce and limit.⁷³ It helps to minimize, for instance, the extent to which mere accusation can be used to deprive a defendant of his reputation, his freedom, or his property. This, in turn, permits individuals to structure their conduct according to their legal obligations with the reasonable certainty that they will not be penalized unjustifiably.⁷⁴ The presumption of innocence, by tagging actual punishment to a conviction, thus increases the regularity and predictability of the law. As the Supreme Court has observed, it is “important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.”⁷⁵

We also may conceive of the presumption of innocence as reflecting a “partnership between the individual and the State.”⁷⁶ By affording defendants the benefit of the doubt, the presumption arguably tempers the hostile aspects of the legal process. In other words, it “contributes to diminishing the sense of humiliation, rejection, and alienation that exist on the normative level (and in many instances on the empirical level) when the State treats a person as if she were guilty.”⁷⁷ In this light, the presumption serves not only to limit the ability of the state to mistreat its citizens, but affirmatively promotes a positive relationship between citizens and their government. Because the costs the state imposes on defendants as a result of guilty verdicts are so high, the standard of proof in turn must be high in order “to command the respect and confidence of the community in applications of the criminal law.”⁷⁸

⁷³ See Levanon, *supra* note 69, at 634.

⁷⁴ Tribe, *supra* note 68, at 394–95.

⁷⁵ *In re Winship*, 397 U.S. 358, 364 (1970).

⁷⁶ Kitai, *supra* note 29, at 281–82.

⁷⁷ *Id.*

⁷⁸ *In re Winship*, 397 U.S. at 364.

The presumption also reflects theological claims about human nature and philosophical considerations related to liberty and individual dignity,⁷⁹ as one might expect considering the history of medieval jurists drawing the presumption from the Bible's teachings. Many religious scholars have linked the presumption to man's (allegedly) original moral perfection.⁸⁰ Christian metaphysics, in particular, centers on "a belief that human beings, created in the image of God, are good by nature."⁸¹ Religious theorists contend that the presumption of innocence is consistent with this theological claim insofar as it "considers a person to be a moral and responsible agent who is capable of fulfilling duties imposed on him by suppressing his instinctive impulses."⁸² Although religious principles of this variety have not played a notable role in American jurisprudence, they are still useful in understanding the broad array of influences that have given the presumption of innocence its vitality over the centuries.

Finally, although the presumption of innocence in Anglo-American law has a fundamentally normative nature, it is not without support in a rough balance of relative costs and benefits: the disutility of a wrongful conviction is invariably severe and acute, whereas the harm associated with a mistaken acquittal may be more diffuse.⁸³ Wrongful convictions impose immense costs on the accused, not only in terms of imprisonment or fines but also in the form of social and legal stigma.⁸⁴ Mistaken acquittals, in contrast, frequently impose indirect costs on society, but only rarely inflict the type of life-altering harm present in the case of a wrongful conviction. This point may of course be overstated; for the previous and future victims of crime, the harms may not be diffuse at all.⁸⁵

⁷⁹ See *supra* Section II.A.

⁸⁰ See, e.g., Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 *Am. J. Juris.* 229, 261 (1996) ("[I]f one subscribes to the proposition (as does St. Thomas Aquinas) that Man's beginnings are perfect and Good, then it is only right to presume a man accused of a crime possesses the same innocence that he possessed in his original state.").

⁸¹ Kitai, *supra* note 29, at 266 & n.57.

⁸² *Id.* at 266.

⁸³ See, e.g., Epps, *supra* note 41, at 1088–89; Volokh, *supra* note 33, at 193.

⁸⁴ *In re Winship*, 397 U.S. 358, 363 (1970).

⁸⁵ See Epps, *supra* note 41, at 1130–31 (arguing that the diffuse harm justification for the Blackstone principle does not survive scrutiny).

This debate over (dis)utility, however, seems more relevant to what specific standards and rules we should apply in particular situations rather than whether there is a presumption of innocence to begin with. For example, one must have probable cause rather than no reasonable doubt for searches, seizures, and arrests,⁸⁶ because the costs resulting from those actions, while high, are less than the costs imposed by a guilty verdict. But the presumption exists in both contexts. The use of the lower standard is evidence that the presumption is stronger when applied to criminal adjudication than criminal investigation. Whether the utilitarian exchange rate of erroneous acquittals to wrongful convictions is truly ten-to-one tells us more about how strong the presumption should be in the context of a criminal trial than it does about whether there is a presumption of innocence at all.

Nevertheless, whichever direction the utilitarian wind blows, the central justifications rooted in individual liberty and dignity hold a steady course. This much will forever be clear: conviction of the innocent is widely considered a more unjust outcome than acquittal of the guilty. The correlative principle can also be strongly stated: coercive state power should not be applied against individuals in the absence of some strong showing of guilt. Although this concept should be intuitive, it often can be lost in the foggy marshlands of law, politics, and our society's emphasis on results rather than process. The presumption of innocence is fundamentally a principle of process, not of results. It is closely related to the principles underlying the Due Process Clauses of the Fifth and Fourteenth Amendments: the state may not impose costs—it may not “deprive any person of life, liberty, or property”⁸⁷—without first going through a particular process. Because every person is presumed to be innocent, the state may not impose costs on an individual arbitrarily. This basic meaning of due process as a non-arbitrariness principle is one of the many moral, religious, constitutional, and even practical threads underlying the presumption of innocence.

⁸⁶ U.S. Const. amend. IV.

⁸⁷ U.S. Const. amend. XIV, § 1; see also *id.* amend. V (stating that persons shall not “be deprived of life, liberty, or property, without due process of law”).

C. Application in Criminal Procedure

The reasonable-doubt standard is not the only application of the presumption of innocence in the criminal sphere. In fact, the presumption animates both the pretrial and trial stages of a criminal proceeding, acting as a shield throughout the entire process, protecting defendants at every stage. It attaches even before the government brings a charge against an individual. Indeed, “attach” may be a misnomer because the presumption operates as a background principle for all criminal investigations, regardless of whether a particular individual has been identified by the state as a suspect or person of interest. We thus may view many facets of American criminal procedure, not just trials, through the lens of the presumption of innocence.

The Fourth Amendment operates as a first level of defense for criminal suspects, serving to protect potential defendants from burdensome intrusions imposed by the investigatory process. The probable-cause requirement “seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.”⁸⁸ The existence of the probable-cause standard as a barrier between the state and the individual’s “houses, papers, and effects”⁸⁹ demonstrates the work done by the criminal presumption of innocence even before the state begins formal criminal procedures.

The probable-cause standard is fortified by the Fourth Amendment’s command that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.”⁹⁰ “The manifest purpose of this particularity requirement” is to “ensure[] that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.”⁹¹ The Founding Generation so despised general warrants because a general license to disrupt, bully, and prosecute individuals without justified suspicion runs directly counter to the presumption of innocence. The Virginia Declaration of Rights was typical in its belief that general

⁸⁸ *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

⁸⁹ U.S. Const. amend. IV.

⁹⁰ *Id.*

⁹¹ *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

warrants “are grievous and oppressive, and ought not to be granted.”⁹² Even if the Fourth Amendment’s intended purpose was to provide an opportunity for government agents to obtain immunity from suit through a warrant before they went searching or seizing,⁹³ the judiciary alone is given the final power and responsibility to decide whether probable cause exists. The exceptions to the warrant requirement for various forms of exigency do not disprove the presumption of innocence. Rather, they demonstrate that the presumption is not an impregnable wall; instead, it serves as a weighty thumb on the scale of the individual versus the state.

The grand jury requirement operates as a second manifestation of the presumption of criminal innocence prior to any ultimate verdict or judgment. The Fifth Amendment provides that, subject to a few narrow exceptions, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”⁹⁴ The grand jury determines whether there is probable cause to indict and thus whether it is justifiable to subject an individual to the costs of trial. Crucially, grand jury hearings are secret. While secrecy arouses suspicion, it also helps prevent to the extent possible reputational harm to individuals who are investigated by a grand jury, but whom the grand jury ultimately does not charge. In all of this, the grand jury serves “a vital function . . . as a check on prosecutorial power,”⁹⁵ by “prevent[ing] harassment and intimidation and oppression through unjust prosecution.”⁹⁶

Of course, the grand jury is, in its current form, far from perfect. Many commentators have criticized it as insufficiently independent to serve as an effective check on prosecutors,⁹⁷ in part because it is

⁹² Va. Declaration of Rights § 10 (1776), reprinted in 1 *The Founders’ Constitution* 6 (Philip B. Kurland & Ralph Lerner eds., 1987); see also *Henry v. United States*, 361 U.S. 98, 100–01 (1959) (citing the Virginia Declaration of Rights and other framing-era documents).

⁹³ See *United States v. Jones*, 565 U.S. 400, 404–08 (2012); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 593–96 (2009); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 774 (1994).

⁹⁴ U.S. Const. amend. V.

⁹⁵ *United States v. Cotton*, 535 U.S. 625, 634 (2002).

⁹⁶ *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring specially).

⁹⁷ See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *Iowa L. Rev.* 393, 423 (2001); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 *Am. Crim. L. Rev.* 1, 30 (2004).

comprised of lay citizens who lack the requisite legal training and experience and, in larger part, because the prosecutor runs the show.⁹⁸ In academic circles it has been called “the laughingstock of American criminal procedure.”⁹⁹ But these alleged defects do nothing to undermine the grand jury’s conceptual place in our criminal justice system. It represents a recognition that, absent some probabilistic showing of guilt, individuals should not be required to run the gauntlet of a coercive adjudicatory procedure that—regardless of outcome—will negatively impact their liberty, property, and reputation.

Another important way in which our criminal justice system attempts to implement the presumption of innocence prior to an adjudication of guilt is through prompt trials. The Sixth Amendment guarantees a speedy trial, thus limiting the amount of time the government can wait between filing charges against an individual and bringing that individual to trial. The Supreme Court has identified numerous justifications for such a requirement, of which two in particular are relevant here. The first is that “[t]he pendency of the indictment may subject [the defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.”¹⁰⁰ The second is that “this oppression” brings “anxiety and concern accompanying public accusation.”¹⁰¹ In short, an unwarranted delay in a trial imposes real costs on a criminal defendant beyond what has been justified by the indictment. The presumption of innocence thus seeks to shorten the time that the shadow of guilt hangs over a defendant’s life.

The Federal Bail Reform Act,¹⁰² which “governs release and detention determinations in federal criminal proceedings,”¹⁰³ contains a presumption in favor of pretrial release. The Act provides that a “judicial officer shall order the pretrial release of the person on personal recognizance, or upon [bail] . . . , unless the judicial officer determines

⁹⁸ See, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 *Cornell L. Rev.* 260, 294 (1995).

⁹⁹ Kevin K. Washburn, *Restoring the Grand Jury*, 76 *Fordham L. Rev.* 2333, 2352 (2008).

¹⁰⁰ *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

¹⁰¹ *Id.* (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)) (internal quotation marks omitted).

¹⁰² 18 U.S.C. §§ 3141–3150 (2012).

¹⁰³ *Bail*, 41 *Geo. L.J. Ann. Rev. Crim. Proc.* 340, 341 (2012).

that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”¹⁰⁴ Indeed, this presumption has a long pedigree, extending back to the Judiciary Act of 1789.¹⁰⁵ As the Supreme Court has recognized, traditionally federal law “unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail.”¹⁰⁶ Bail is also generally available in the states. And, where bail is available, the Eighth Amendment¹⁰⁷ ensures that the government cannot make its terms so onerous as to be “excessive.”¹⁰⁸

There are numerous justifications for bail, several of which overlap with the justifications for the presumption of innocence. The Court has defended bail, for instance, by noting that “[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.”¹⁰⁹ These justifications intend to minimize the costs of trial to a defendant. They likewise serve the larger goal of not imposing costs before a *fair* adjudication of culpability, since a trial for which the defendant has not had a chance to properly prepare cannot be considered a fair one. It is little wonder that the Supreme Court has recognized that, “[u]nless this right to bail before trial is preserved, the *presumption of innocence*, secured only after centuries of struggle, would lose its meaning.”¹¹⁰

Of course, bail is not categorically available. The government may impose pretrial detention if the court finds, by clear and convincing evidence, that such detention is necessary to ensure the safety of the community.¹¹¹ This is a commonsense recognition that “the

¹⁰⁴ 18 U.S.C. § 3142(b).

¹⁰⁵ Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91–92. (“And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”).

¹⁰⁶ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

¹⁰⁷ The Eighth Amendment applies to both the states and the federal government. See *Baze v. Rees*, 553 U.S. 35, 47 (2008).

¹⁰⁸ U.S. Const. amend. VIII.

¹⁰⁹ *Stack*, 342 U.S. at 4.

¹¹⁰ *Id.* (emphasis added).

¹¹¹ See 18 U.S.C. § 3142(d) (2012).

Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."¹¹² Nor is it unreasonable to deny bail when the court concludes that the defendant presents a risk of flight. This reality, however, does not undermine the basic principle that excessive bail and prolonged pretrial detention are not compatible with a presumption of innocence.

One could go on. The double-jeopardy guarantee, for instance, applies even more than a simple presumption of innocence after acquittal. But the point is that the presumption of innocence is a ubiquitous principle in criminal procedure, not just some maxim pronounced by a judge in final instructions to a jury. To be sure, the presumption is just that—a presumption. Still, it matters. Many trial rights, such as confrontation, lose their force at sentencing when the presumption no longer applies.¹¹³ Because the presumption is not an absolute, it should not silence debate over whether police searches, grand jury procedures, plea-bargaining practices, pretrial release, and many other features of criminal justice are implemented in a manner that gives the presumption genuine substance. Conceptually, however, the presumption remains the foundational principle of American criminal justice. That being the case, it becomes terribly hard to explain why a principle of such power in criminal justice should lose its meaning in a civil setting.

III. THE PRESUMPTION OF CIVIL INNOCENCE

The presumption of criminal innocence is well known. It is manifest not only in many different facets of the criminal law but in the culture more broadly. The concept is familiar even to non-lawyers. Nearly everybody can recite the familiar maxim: "All persons are innocent until proven guilty."

But there is no comparable recognition of a presumption of *civil* innocence. Lawyers speak of burdens and standards of proof, laymen of government power and fairness. But hardly anyone speaks of a presumption of civil innocence. To be sure, lawyers wrestle with the notion of due process in the civil sphere. What is missing is a concept for *why* process is due in the application of civil law. Where is the idea that strikes the balance between fairness to individuals and assertions of

¹¹² *United States v. Salerno*, 481 U.S. 739, 748 (1987).

¹¹³ See *Williams v. New York*, 337 U.S. 241, 251–52 (1949).

governmental power, the idea that drives our standards and burdens of proof?

The presumption of civil innocence fills that gap. Civil defendants receive procedural protections because civil lawsuits impose heavy burdens on them. Unlike in criminal cases, the opposing party is most often not the government itself,¹¹⁴ the courts act as a kind of arbiter when both sides are private parties. Still, government is intimately involved in civil cases, and, as such, government power underlies the varied impositions on the civilly accused. Civil cases entail government coercion of private parties. The inescapability of that coercion requires a countervailing principle: the presumption of civil innocence.

This Part begins by examining the justifications underlying the presumption of civil innocence. It revives the ancient idea that a presumption of innocence did not differentiate between the application of criminal and civil law. It quickly traces the specific history of American civil procedure. Finally, it outlines the practical exactions that our system of civil litigation levies on those accused of wrongful, indeed unlawful, conduct. The terminology here is important. One can fairly call defendants in civil as well as criminal cases the “accused.” Indeed, the very purpose of the complaint is to level accusations. To be sure, a complaint is not the same as an indictment. But it is more than sheer coincidence that both documents are broken into counts and that civil causes of action as well as criminal prosecutions require proof of elements. What else but kinship do such similarities suggest?

A. Philosophical Justifications and the Historical Presumption

Civil liability plainly is not the same thing as criminal guilt. Yet at the broadest level the two poles of American law converge on at least one major, salient point: state power is marshalled against a private party. Courts are instruments of state power, and so court procedures constitute state action—as a matter of both political theory and constitutional law.¹¹⁵ As Professor John Leubsdorf has noted:

¹¹⁴ See Tracey Kyckelhahn & Thomas H. Cohen, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 1990–2006* (2008), <https://www.bjs.gov/content/pub/pdf/crcusde06.pdf> [<https://perma.cc/9YD4-MTAF>].

¹¹⁵ See, e.g., *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 940–42 (1982).

The government . . . is involved in suits between private parties. It uses private litigation to enforce its own rules of law; it specifies the courts and procedures that will resolve disputes; its officials construe substantive and procedural rules and preside over the litigation; and it enforces its courts' judgments, sometimes by extraordinary means. Civil litigation brings the government's power and policies to bear on individual citizens even in private disputes.¹¹⁶

These "extraordinary means" for enforcing court judgments can include such highly coercive measures as attachment of property, garnishment of wages, and even criminal sanctions. Judges have long recognized that a system of civil procedure that unjustifiably deprives defendants of liberty or property—such as by imposing excessive costs or permitting flawed findings of liability—violates defendants' legitimate claims to protection under the law. It is not merely plaintiffs who violate defendants' rights under such conditions, but also the government.

This commonality arguably is most obvious where civil and criminal law converge: in administrative proceedings and the levying of civil penalties, whether through an agency adjudication or an agency-initiated lawsuit in federal court. The Securities and Exchange Commission, for example, has the option to pursue violators of federal securities regulations through civil actions.¹¹⁷ Agency-instigated penalties such as compliance orders do not fall under the umbrella of criminal law. However, the government is a party. The government is not quite a prosecutor, but neither is it clearly a simple plaintiff. Despite the haziness, these disputes with agencies demonstrate that government imposes costs on defendants not just by filing a case (whether a criminal prosecution or a civil or administrative claim), but also by adjudicating it. As discussed below, it is the adjudicatory process that thrusts government most directly and coercively into the lives of private citizens.

Some people will protest that the government's role in most civil cases is as a mere referee; that the costs that result from civil procedure

¹¹⁶ Leubsdorf, *supra* note 19, at 603 (footnote omitted).

¹¹⁷ See 15 U.S.C. § 78u(d) (2012); Christopher A. Yeager et al., *Securities Fraud*, 51 *Am. Crim. L. Rev.* 1661, 1724–27 (2014).

are unavoidable transaction costs that come with any dispute; and that plaintiffs suffer similar, if not as acute, costs in bringing a claim to court. Under this view, there really is no government-imposed burden on civil defendants. Only where the government is a party on the other side of the “v.” can it be said that the coercion of the state is at work. That is why there is a higher standard (reasonable doubt) for a criminal conviction than for the usual civil judgment (preponderance of the evidence).

The fundamental error with that line of thinking is that it skips to the economic cost-benefit calculation without establishing the first principles involved. I do not dispute that the financial, reputational, and libertarian costs borne by criminal defendants are in the clear majority of cases greater than those saddled on civil defendants. But that is evidence only of the level of protections we must give to the different types of defendants. Our legal system applies the reasonable-doubt standard to criminal adjudications of guilt rather than the lower preponderance standard used in civil cases because our society has rightly made the moral judgment “that wrongfully depriving an innocent man of his liberty is a worse outcome than wrongfully picking his pocket with an erroneous civil judgment.”¹¹⁸ That is *not*, however, the same as saying we presume that the criminal defendant is not guilty but the civil defendant is liable. It *is* a statement that because the costs to criminal defendants are higher, the presumption of innocence is stronger as it applies to a criminal defendant. Lesser costs do not defeat the presumption, but rather adjust the strength of the protection offered by it.

Nor do I dispute that plaintiffs bear procedural burdens too. A lawsuit can be a stressful and time-consuming affair as much for the plaintiff as for the defendant. And because the American rule requires each party to pay its own way, litigation often imposes staggering legal costs on the plaintiff as well. Depending on the particularities of a given case, these costs may outweigh those borne by the defendant, especially in relative terms. There are no rules, express or otherwise, that prohibit defendants from making discovery requests that delay or wear down plaintiffs.¹¹⁹

¹¹⁸ J. Harvie Wilkinson III, In Defense of American Criminal Justice, 67 Vand. L. Rev. 1099, 1112 (2014).

¹¹⁹ Although Rule 26(g) requires that discovery requests not be “unduly burdensome” or issued for an “improper purpose,” the Federal Rules do not prohibit discovery requests that

Indeed, many defendants adopt a Fabian strategy precisely to vex adjudication of the merits until the plaintiff surrenders out of financial exhaustion.¹²⁰ But contingency-fee arrangements and fee-shifting statutes like 42 U.S.C. § 1988 can mitigate or even erase a plaintiff's cost exposure, at least for many causes of action. Defendants have no similar recourse.¹²¹ And in all events, it remains the fact that it is usually the plaintiff who initiates litigation and thus decides to bring the attendant burdens down on both parties.

Granted, a plaintiff's decision to sue is rarely voluntary in a metaphysical sense. One would have to wear large blinders to see as voluntary an honest small-business owner's decision to sue a predatory bank to protect his career and life savings from imminent ruin. For that plaintiff—and many others in like circumstances—litigation is doubtless a nightmare come true. Civil procedure must be fashioned to account for the whole run of cases, however, not just those with the most sympathetic plaintiffs. Moreover, no matter the equities of any given case, we must acknowledge the basic difference between those who invoke governmental power with its attendant burdens and those on whom that power and those burdens (which may include reputational harms unique to the defendant) are imposed. Just as a prosecutor may bring a just prosecution, a plaintiff may bring a meritorious action. But the presumption of innocence still applies to defendants in both cases.

Furthermore, I do not hesitate to acknowledge the many positive externalities that flow from an open courthouse door. For instance, no matter how it ends, litigation provides a peaceful forum in which to air disputes. Indeed, before modern courts were up and running, alternative dispute resolution could mean a blood feud¹²² or man-to-man combat.¹²³

have the side effect of wearing down plaintiffs. Fed. R. Civ. P. 26(g). Moreover, a recent study found that courts almost never use their ability to sanction attorneys for making improper discovery requests. See Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 *Duke L.J.* 789, 815 (2010).

¹²⁰ See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 *Duke L.J.* 547, 549–51 (2010); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 *Denv. U. L. Rev.* 513, 513, 516 (2010).

¹²¹ See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (holding that a trial court may only award attorney's fees to a prevailing defendant if plaintiff's claim was "frivolous, unreasonable, or without foundation").

¹²² See William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* 179–82 (1990).

And although a return to these practices seems inconceivable today, the value to society of having a designated space for one to assert his grievances and seek vindication is significant. We all certainly can empathize with those who feel wronged and want only to have their day in court. Additionally, private suits can serve an important deterrent function. Business-to-business antitrust disputes, consumer products-liability actions, and of course civil rights claims are three obvious examples of private litigation that support the commonweal. That plaintiffs in these and like contexts can serve the public by asserting their private interests is indisputable.

However, that trial by jury has come to replace trial by battle, or that private plaintiffs may supplement government law enforcement, does not justify granting plaintiffs untrammelled access to government power. Just the opposite. Personal or communal animosity will only rise if the state endorses a resolution perceived to be unjust. Similarly, to supplement state deterrence with irrational or contradictory private enforcement is more harm than help. To utilize the coercive machinery of the state to keep the accused in court when the merits of the plaintiff's case seem dim breeds only cynicism, not an enhanced respect for law. This principle must be upheld in the context of Rules 12 and 56 of the Federal Rules of Civil Procedure just as faithfully as in the context of Rule 29 of the Federal Rules of Criminal Procedure. As with everything else, then, moderation is key. The benefits that come from an open courthouse door can only be taken so far. Always remaining are the questions of whom the plaintiffs pulled through that door and why.

What we see emerging here are the same general justifications for civil innocence that underlie the criminal presumption. The empirical question—"What is the aggregate balance of costs and benefits from presuming that a defendant is not guilty or not liable?"—does not do the most work. Rather, the presumption embodies an informed moral judgment about the imposition of costs and restraints on private parties by government. Professor Laurence Tribe could just as easily have been referring to civil defendants when he wrote that "[t]he presumption retains force not as a *factual* judgment, but as a *normative* one—as a

¹²³ James B. Thayer, *The Older Modes of Trial*, 5 Harv. L. Rev. 45, 66 (1891) (discussing the 1077 case of *Wulfstan v. Walter*, the first recorded trial by battle in Anglo-American law).

judgment that society *ought to speak* of accused men as innocent, and *treat* them as innocent.”¹²⁴ Private parties in all forms and manner of litigation must be seen as individuals, whose mere existence does not confer omnipotent license on the state. Individual autonomy and liberty cannot be dismissed with superficial assertions that a criminal accusation is worse than a civil pleading, that plaintiffs and defendants jointly bear the costs of civil litigation, or that civil litigation has a set of well-recognized positive externalities. For a civil pleading fundamentally claims that the defendant acted unlawfully and, thus, wrongfully in the sense that he is in violation of law, whether statutory or common. Criminal violations are, in most cases, more serious than civil violations, though they, too, vary dramatically in degree. Once again, which is worse: a Class IV misdemeanor, a medical malpractice verdict, or a civil judgment for wrongful death? Many would say the financial and reputational costs are far greater in the latter cases. Professors Jacob Gersen and Jeannie Suk have noted that administrative agencies and universities have circumvented the procedural protections guaranteed in criminal actions by regulating sex outside of the criminal context. They have described campus sexual assault adjudications as a system of justice that “operates largely apart from criminal enforcement” despite the fact that its findings and consequences “are inseparable from criminal overtones and implications.”¹²⁵

These consequences are no less tremendous on account of their civil nature. And all would recognize the stain that the law casts upon all violations, whether the violation be criminal or civil. To state this another way: criminal law implies a moral condemnation of the criminal act itself. Although civil law may view the act that creates liability with greater ambivalence, the fact that the act is a violation of law is what is crucial—the act is wrong, because it is unlawful. Though the “mens rea” may be more variable in civil actions—negligence (the ordinary tort) or intentionality (other tort actions, discrimination suits, antitrust conspiracies)—it is the alleged wrong that sets every wheel in motion. Being labeled by law as a tortfeasor or a discriminator or a conspirator, notwithstanding its civil tag, is hardly a boon to one’s financial or reputational health.

¹²⁴ Tribe, *supra* note 72, at 1371.

¹²⁵ Gersen & Suk, *supra* note 26, at 891.

We can thus see this understanding of the presumption of innocence in the concept of civil due process. The two fundamental aspects of civil due process are notice and the opportunity to be heard, which in practice means service of process and the availability of a forum with appropriate personal jurisdiction. Inherent in that view is an understanding that interim costs and eventual judgments will not be imposed upon you until you have had the opportunity to defend yourself, a clear reflection of the presumption that you are innocent. The notice and opportunity-to-be-heard requirements simply define the presumption in the civil arena.

The fact that civil litigation implicates many of the philosophical considerations undergirding the criminal presumption suggests that there is no principled reason for depriving the civilly accused of the presumption's protection. There is nothing *sui generis* about criminal litigation that renders the presumption exclusively applicable to that field. That corporations or other "fictitious" legal entities are often parties to civil actions does not distinguish civil from criminal law for the purposes of recognizing a presumption of innocence. First, corporations can be criminal defendants.¹²⁶ Second, a corporation is a juridical person.¹²⁷ For the men and women who work for, manage, and own them, companies are combinations of people. Their behavior is drawn into question by the civil lawsuit. Their freedoms are curtailed by judicial process. Their time is imposed upon. Their level of stress is raised. Of course, they may well be liable. But they should not be presumed so.

Indeed, the ancient history of the presumption does not indicate a distinction between its criminal and civil applications. What mattered was the invocation of government power. In fact, because even criminal justice often was meted out as the result of a pleading by the individual who was wronged, ancient laws may look in this respect more like our modern civil system than our criminal justice structure. Thus, under the Code of Hammurabi, the person accusing his neighbor of possessing stolen property does not clearly resemble either a criminal complainant or civil plaintiff. In either case, if the accuser did not produce witnesses to back up his claim, the state would execute the accuser.¹²⁸ This

¹²⁶ See *United States v. Automated Med. Labs.*, 770 F.2d 399, 406 (4th Cir. 1985).

¹²⁷ See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636–37 (1819).

¹²⁸ See *Quintard-Morénas*, *supra* note 34, at 111.

placement of the burden of proof on an accuser, whether the action was styled civil or criminal, also animated Roman law.¹²⁹ To expand on our earlier reference,¹³⁰ the code of Byzantine Emperor Justinian ordered plaintiffs seeking a money judgment—what would clearly be a civil case today—to “ascertain the proof necessary to establish the fact that you are entitled to the money which you allege you have deposited, for your demand that your adversary produce his accounts cannot be conceded.”¹³¹ More broadly, the code stated that plaintiffs “must have the evidence, for neither law nor equity permits that power be granted to inspect the documents of the other side. Therefore, if the plaintiff does not prove his allegations, the defendant shall be discharged, even if he himself furnishes no evidence.”¹³² Professor Thayer made this very point in the late nineteenth century. It is a “sound maxim” that “the party who seeks to move the court, must make out a reason for his request,” and that maxim applies in the favor of “a defendant in any sort of a case,” not just criminal cases.¹³³

The objection will be raised that a presumption of innocence is already present in the civil context because the burden of proof in a civil suit lies initially and ultimately with the civil plaintiff. But this argument is unavailing for several reasons. Burdens of proof and standards of proof may strengthen and fortify the presumption of innocence, but they are no substitute for it. Indeed, as we have seen in Part II, the protections that burdens of proof afford the accused are derivations of the presumption of innocence and wilt in its absence. Accordingly, burdens and standards of proof are variable in a way that the presumption of innocence is not. For a burden of proof attached to a preponderance of the evidence standard is a far different thing from a burden attached to a standard of beyond a reasonable doubt. The truth is that a presumption of innocence signifies a wholly different way of looking at an accused person that the assignment of burdens and standards of proof cannot aspire to replicate. If one is truly concerned about the impositions of state coercion on personal liberty, the most meaningful way, by far, to express that concern is to endow the accused party with the time-

¹²⁹ See *id.*

¹³⁰ See *supra* Section II.A.

¹³¹ Code Just. 2.1.1, *in* 12 S.P. Scott, *The Civil Law* 165, 165 (2d ed. 1932).

¹³² *Id.* at 2.1.4, *in* S.P. Scott, *supra* note 131, at 166.

¹³³ Thayer, *supra* note 41, at 188–89.

honored protection of a presumption of innocence. From this endowment, all manner of protections flow.

B. The Advent of the Federal Rules

There is thus no good reason to trumpet the presumption of innocence in the criminal context but ignore it in the civil sphere. Unfortunately, the Federal Rules of Civil Procedure came close to doing that. While the approach of the Federal Rules may seem understandable in the context of the technical and formalistic systems that preceded them, they have come over time and in light of modern litigation practices to embody something very close to a presumption of liability or guilt. Modern litigation is more complex and protracted than litigation practices at the time of the Rules' adoption. Even at the time the Rules were promulgated, however, there was little or no thought given to the transcendent question of the role that a presumption of civil innocence should play.

Charles Clark is widely considered the father of the Federal Rules of Civil Procedure. Although he was “not a declared New Dealer,” he was “at least a sympathizer of the cause.”¹³⁴ And those political values may well have influenced the adoption of the Rules. Clark claimed that the Rules Enabling Act of 1934, which gave the Supreme Court the power to make rules of procedure for all federal civil actions,¹³⁵ was the “culmination of one of the most persistent and sustained campaigns for law improvement conducted in this country.”¹³⁶ The campaign arose in part because the Conformity Act of 1789 had created an “unduly onerous”¹³⁷ system where the federal courts were bound to use the “common-law pleadings, forms, and practice[s]” of a prior era, but in state courts, even in the same district, “the simpler forms of the local code prevailed.”¹³⁸

¹³⁴ Michael E. Smith, Judge Charles E. Clark and the Federal Rules of Civil Procedure, 85 *Yale L.J.* 914, 952 (1976).

¹³⁵ Fed. R. Civ. P. 2.

¹³⁶ Charles E. Clark & James Wm. Moore, A New Federal Civil Procedure: I. The Background, 44 *Yale L.J.* 387, 388 (1935).

¹³⁷ *Id.* at 401.

¹³⁸ *Id.* (quoting *Nudd v. Burrows*, 91 U.S. 426, 441 (1875)); see Samuel P. Jordan, Local Rules and the Limits of Trans-Territorial Procedure, 52 *Wm. & Mary L. Rev.* 415, 422–25 (2010).

Earlier procedural reforms, such as New York's mid-nineteenth-century Field Code, had liberalized common law procedure,¹³⁹ but they did not embrace the “judicial discretion and legal flexibility” that Clark and his colleagues would later endorse in the Federal Rules.¹⁴⁰ Field and his Commission focused on creating known rules that judges could easily apply.¹⁴¹ Although the Field Codes were widely adopted, critics emphasized that they still had a “restrictive, confining, [and] formalistic nature.”¹⁴² In addition, “nineteenth-century judges applied the code rules in a hyper-technical fashion, insisting on ‘strict and logical accuracy’ and drawing hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts.”¹⁴³

As a result, the Federal Rules of Civil Procedure were modeled on the Federal Equity Rules of 1912, which Clark described as embodying “the best of modern reform procedure.”¹⁴⁴ Clark and his contemporaries drew heavily from equity's more flexible, discretionary approach. They believed it was necessary that federal procedure “should eventually jettison the unseemly practice of turning a suitor out of court because he had come in at the wrong door.”¹⁴⁵ Reformers thought that they were responding to what was widely believed to be the primary contemporary problem in civil litigation.¹⁴⁶ There had long been “complaints that both common law procedure and code procedure (patterned on the [1848 Field Code]) were too technical and interfered with cases being decided on the merits.”¹⁴⁷ As Professor Stephen Subrin has explained, historically “the writ and single issue common law system forced

¹³⁹ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 934 (1987).

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 935; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. Kan. L. Rev. 347, 382–83 (2003).

¹⁴² Subrin, *supra* note 139, at 939.

¹⁴³ Robert G. Bone, *Twombly*, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873, 891 (2009) (quoting Charles E. Clark, *Handbook of the Law of Code Pleading* 159 (1928)).

¹⁴⁴ Clark & Moore, *supra* note 136, at 394.

¹⁴⁵ *Id.* at 415.

¹⁴⁶ See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), abrogated by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); Janice Toran, *Essay, ‘Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 Mich. L. Rev. 352, 385–86 (1990).

¹⁴⁷ Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691, 693 (1998).

disputes into narrow cubbyholes, [but equity petitions] . . . tended to tell more of the story behind a dispute.”¹⁴⁸ The Federal Rules were thus “almost universally drawn from equity rather than common law,” which “made an enormous change” in American civil procedure practices.¹⁴⁹

Reforming pleading procedures was central to Clark’s task. It was Clark’s intention to simplify pleading requirements and make it easier for meritorious claims to survive at least until the fact-finding stage of litigation.¹⁵⁰ Clark thought that “merits screening should take place after discovery, at summary judgment in some cases and at trial in most.”¹⁵¹ To that end, the Federal Rules dramatically simplified pleadings, requiring only “a short and plain statement of the claim showing that the pleader is entitled to relief”¹⁵² in order for plaintiffs to survive early motions to dismiss. The veracity of the claim was to be sorted out later, after discovery, when the court or jury would have the information it needed to make findings in the interest of justice. Adopting a system based on equitable procedural standards would reduce the chances that meritorious cases would be thrown out due to “one misstep by counsel” early in the process.¹⁵³ The proper purpose of pleading was simply to get the ball rolling and to “facilitate a proper decision on the merits.”¹⁵⁴

Put simply, the new Federal Rules of Civil Procedure “reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information.”¹⁵⁵ The reforms did indeed help alleviate the procedural minefields and tripwires inherent in the arcane requirements of common law pleading. Prior to the Federal Rules, discovery in the federal court system was extremely limited¹⁵⁶—the primary focus was on production of evidence at trial. In 1911, for example, the Supreme Court reversed a

¹⁴⁸ Subrin, *supra* note 139, at 918.

¹⁴⁹ *Id.* at 922; see also Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 *Wash. L. Rev.* 429, 433–34 (2003) (“[The] Federal Rules of Civil Procedure incorporated much of the philosophy and practices of equity procedure.”).

¹⁵⁰ David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 *Ga. L. Rev.* 433, 476–78 (2010).

¹⁵¹ Bone, *supra* note 143, at 892.

¹⁵² Fed. R. Civ. R. 8(a)(2).

¹⁵³ *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

¹⁵⁴ *Id.*

¹⁵⁵ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *Duke L.J.* 1, 3–4 (2010).

¹⁵⁶ See Subrin, *supra* note 147, at 691.

decision by the United States Court of Appeals for the Fourth Circuit interpreting the Judiciary Act of 1789, and found that it only permitted the production of documents at trial, not before.¹⁵⁷

The Federal Rules, following the example of the Equity Rules of 1912, made several important changes to federal discovery, including most importantly, “permit[ting] parties to take oral depositions of both parties and witnesses as a matter of right.”¹⁵⁸ Professor Edson Sunderland, a Michigan Law School scholar whom Clark tapped to write the discovery and summary judgment rules, believed that discovery would remedy the failure of pleadings to convey meaningful information by allowing “the true nature of the controversy [to] be satisfactorily ascertained.”¹⁵⁹ The point of discovery, he believed, would be to ascertain the full story early in the proceeding and prevent the kind of fishing expedition that would waste valuable judicial resources.¹⁶⁰ As a result, the Federal Rules allowed a “panoply of devices” much broader than any one state permitted at the time and “eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.”¹⁶¹

Some critics at the time noted that “this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people.”¹⁶² Although the Committee considered a number of devices to constrain the wide reach of discovery, “every major discovery device previously known anywhere in the United States” and “fewer constraining devices than . . . originally drafted” ended up in the final version of the Federal Rules.¹⁶³ Furthermore, “[b]y the end of the

¹⁵⁷ *Id.* at 701; see Charles C. Callahan & Edwin E. Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 *Yale L.J.* 622, 639–40 (1936) (citing *Carpenter v. Winn*, 221 U.S. 533 (1911)).

¹⁵⁸ Subrin, *supra* note 147, at 703. The Federal Rules also allowed parties “for good cause [to] move that the court direct any other party to produce documents or tangible objects for inspection before trial.” *Developments in the Law – Discovery*, 74 *Harv. L. Rev.* 940, 952 (1961).

¹⁵⁹ Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 *Annals Am. Acad. Pol. & Soc. Sci.* 60, 74 (1933).

¹⁶⁰ *See id.*

¹⁶¹ Subrin, *supra* note 147, at 719.

¹⁶² 3 Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States 735 (statement of George Wharton Pepper, Feb. 22, 1936).

¹⁶³ Subrin, *supra* note 147, at 729.

first decade after the Federal Rules became law, many courts were routinely giving the discovery provisions [their] full scope.”¹⁶⁴ As Professor Subrin has explained, “[e]nlarging the potential for broad discovery seemed like a good idea at the time” because “[t]he idea of hiding relevant facts and documents from the other side and from the judge and/or jury”¹⁶⁵ was antithetical to the concept of litigation as adjudication of the merits of a claim.

Clark and the other drafters of the Federal Rules were well-meaning, and their reforms were appropriate for their time. In freeing the Federal Rules from the hyper-technical standards that characterized procedural rules at the beginning of the twentieth century, they helped ensure that meritorious claims were not barred by technical pleading standards. The fact that Clark was right for his time does not mean that his reforms are altogether right for ours. The point of this contemporary critique, however, is not to keep everyone out of court. I am advocating a presumption—not a rule—of civil innocence.

In the criminal context, we never think the presumption would bar meritorious and necessary prosecutions. There is no reason to think that the presumption of civil innocence would bar meritorious suits. Presumptions are not red lights or absolute rules. They are more like flashing yellows, as indeed they should be since the misuse of state authority is such a real and disquieting possibility. It now seems clear that Clark and his contemporaries did not anticipate the modern-day burdens, especially associated with discovery, which lax pleading requirements would foist upon defendants in the civil litigation system prior to any probabilistic forecast of liability. Even from “the beginning, equity’s expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice.”¹⁶⁶ The thrust of the reforms was to back up the entire system of civil litigation.¹⁶⁷ The new backed-up system, however, came at a huge cost. Accusations were assumed to

¹⁶⁴ Id. at 738.

¹⁶⁵ Id. at 740; see also Beisner, *supra* note 120, at 556 (describing the drafters’ motivations for liberal discovery rules); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *Yale L.J.* 522, 543 (2012) (same).

¹⁶⁶ Subrin, *supra* note 139, at 921.

¹⁶⁷ See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 439–40 (1986).

be true until proven otherwise. Any presumption of innocence was turned abruptly on its head. The civilly accused was explicitly viewed as guilty early in the process unless he could prove his innocence at the end. The idea that a presumption of civil innocence should be used to temper the new pleading rules and to consign false and insubstantial accusations to an early demise did not receive anything approaching adequate consideration.

The demise of the presumption of civil innocence had many manifestations, but none more obvious than soaring discovery costs. By the dawn of the twenty-first century, the pendulum had swung perilously far toward the unthinking imposition of large litigation burdens, borne of a momentum all its own. Plaintiffs today are able to harness the vast coercive power of the judicial system to extract significant costs, to the tune of months of production and millions in legal bills, from defendants before any real showing of the veracity of the claim is required. Moreover, the digital revolution has fundamentally changed the nature of broad discovery devices. Modern electronic devices generate and record a huge variety and volume of information. It is now easier and faster to store evidence, and that has meant inevitably more targets and opportunities for discovery requests. Of course, the new litigation dynamic goes both ways; defendants can and often do respond with costly discovery tactics of their own. But the presumption of innocence is something that belongs to the accused, the one who is brought involuntarily before the court.

The drafters of the Federal Rules likely could not, and did not, fathom what unconstrained discovery would mean in the age of email, storage in “the cloud,” and data networks. It is important to note that Clark himself never intended the Federal Rules of Civil Procedure to be frozen in time. He wrote in 1935 that “continual supervision and change” was necessary because “procedure is not an end in itself, but merely a means to an end . . . [and] procedural rules must be continually reexamined and reformed in order to be kept workable.”¹⁶⁸

In fact, it has not just been the original drafters who embedded a presumption of guilt throughout the civil litigation process. The many lawyers, judges, and politicians who have worked on revising the Federal Rules since their adoption in 1937 are equally culpable in

¹⁶⁸ Clark & Moore, *supra* note 136, at 392.

creating our accusatory culture. In seeking to further open the doors of the courtroom, the reformers ended up creating a system that favors the accuser at nearly every stage of litigation. As Professor George Rutherglen has recently pointed out, this trend dates back to the 1937 Rules' first major revision, the 1955 amendments: "The common theme to be found in these proposed changes can be summarized in one word: expansion, specifically of the scope and authority of the Federal Rules. Judges received expanded managerial authority; parties had expanded access to discovery; courts could exercise expanded jurisdiction. Moreover, all these changes favored plaintiffs."¹⁶⁹ And the greater antagonist in this tale may be the Supreme Court, which set sketchy, bare-boned pleading standards for the next sixty years. *Conley v. Gibson*¹⁷⁰ is regarded as the landmark case that solidified pleading standards for much of the latter half of the twentieth century. The Court announced the well-known maxim that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."¹⁷¹ The Court made clear that Rule 8 of the Federal Rules of Civil Procedure "do[es] not require a claimant to set out in detail the facts upon which he bases his claim," but only to provide "a short and plain statement" of the claim that will give the defendant (and the court) "fair notice of what the plaintiff's claim is and the grounds upon which it rests."¹⁷² Such notice pleading, the Court reasoned, went hand in hand with pretrial procedures like discovery to allow the plaintiff an opportunity to develop his claim and the defendant the opportunity to demonstrate it unworthy of trial.¹⁷³

The Supreme Court doubled down on this approach for much of the post-World War II period. In *Adickes v. S.H. Kress & Co.*, the Court turned to the summary judgment stage.¹⁷⁴ The majority declared that the burden of showing the absence of a genuine factual dispute lay with the

¹⁶⁹ George Rutherglen, What Happened to the Framers of the Federal Rules? Generational Change and the Transformation of the Rulemaking Process, 42 J. Sup. Ct. Hist. 193, 194 (2017).

¹⁷⁰ 355 U.S. 41 (1957).

¹⁷¹ *Id.* at 45–46.

¹⁷² *Id.* at 47.

¹⁷³ See *id.* at 47–48.

¹⁷⁴ 398 U.S. 144 (1970).

party moving for summary judgment—almost always the defendant.¹⁷⁵ Further, “inferences to be drawn from the underlying facts contained in (the moving party’s) materials must be viewed in the light most favorable to the party opposing the motion,” thus placing the burden squarely on the moving party to show there were no factual issues left for trial.¹⁷⁶ The Court explained that where a moving party failed to “carry its burden because of [a] failure to foreclose the possibility” that the facts might support the nonmoving party’s theory of the case, summary judgment was improper.¹⁷⁷ The damage done by all this to the presumption of innocence was profound. It made little difference that the ultimate burden of proof in a civil case still lay with the plaintiff when the interim burden at such a crucial juncture of the case remained with the accused. Every lawyer knows that the key moment in civil litigation often is not the closing argument before the jury, but whether the case clears summary judgment to get to the jury at all. As to who bore the burden at this stage, *Adickes* left no doubt.

Of course, *Conley v. Gibson* and *Adickes v. Kress* were only two of many cases that embodied the emerging trend. Lower courts followed suit with expansive readings of their own. In one such ruling the Fourth Circuit noted that the nonmoving party in summary judgment

is therefore entitled, as on motion for directed verdict, to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered.”¹⁷⁸

That formulation is extraordinary. What accused party upon reading it would think it had more than a ghost of a chance?

Whether the above judicial rulings were in any way compelled by the Federal Rules themselves is open to question. The cases may have reflected the general bent of the new Federal Rules more than any

¹⁷⁵ See *id.* at 157.

¹⁷⁶ *Id.* at 158–59 (alteration in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)) (internal quotation marks omitted).

¹⁷⁷ *Id.* at 157.

¹⁷⁸ *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

specific mandate. By virtually assuring that any sketchily drafted complaint would withstand a motion to dismiss, *Conley* used the relaxed pleading standard of Rule 8 to render Rule 12 motions to dismiss all but a dead letter. And by requiring defendants moving for summary judgment to prove the absence of merit in the plaintiff's case rather than simply the presence of merit in their own, *Adickes* made the assertion of innocence a more difficult task than the strict language of Rule 56 would appear to require. *Conley* and *Adickes* both involved claims of racial discrimination, and defendants in discrimination cases during the 1950s and '60s were doubtless an unsympathetic lot. Nonetheless the impact of the rulings stretched far beyond the context of civil rights and dealt the presumption of civil innocence a further body blow.

Defenders of *Conley* and *Adickes* claim those standards were meant to address the major informational deficit with which many plaintiffs, especially the poor and powerless, arrive in federal court.¹⁷⁹ The responses to this are several. First, it is not clear that an informational deficit can be presumed from the relative status of the respective parties. The plaintiff as the alleged victim of a legal violation is likely to have a good bit of information about what happened to him and why. Second, there already exist numerous mechanisms such as contingency-fee arrangements¹⁸⁰ and fee-shifting statutes¹⁸¹ that are intended to address precisely this problem.¹⁸² Third, the presumption of innocence is not a Katy-bar-the-door device, but a way of correcting the manifest injustices that result from invoking the awesome coercive powers of the state on

¹⁷⁹ See Stephen B. Burbank, Pleading and the Dilemmas of Modern American Procedure, 93 *Judicature* 109, 118 (2009) ("Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy their requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries."); Scott Dodson, New Pleading, New Discovery, 109 *Mich. L. Rev.* 53, 53 (2010) (defending *Conley* for helping plaintiffs who "lack sufficient factual knowledge of the elements of their claims not because the claims lack merit but because the information they need is in the hands of defendants").

¹⁸⁰ See 28 U.S.C. § 2678 (2012) (setting rules governing contingency fee arrangements in federal court).

¹⁸¹ See, e.g., 42 U.S.C. § 1988(b) (2012) (empowering the district court to award attorney's fees to the prevailing party in civil rights cases).

¹⁸² See Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 *Rand J. Econ.* 404 (1984) (creating an economic model showing the extent to which contingency fee arrangements and fee-shifting rules can counterbalance informational asymmetries).

patently flimsy grounds. And fourth, as I have already mentioned, any informational deficit is not going to be cured by incentivizing putative defendants to avail themselves of alternative and arguably more pro-defendant forums.

Whether textually mandated or not, the combined effect of cases such as *Conley* and *Adickes* was enormous. The cases did much to ensure that the Federal Rules of Civil Procedure procedurally protected every remotely or conceivably meritorious claim long enough to be vindicated at trial. However, in doing so, the Supreme Court gave no concern to how this thoroughgoing protection might penalize defendants—monetarily and otherwise—before any realistic likelihood of liability was established. This does not mean that the Rules reformers or the Supreme Court should be subject to special condemnation. Moving the dial in any complex social process will necessarily have collateral effects, some known and some unknown. The mid-twentieth-century adjustment to the rules of civil litigation was no different. It is just that now, with the benefit of hindsight, we can understand the extent to which the reforms shifted the balance decisively against the defendant's presumption of innocence. The sheer magnitude of what transpired has never been fully appreciated. It came almost to be taken for granted that American justice would couple the presumption of innocence in the criminal sphere with a presumption of civil culpability. When the arsenal of judicial power is unleashed in a criminal case, it is at least at the behest of a prosecutor subject to some measure of public electoral or appointive accountability. But the new civil regime beckoned private parties of every description to harness public power to their own ends, confident that all inferences and all benefits of the doubt were to be conferred upon them.

That such a dichotomy in the American system of justice would have developed was surely worthy of more attention and debate than it received. For the matter goes far beyond the oft-voiced complaints about discovery costs and the like. It speaks to the very casualness by which the liberty of an accused can be curtailed, the finances of an accused burdened, and the reputation of an accused besmirched. One must surely recognize that many plaintiffs present strikingly sympathetic cases and many press meritorious claims. But whereas we do not allow sympathetic crime victims and accusations of heinous conduct to strip the criminal defendant of the presumption of innocence, we should not

permit the mere allegation of wrongful behavior on the part of civil defendants to deprive them of law's most basic and fundamental protections.

C. The Costs Imposed by the Modern Regime

The simplified pleading requirements of the Federal Rules may have been prudent at a time when most civil disputes were rather small affairs. But the basic assumption underlying the Rules' vision of pleading—that merits screening should take place after the full course of discovery—has become entirely incompatible with the realities of litigation today. Whereas the preceding sections uncovered the schism between historical assumptions and contemporary practice, the pages that follow describe the costly and complex nature of modern civil suits. It is this changing nature of contemporary litigation that has made the absence of a presumption of civil innocence even more untenable.

We need to spend some time contemplating the considerable costs of contemporary litigation for two reasons. The first is that the higher the cost of litigation, the more indefensible it becomes to impose those costs on a party whose ultimate culpability is merely speculative. The second is that the combination of large imposed costs and no presumption of innocence is itself denying plaintiffs access to courts, as companies seek to reroute would-be litigants away from the civil justice system through such devices as contractual arbitration provisions. The irony of the whole situation thus becomes apparent: those who are sincerely concerned about providing plaintiffs proper access to courts are devising a system that incentivizes defendants to do everything possible to prevent precisely that.

In fact, the law of unintended consequences is most decidedly at play here. To be blunt, the desire to enhance court access, to acquire the most complete information possible about a given controversy, and to submit that controversy to a jury of one's peers is, when carried to excess, driving people away in droves from the civil justice system and toward alternative dispute resolution.¹⁸³ The presumption of innocence is not by

¹⁸³ See Todd B. Carver, ADR – A Competitive Imperative for Business, 59 *Disp. Resol. J.*, Aug.–Oct. 2004 at 70–72 (2004) (arguing that companies are turning to alternative dispute resolution in order to avoid the high costs of civil litigation); Catherine Cronin-Harris, Mainstreaming: Systematizing Corporate Use of ADR, 59 *Alb. L. Rev.* 847, 855–

itself going to resolve this sad state of affairs, but it will provide a long-awaited and much-needed start. Without it, what we term alternative dispute resolution will shortly be transformed into preferable dispute resolution, something the well-intentioned critics of *Twiqbal* will come to rue and regret.

Like criminal litigation, civil litigation presents the danger of imposing costs on the basis of mere accusation. The danger of assessing wrongful costs against the defendant is acute at the moment, given the proliferation of lawsuits and the increasing cost of litigating them, even absent a damages award. Indeed, one of the most frequently discussed problems of contemporary civil litigation is the extraordinary financial burden that lawsuits place both on those who press claims and those who defend them. The price of litigation in the United States is extraordinarily high, both in an absolute sense and in a comparative one, and it continues to rise.¹⁸⁴ It is worth pausing for a moment to assess the extent of the damage, because the numbers boggle the mind.

American individuals and companies spend hundreds of billions of dollars every year on litigation.¹⁸⁵ The lawsuits come in all shapes and sizes: contract cases, employment disputes, patent fights, bankruptcy scums, and on and on.¹⁸⁶ But no matter the form, costs add up. The most comprehensive study on corporate litigation costs was commissioned by Duke University in 2010. The study found that just thirty-six of the Fortune 200 companies spent \$4.1 billion dollars on litigation costs in 2008 alone.¹⁸⁷ Tort litigation cost litigants \$260 billion in 2004 according to that study;¹⁸⁸ another study pegged the annual total at \$865 billion.¹⁸⁹ Still another found that “more than three-quarters of

57 (1996) (describing that the appeal of ADR stems from dissatisfaction with the court system).

¹⁸⁴ See Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies 2–4* (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigton%20Cost%20Survey%20of%20Major%20Companies.pdf> [<https://perma.cc/L3M7-E98X>] [hereinafter *Litigation Cost Survey*].

¹⁸⁵ See *id.* at 4 & n.5.

¹⁸⁶ See Fulbright & Jaworski L.L.P., *Second Annual Litigation Trends Survey Findings 7* (2005).

¹⁸⁷ *Litigation Cost Survey*, *supra* note 184, at 4.

¹⁸⁸ *Id.* at 4 n.5.

¹⁸⁹ Lawrence J. McQuillan et al., *Pac. Res. Inst., Jackpot Justice: The True Cost of America's Tort System*, at xii (2007), http://www.legalreforminthenews.com/2007PDFS/PRI_2007_JackpotJusticeFinal.pdf [<https://perma.cc/P75H-BLXH>].

the US companies in the survey had at least one court action filed against them” in 2005.¹⁹⁰ Large companies surveyed, meaning ones with at least \$1 billion in revenue each year, had on average 140 lawsuits pending at any given time.¹⁹¹ Unsurprisingly, this led the surveyed companies to spend more than one percent of their budgets on legal work—a substantial sum for firms hoping instead to spend their limited resources on other worthwhile goals and needs.¹⁹²

Compounding the absolute cost is the unpredictability of budgeting for litigation—with nearly half of respondents to one survey saying they were unable to predict litigation expenses in advance.¹⁹³ That’s a problem for executives who attempt to prudently manage company outlays. A more recent study estimated that “one-third of the after-tax profit of the *Fortune* 500” is spent on litigation costs.¹⁹⁴ To be sure, the figures generated by these studies should be viewed with some skepticism; the organizations that produced the data are composed primarily of corporate entities and the lawyers who represent them. But that doesn’t belie the truth of the general point: for many corporations conducting business in America, the mounting cost of litigation has become a real burden. Many lawyers have been in disputes where depositions drone on aimlessly as legal costs mount up and up. Indeed, this burden has caused many to flee the court system entirely.¹⁹⁵ There is, as noted earlier, no better testament to the rising costs of litigation than the astonishing growth in arbitration, mediation, and other alternative dispute resolution methods over the last few decades.¹⁹⁶

Not to worry, say defenders of the present system. Defendants are, for the most part, fat cats with deep pockets. They can afford the cost of

¹⁹⁰ See Fulbright & Jaworski L.L.P., *supra* note 186, at 8.

¹⁹¹ *Id.* at 13.

¹⁹² See *id.* at 12.

¹⁹³ See *id.*

¹⁹⁴ See John B. Henry, eLawForum, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, *The Metropolitan Corporate Counsel*, Feb. 2008, at 28, <http://cebjournal.com/pdf/2008/February/28.pdf> [<https://perma.cc/AL5W-L6GQ>].

¹⁹⁵ See Shelly Smith, Note, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 *DePaul L. Rev.* 1191, 1191–92 (2001) (“Out of court arbitration was initially created so that parties . . . could reduce the costs of litigation.”).

¹⁹⁶ See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 *U. Ill. L. Rev.* 1, 24–26 (attributing the growth of arbitration and the subsequent growth of mediation to the high costs of litigation and the high costs of some forms of arbitration).

modern litigation without breaking a sweat. In fact, they bring many of these costs upon themselves and upon plaintiffs by devising their own litigation strategies of delay. All of this is said to justify what nevertheless amounts to a massive, judicially imposed transfer of wealth from one caricatured party (the callous corporate defendant) to another (the virtuous plaintiff). Given the alleged imbalance of resources and power, opponents can be counted upon to contend a presumption of civil innocence has no place.

Of course, this paradigm of civil litigation is grossly oversimplified. If just anyone can file a complaint, it stands to reason that a certain percentage of plaintiffs will have objectively reasonable grounds for bringing suit, and another percentage will be pressing manifestly thin contentions in hopes of a settlement. And if just anyone can be styled a defendant, then defendants will run the gamut from those who observe the law in every particular to those who will embrace any chance to break it. In short, argument through stereotype has no place.

Moreover, it is just not true that civil defendants are the only ones wielding corporate might. Much civil litigation is between corporations. Often the federal government is itself an amply resourced plaintiff that can outlast all but the most determined private company. Other cases present large trademark holders bringing infringement actions against very small companies, large corporations bringing diversity breach-of-contract claims against much smaller competitors, or major insurance companies seeking declaratory judgments of non-coverage against smaller policy holders. The list goes on and on. And even in the stereotypical small v. big case, we might remember that not all corporations are embodiments of evil, but providers of jobs and wages and guardians of their workers' health insurance and retirement plans.

There is, however, an even more fundamental reason why a presumption of innocence cannot be jettisoned in civil litigation simply on the basis of speculative imbalances between the respective parties. For all their problems, the Federal Rules of Civil Procedure, like most procedural codes, are drafted in strikingly neutral terms. That is to say, they do not vary and fluctuate with the identity of the parties. With respect to the most prominent examples—rules governing motions to dismiss, motions for summary judgment, joinder of claims and parties, and the conduct of discovery and trial—the Federal Rules set up the identical signposts for parties large and small. While their practical

effect may in many instances weigh in favor of plaintiffs, it remains the fact that the text itself does not for the most part differentiate. Thus, the overall lesson conveyed is that justice will not rise or fall on the mere identity of parties. If size or resources is no reason to deprive a party of the law's textual neutrality, those same characteristics should not serve as an excuse to deny certain types of defendants the most basic procedural protection of them all: the simple presumption that one is innocent until proven otherwise.

Of course, the designation of parties as plaintiffs and defendants in a civil action is more fluid than in a criminal prosecution, due largely to the presence of counterclaims and crossclaims,¹⁹⁷ especially in the most complex civil lawsuit. It would be consistent with my thesis to accord a presumption of innocence to a party defending a counterclaim. But there remains a basic difference between a defendant to the original complaint and the party opposing a compulsory or permissive counterclaim. The party filing the original complaint remains the one who has first invoked the awesome machinery of the state against his adversary, while the counterclaims and crossclaims largely grow out of that initial decision. More particularly, it is the original plaintiff who decides, at least initially, when and where (and to some extent how) the case will be decided.¹⁹⁸ This is no small matter, as the rush to the courthouse in many declaratory judgment matters attests.

Just as in the criminal justice context, the presumption of innocence has to kick in at all stages of litigation. Massive interim costs have occasionally become so large as to be conceived as every bit as consequential as an entry of final judgment. That being the case, the interim steps of litigation would benefit from the presumption of innocence. Consider the example of discovery. I have earlier noted the idealized conception of discovery that animated the adoption of the Federal Rules. This ideal of earnest parties whose foremost interest lies in arriving at the truth has, alas, run aground in reality. There is no doubt

¹⁹⁷ See Fed. R. Civ. P. 13 (establishing rules for compulsory and permissive counterclaims and for permissive crossclaims).

¹⁹⁸ See *id.* Of course, defendants can in some circumstances remove to federal court claims originally filed in state court. See, e.g., 28 U.S.C. § 1441(a) (2012) (allowing the defendant to remove a case to federal court if the federal court would have had original jurisdiction over the suit). But even then, it is the plaintiff who decides to invoke the sovereign's authority to resolve the dispute in the first place.

that modern discovery is both costly and burdensome to defendants, effectively penalizing them upon a mere complaint by the opposing party. Scholars and judges have long recognized its costs to the legal system. Judge Posner famously labeled protracted discovery “the bane of modern litigation.”¹⁹⁹ Judge Easterbrook recognized that discovery was often no more than abuse.²⁰⁰ Other commentators have observed that the “elaborate discovery process” is the greatest problem brought on by the Federal Rules;²⁰¹ that “expensive, burdensome discovery” takes place long before the parties address the merits;²⁰² and that “[d]iscovery is costly, and many of its costs are externalized by the requesting party.”²⁰³ Thus, many have rightly lamented the extraordinary price borne by our system due to liberal discovery rules. Scholars and judges are correct to worry about the costs of increasingly burdensome discovery to the legal system as a whole, but there is a particularly nefarious consequence when it comes to the costs paid by civil defendants in this process: they are often paid long before there has been any real prospect, not to mention adjudication, of liability—and indeed, often at the expense of just such a determination.

For as currently written and interpreted, the Federal Rules not only do little to constrain costs; they also fail to distinguish between requests that provide high-value information to the plaintiff and those that do not.²⁰⁴ Indeed, if anything, our current system incentivizes high-cost requests by plaintiffs, regardless of the fruit they may yield. For using discovery to raise costs on defendants is a strategic move, one that can be used to secure a settlement from a defendant solely to avoid the high costs of compliance with a plaintiff’s requests.²⁰⁵ This use of the coercive power of the legal system to put the screws to opponents often without regard to the actual prospect of liability is not practiced by every

¹⁹⁹ *Rossetto v. Pabst Brewing Co., Inc.*, 217 F.3d 539, 542 (7th Cir. 2000).

²⁰⁰ See Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989).

²⁰¹ See Martin H. Redish, *The Allocation of Discovery Costs and the Foundations of Modern Procedure*, in *The American Illness: Essays on the Rule of Law* 201, 202 (F.H. Buckley ed., 2013).

²⁰² See Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 Vand. L. Rev. 1807, 1809 (2013).

²⁰³ Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. Legal Stud. 481, 500 (1994).

²⁰⁴ See *id.* at 500–01.

²⁰⁵ See *id.* at 501.

plaintiff, of course, but it is rampant enough to powerfully distort the goals of legal process. As one scholar has noted, “In its most extreme form, intentionally abusive discovery effectively transforms the adjudicatory system into a means of facilitating legalized blackmail and extortion.”²⁰⁶

The problem of discovery costs has, as noted above, only worsened with the arrival of electronic discovery. As any observer of contemporary litigation knows, “the costs involved in electronic discovery are simply staggering.”²⁰⁷ Conducting electronic discovery can cost in the range of \$30,000 per gigabyte.²⁰⁸ Thus, electronic discovery “give[s] rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.”²⁰⁹ This troubling observation makes sense: because emails tend to hang around, and because they are replicated and distributed to many parties, through “replies,” “forwards,” and similar functions, any request for a particular document can necessitate production of literally thousands of individual pieces of evidence in return.²¹⁰ As a result, as one colleague on the federal bench has noted, “[i]n many cases . . . the cost of electronic discovery may become the decisive factor in developing a comprehensive litigation strategy.”²¹¹ Another scholar notes that “[t]he inescapable result is substantial waste and inefficiency in the conduct of discovery.”²¹²

Lurking beneath these generally worded criticisms of electronic discovery is the fact that, in the vast majority of cases, it requires “parties to bear the full costs of responding to the discovery requests of other litigants.”²¹³ Of course we should expect parties to have to

²⁰⁶ Redish, *supra* note 201, at 203–04.

²⁰⁷ Lee H. Rosenthal et al., Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 *Fordham L. Rev.* 1, 1 (2007) (remarks of moderator Prof. Daniel J. Capra, April 17, 2007).

²⁰⁸ David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 *Minn. J.L. Sci. & Tech.* 151, 151 (2011).

²⁰⁹ Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 *Duke L.J.* 561, 592 (2001).

²¹⁰ See Rosenthal et al., *supra* note 207, at 1–2.

²¹¹ Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 *B.C. L. Rev.* 327, 349 (2000).

²¹² Redish, *supra* note 209, at 569.

²¹³ *Id.*

shoulder some costs of producing their own documents,²¹⁴ but that burden ought to be balanced more evenly between the parties. The current imbalance arguably represents a form of pretrial compensation to the plaintiff:

Unlike the costs incurred by a defendant in mounting his own case, the costs involved in responding to a plaintiff's discovery requests are a financial benefit that the defendant is required—at the risk of severe sanctions—to provide to the plaintiff on the basis of nothing more than the unilateral filing of the plaintiff's complaint.²¹⁵

Courts impose the enormous cost of electronic discovery on a party far before any finding of prospective liability, often making the cost of even attempting to prove one's own innocence prohibitive. This structure of litigation—using the coercive tools of state-sanctioned procedure to inflict punishing costs on a party that may have done nothing more than be sued—ignores a fundamental tenet of the Anglo-American system of justice: presuming a party innocent until adjudicated otherwise.

The situation is worsened by the fact that discovery costs are frequently exacerbated by abusive litigation tactics. Although designed simply to aid the information-gathering process prior to trial, discovery is often wielded as a strategic weapon for the purpose of harassing opposing parties.²¹⁶ “Abusive requests are ‘motivated by goals other than the exchange of information fairly related to the issues in dispute’ and are generally designed to ‘force favorable settlements by driving up the other party’s discovery costs beyond the case’s value’”²¹⁷ Unnecessary requests do not contribute to the resolution of a lawsuit on the merits because the costs are imposed on defendants “without even a

²¹⁴ See *id.* at 595–97 (discussing the important tradeoffs between procedures that promote access to information and the need to protect the dignity of litigants who are forced to foot the bill).

²¹⁵ Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 *Geo. Wash. L. Rev.* 773, 810 (2011).

²¹⁶ See Degnan, *supra* note 208, 153–54.

²¹⁷ Redish & McNamara, *supra* note 215, at 803 (footnote omitted) (quoting Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 *U.S.F. L. Rev.* 189, 193–94 (1992)).

preliminary judicial finding of wrongdoing.”²¹⁸ Cases often just amble along without any real monitoring of their chances for success. The lack of calibration may seem to serve the pocketbook interests of the legal profession, but not really: there are enough high-minded attorneys dismayed by what an anti-innocence system civil justice has become. Crippling, arbitrary discovery costs disrupt the ability of individuals and businesses to successfully avoid legal liability by conscientiously ordering their lives in a law-abiding manner. This state of affairs strikes at the heart of the presumption of innocence by functionally imposing punishment upon the blameless.

The use of abusive litigation tactics is a problem, critics might reply, but district courts already possess the tools to combat it. After all, under Rule 37, courts can impose financial penalties on parties making frivolous discovery requests. More specifically, after a motion to compel discovery is denied, the court may award the nonmoving party reasonable expenses incurred, including reasonable attorney’s fees, unless the moving party’s actions were “substantially justified.”²¹⁹ According to the Advisory Committee, “the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.”²²⁰

But the Federal Rules themselves do not provide meaningful constraints on abusive discovery tactics. Rather, the judges entrusted to enforce those rules are the principal mechanisms for curbing misconduct, and discovery supervision by the judiciary has been modest at best. Indeed, “judges have been reluctant to award expenses on motions to compel discovery.”²²¹ An Advisory Committee Note to Rule 37 affirms that although “substantial justification may appear adequate . . . it has been little used. Only a handful of reported cases include an award of expenses”²²²

²¹⁸ Id. at 807.

²¹⁹ Fed. R. Civ. P. 37(a)(5)(B).

²²⁰ Fed. R. Civ. P. 37(a)(4) advisory committee’s note to 1970 amendment.

²²¹ Lindsey D. Blanchard, Rule 37(a)’s Loser-Pays “Mandate”: More Bark Than Bite, 42 U. Mem. L. Rev. 109, 122 (2011); see also *Twombly*, 550 U.S. at 559 (“[T]he success of judicial supervision in checking discovery abuse has been on the modest side.” (citing Easterbrook, *supra* note 200, at 638)).

²²² Fed. R. Civ. P. 37(a)(4) advisory committee’s note to 1970 amendment (internal quotation marks omitted).

What accounts for the lack of supervision? Put simply, trial judges are busy. In 2014 alone, over 400,000 cases were pending in U.S. district courts.²²³ This saddled, on average, every district judge with the daunting task of resolving about 600 cases in the calendar year.²²⁴ Having such a heavy workload invariably means that judges must set priorities. Many understandably feel their time is better spent overseeing trial, addressing motions for continuance and conferencing that affect their schedules, and dealing with dispositive motions to dismiss or for summary judgment rather than enlisting themselves in the trench warfare of discovery disputes. There is the temptation, and an understandable one, to respond to discovery requests by instructing the parties, “Folks, go figure this one out on your own.”

Some commentators suggest that discovery can be effectively policed by simply shoveling more of the responsibility on magistrate judges.²²⁵ But that proposal ignores the realities on the ground. Like district judges, magistrates often have neither the time for nor the interest in slogging through the quagmire of a discovery dispute. In 2014, for example, the 534 full-time and 36 part-time magistrates²²⁶ presided over 182,230 criminal pretrial hearings, 20,641 settlement conferences, and 59,673 other pretrial conferences in civil cases.²²⁷ Federal magistrate judges also held 271 civil jury trials and 138 civil trials without a jury.²²⁸ Even assuming magistrate judges have the time or interest to referee the war of attrition that is discovery, the very nature of discovery conflict

²²³ Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> [<https://perma.cc/W2N4-D29Y>] (last visited April 2, 2018).

²²⁴ Admin. Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile for 12-Month Period Ending December 31 (2014), http://www.uscourts.gov/sites/default/files/statistics_import_dir/district-fcms-profiles-december-2014.pdf [<https://perma.cc/ZXZ7-HSU2>].

²²⁵ See, e.g., David A. Bell, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 *Alb. L. Rev.* 433, 457 (1997). Pursuant to § 636 of the Federal Magistrates Act, U.S. magistrate judges have the power to “hear and determine” non-dispositive pretrial discovery matters. See 28 U.S.C. § 636(b)(1)(A) (2012).

²²⁶ Admin. Office of the U.S. Courts, Appointments of Magistrate Judges – Judicial Business 2014, <http://www.uscourts.gov/statistics-reports/appointments-magistrate-judges-judicial-business-2014#table13> [<https://perma.cc/447U-6PF3>].

²²⁷ Admin. Office of the U.S. Courts, Matters Disposed of by U.S. Magistrate Judges During 12-Month Periods Ending September 30, 2005 Through 2014, http://www.uscourts.gov/sites/default/files/statistics_import_dir/S17Sep14.pdf [<https://perma.cc/3MBU-ZHTD>].

²²⁸ *Id.*

presents yet another roadblock to effective oversight: the start-up costs for judges attempting to get to the bottom of a discovery dispute can be steep. Indeed, “[w]e cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.”²²⁹ Judicial officers often cannot uncover an abusive discovery practice without digging relatively deep into a case, something trial courts in the case of non-dispositive motions are often reluctant to do.

It is far easier to identify and lament a problem than it is to propose a workable solution. And here I confess I have no silver bullet. But if the violence done to the presumption of innocence by civil discovery is as great as I believe it is, and if district and magistrate judges are overwhelmed with competing tasks and other priorities, as I believe they are, then it makes sense to have a special master²³⁰ or other court officer whose sole function is to ride herd on discovery costs and ensure that they are justified by some reasonable prospect that defendants will be found culpable. This proposal can be structured in different ways. But it would, for one thing, lessen the comparative disadvantage at which courts find themselves vis-à-vis mediation and arbitration. If the proposal becomes a viable one, it could be a winning proposition for defendants and plaintiffs alike. Defendants would be relieved to see some attempt by the judicial system to master uncontrolled discovery expenses, and plaintiffs might actually find the court system a less expensive and more expeditious place to be as well. Bringing some additional force to bear would at least be better than the present system, which leaves discovery control largely to the ineffectual efforts of beleaguered district and magistrate judges and to the parties themselves.

The financial hardship of discovery is not the only problem caused by the failure to recognize a presumption of innocence. Civil defendants, upon accusation alone, may face great disruptions, intrusions, and inconveniences as a result of the accusations levied in their direction. While less easily measured than the financial burdens of litigation, these costs to a party’s time, privacy, reputation, and dignity are very real, and their effects undermine the fairness and legitimacy of our legal system.

²²⁹ Easterbrook, *supra* note 200, at 638–39.

²³⁰ Fed. R. Civ. P. 53(a)(1)(C).

The reputational costs to those named in lawsuits can be substantial and demoralizing.²³¹ Being named as a defendant in a suit inevitably brings with it harm to those accused of wrongdoing. Accusations alone may stigmatize a defendant and inflict significant psychological damage.²³² The fact that a civil case may later be dismissed may not remove the reputational damage caused by the earlier accusation. Because officers and directors are often drawn into the record by name when there are corporate defendants, the damage is not limited to the reputation of the company. Defendants who may well have had nothing to do with the conduct at issue may nonetheless find themselves responsible under theories of respondeat superior and vicarious liability. As with criminal defendants, those civilly accused are often tried in the court of public opinion long before an actual trial materializes. They may well need to hire separate counsel for themselves and spend countless hours preparing to defend themselves in court. Often, a trial never does come because the costs of litigation discussed above are so high that it makes financial sense to settle. But while such settlements may limit the financial costs, they may only enhance the reputational costs, making it appear that the settling party has admitted guilt.²³³ These costs, sometimes called “embarrassment costs,” can result in the loss of significant business for defendants and harm the personal lives of individuals who may be charged solely by virtue of their position of employment.²³⁴

All of these costs are indeed high, but critics might properly ask: are they too high? Do they truly constitute “punishment” before an adjudication of liability? After all, as we have noted, many criminal defendants also incur sizeable costs to defend themselves; that is a natural part of the trial process once a valid charge has been made. It is in the answer to this question that the presumption of civil innocence provides substantial value. Even setting aside the costs of verdicts—

²³¹ See Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 *BYU L. Rev.* 537, 550 (1997) (noting that reputational costs can exceed the burden of financial costs).

²³² Cf. Kitai, *supra* note 29, at 284 (“A person, innocent as well as guilty, may experience insult, unfair persecution, rejection, and betrayal as a consequence of being treated like a criminal prior to conviction.”).

²³³ See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 *Mich. L. Rev.* 867, 878 (2007).

²³⁴ *Id.*

costs that do not implicate the presumption of innocence because they come after a finding of liability—accused parties are still expending hundreds of billions on litigation in situations where there is no reasonable prospect of liability. Of course, there will always be some transactional costs to lawsuits, and some defendants will choose to settle because their case is infirm and trial is a losing proposition, irrespective of litigation burdens. But the balance is tipped too heavily toward those parties that allege and often need do little more. A presumption of civil innocence would not squash meritorious lawsuits—it is only a presumption after all. But it would at least sensitize us to the accusatory haven we have created. In a country that prides itself on providing fair process and preserving liberty from state coercion where possible, our current system ought to engender substantial consternation.

IV. TWENTY-FIRST CENTURY CIVIL PROCEDURE IN CONTEXT

The Supreme Court's efforts to protect defendants from arbitrarily being subject to the power of the state, before any showing of a likelihood of liability, are most salient and evident in the *Twombly* and *Iqbal* cases. Far from being "pro-defendant," as many of their critics charge, *Twombly* and *Iqbal* represent nothing more than a modern instantiation of the age-old concern for ensuring that plaintiffs are justified in invoking the coercive power of the state. If these cases departed from existing pleading doctrine, it was only to the extent necessary to adapt prior doctrine to the realities of twenty-first-century litigation—which, as detailed below, imposes significant harm without significant justification. In this respect, *Twombly* and *Iqbal* help "secure the just, speedy, and inexpensive determination of every action and proceeding."²³⁵

Despite the shortcomings of the civil justice system discussed in Part III, a nascent shoot of the presumption of civil innocence may already be found in various aspects of even pre-*Twombly* civil practice. The most important and wide-ranging constitutional protections are found in the Due Process Clause of the Fifth and Fourteenth Amendments. In countless areas, courts have applied due process to craft protections for defendants that protect them from baseless accusation. Although *Twombly* and *Iqbal* are generally regarded as glosses on the Federal

²³⁵ Fed. R. Civ. P. 1.

Rules, these due process cases suggest that *Twiqbal* can—and should—likewise be grounded in due process.

For example, due process values have found important expression in limitations on state (and thus federal)²³⁶ court exercises of personal jurisdiction over out-of-state defendants. As the Supreme Court recently noted, “A state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause.”²³⁷ Although personal jurisdiction rules are shaped in part by horizontal federalism concerns and a desire to preserve each state’s sovereign authority over its own territory and citizens,²³⁸ the Court has recognized that such considerations are subject to “the individual liberty interest preserved by the Due Process Clause.”²³⁹ The fundamental liberty interest protected by personal jurisdiction is the defendant’s “interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.”²⁴⁰ Freedom from the coercive power of a tribunal that has no legitimate claim to exercising judicial power over a defendant is, in the words of one commentator, “one of our longest-standing legal traditions, traceable to medieval England where it became a well-established doctrine under the English common law approximately four centuries ago.”²⁴¹ Like the presumption of innocence, this doctrine is rooted in the notion that liberty should be the default status of every citizen, and that coercion may only be employed by the sovereign in conformance with specific legal rules.

Other due process protections in civil procedure focus on ensuring that judicial procedures themselves are adequate to ensure that defendants are not erroneously deprived of liberty or property. These protections find their source in the idea that individuals should not be

²³⁶ See Fed. R. Civ. P. 4(k).

²³⁷ *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 918 (2011) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

²³⁸ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

²³⁹ *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.10 (1982).

²⁴⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (internal quotation marks omitted).

²⁴¹ Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 *Tul. L. Rev.* 567, 608 (2007).

subject to governmental penalties of any sort without a proper forecast or adjudication of liability or guilt. As the Supreme Court has held, “there can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”²⁴² Notice must be “reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, [be such] that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.”²⁴³

The Supreme Court has even extended the notice and hearing requirements to pretrial attachment of property. In *Sniadach v. Family Finance Corp. of Bay View*, the Supreme Court invalidated a state garnishment procedure that would have deprived the defendant of half his weekly income without notice or opportunity to be heard.²⁴⁴ In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, the Court noted that this due process protection was not limited to individual defendants but also applied to corporations facing pretrial attachment.²⁴⁵ Recognizing the potential for erroneous deprivation of property inherent in such procedures, the Supreme Court has emphasized that “the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property.”²⁴⁶ In a later case, *Connecticut v. Doebr*, the Supreme Court recognized that the costs of pre-judgment attachment required more than the plaintiff’s conclusory claims as to the defendant’s liability and instead needed to have some relation to the ultimate standard of proof: “Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant’s property when the claim would fail to convince a jury”²⁴⁷

Indeed, *Twombly* and *Iqbal* can also be understood as the latest in a long line of cases that vindicate due process values. This may seem remarkable given the fact that those two cases scarcely mention due

²⁴² *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

²⁴³ *Id.* at 315 (citations omitted).

²⁴⁴ 395 U.S. 337, 341–42 (1969).

²⁴⁵ 419 U.S. 601, 608 (1975).

²⁴⁶ *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972).

²⁴⁷ 501 U.S. 1, 13 (1991).

process at all. They were presented not as constitutional holdings, but as flowing out of the spirit of the Federal Rules. But consider their close kinship with due process, which, if it means anything, would protect litigants against the interim impositions that accrue from scarcely more than being named a defendant in a civil complaint. Consider first the language of the opinions themselves. The defendant's interest in avoiding arbitrary deprivations of time and money is reflected in the *Twombly* opinion's pervasive concern with not permitting mere allegations to survive the pleading stage, "lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."²⁴⁸ It noted that, because of the high costs of discovery, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed,"²⁴⁹ especially given the limitations of judicial case management in controlling discovery costs.²⁵⁰

The Court, by inveighing against the *arbitrary* use of state authority, is speaking the language of due process here. It is lamenting a deprivation, albeit one of time and money. The deprivation may not be one of classic liberty in the sense that no one in a civil suit is being thrown in jail. But it is a deprivation of liberty nonetheless because the litigant subject to judicial process is no longer left free to do what he will with that most valuable of assets—his time. The same is true as to property. It is hard to make the claim that an arbitrary and ultimately groundless exaction of expense by the state is not a deprivation of property. After all, money can be used the next day to buy a parcel of property or a piece of antique furniture. Thus, the deprivations denounced in *Twombly* and *Iqbal* are no less real for taking other than classic forms. They belong in the mainstream of our conception of due process even where they are nominally presented as mere renderings of Rule 8. Of course, the plaintiff in any lawsuit may spend time and money too, but the initiating party who invokes the power of the state

²⁴⁸ *Twombly*, 550 U.S. at 558 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotation marks omitted).

²⁴⁹ *Id.* at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)) (internal quotation marks omitted).

²⁵⁰ *Id.* at 559 (citing Easterbrook, *supra* note 200, at 638).

against an opponent is simply not cloaked with a presumption of civil innocence.

So why weren't *Twombly* and *Iqbal* written in terms of due process? Perhaps the Supreme Court was reluctant to take the far-reaching step that constitutionalization would have brought about. Rule 8 is limited by definition to the federal system. A due process decision would have applied to state court rules of procedure, not all of which conform to the Federal Rules.²⁵¹ That said, the obvious kinship between due process and *Twombly* and *Iqbal* further fortifies both decisions.

Additional civil protections can be found in the Federal Rules themselves, rather than the Constitution; these too are chiefly concerned with avoiding penalizing defendants prior to any assessment of liability. For example, Rule 9 requires that fraud or mistake be specially pled.²⁵² This requirement stems both from the pre-FRCP common law practice as well as from English procedure as it existed under the Judicature Act when the FRCP were first promulgated.²⁵³ Courts and commentators have advanced a number of justifications for this special requirement, three of which are particularly relevant here. The first is that allegations of fraud, even if they are disproved, impose substantial reputational harms on defendants.²⁵⁴ The second is that allegations of fraud are often used merely to coerce defendants into settling.²⁵⁵ The third is that allegations of fraud are often used as a basis for discovery "fishing expeditions."²⁵⁶ Rule 9 thus mirrors *Twombly* and *Iqbal*'s concern with allowing plaintiffs to use non-meritorious claims to exact costs on defendants through the litigation process.

Similarly, modern class action jurisprudence requires a searching inquiry into whether Rule 23's class-certification requirements have

²⁵¹ See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367 (1986).

²⁵² See Fed. R. Civ. P. 9(b).

²⁵³ 5A Charles Alan Wright et al., *Federal Practice & Procedure* § 1296 (2017).

²⁵⁴ See, e.g., *Cozzarelli v. Inspire Pharm.*, 549 F.3d 618, 629 (4th Cir. 2008) (noting that "one of the primary purposes of Rule 9(b)" is to "protect[] defendants from the reputational harm that results from frivolous allegations of fraudulent conduct").

²⁵⁵ See Herbert I. Weisberg & Richard A. Derrig, *Fraud and Automobile Insurance: A Report on Bodily Injury Liability Claims in Massachusetts*, 9 J. Ins. Reg. 497, 537 (1991) (highlighting the frequency with which bodily injury plaintiffs use fraud to induce settlements).

²⁵⁶ See *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 255 (6th Cir. 2012) (quoting *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 466 (6th Cir. 2011)).

been met. The reasons for this are clear. Judges, who witness firsthand the immense costs associated with class certification, have long recognized the dangers to defendants of this form of litigation. Judge Henry Friendly worried about “blackmail settlements” from class-action certifications in the early 1970s.²⁵⁷ Judge Posner recognized that defendants, even when facing likely non-meritorious suits, “may not wish to roll the dice” and will thus “be under intense pressure to settle.”²⁵⁸ The Supreme Court observed in the 1970s that “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.”²⁵⁹

The Supreme Court’s recent high-profile class-action cases have reflected this pervasive concern. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court noted that, “when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”²⁶⁰ And in *Wal-Mart Stores v. Dukes*, the Court noted that the “rigorous analysis” required to determine whether plaintiffs have met the requirements of Rule 23 may overlap with the merits of the case.²⁶¹ Although the Court framed the issue presented in terms of Rule 23, its approach had the additional benefit of enabling courts to protect defendants from non-meritorious claims at the certification stage.

The above list of litigation costs divorced from the merits is far from exhaustive. The same concerns that underlie the above areas of law inform other legal rules as well: exhaustion requirements, sanctions for frivolous complaints and filings, stringent standards for preliminary

²⁵⁷ Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

²⁵⁸ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

²⁵⁹ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

²⁶⁰ 563 U.S. 333, 350 (2011); see also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (“A court’s decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims. When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.” (citation omitted)).

²⁶¹ 564 U.S. 338, 350–51 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)) (internal quotation marks omitted).

injunctions and temporary restraining orders, etc. For instance, before issuing a preliminary injunction, a court must find that a plaintiff has shown a substantial likelihood of success on the merits.²⁶² Thus, even when relief is nominally preliminary, the Supreme Court requires that even interim impositions will be upheld only after the plaintiff overcomes a presumption of innocence. Admittedly, a preliminary injunction is an appealable order and closer to final relief than many interim rulings. Nonetheless, the analysis in *Winter v. Natural Resources Defense Council* links merits forecasts to interim stages of litigation and interim relief.²⁶³

Whether it be the due process decisions, or the special pleading requirements of fraud, or scrutiny of class action certifications, or stiffened requirements for preliminary injunctions, decisions auguring the emergence of a presumption of civil innocence are scattered like wildflowers on the hills. Many of these cases now explicitly link the availability of interim impositions to an ultimate forecast of the merits of a plaintiff's case. The presumption of civil innocence at this point, however, is not full-blown. Nor have the scattered flowers been gathered under the roof of a single theory. It is crucial to do so, however, because the power of a single idea will have geometrically more influence than its disparate and isolated strands. Of course, the idea will be denounced as a defendant's wolf in sheep's clothing and as out-of-character judicial activism. But those doing the denouncing have a few questions of their own to answer. How did something so basic as a presumption of innocence in all legal proceedings manage to remain so elusive and how did the world's most advanced legal system manage to so lose its way?

The intensity of the expected resistance to this legal principle will no doubt be many times what we have already experienced in the heated debates over *Twombly* and *Iqbal*. The resistance from members of the bar and the academy to those two cases has at times been stiff.²⁶⁴ Even judges on the lower courts, though bound by these rulings, have been slow to break old habits. Apart from possible ideological motivations, judges have been "just as susceptible to many of the same unconscious biases, aversions to costs, and preferences for the familiar status quo as

²⁶² *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32 (2008) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)).

²⁶³ *Id.*

²⁶⁴ See *supra* notes 3–16.

the rest of us.”²⁶⁵ The old familiar ways die hard. Lower courts so accustomed to past formulations and applications of the rules may simply have been reluctant to change. They have balked at fully applying doctrines which, like *Twombly*’s replacement of *Conley v. Gibson*’s standard of notice pleading, depart from the decisions they have made and justified (to others and to themselves) for many years.²⁶⁶

Empirical research has attempted to evaluate *Twombly*’s effects in light of this potential resistance—to measure *Twombly*’s impact on the ground. What’s surprising is not how much impact these studies show, but rather how little. A 2011 study of motions activity in twenty-three federal district courts between 2006 and 2010, for example, found that though motions to dismiss were more common in 2010, there was no increase in the rate at which they were granted without leave to amend.²⁶⁷ This may be explained in part by human behavior—if lawyers reacted to *Twombly* by filing only stronger, more worthwhile cases, then the dismissal rate could have stayed constant, even though *Twombly* had the desired effect.²⁶⁸ But another study controlled for this variable by examining only motions filed before, but decided after, *Twombly*.²⁶⁹ It still found no change in the dismissal rate.²⁷⁰ There are, of course, two sides to the debate.²⁷¹ But one may cautiously conclude that the risk of reluctance in the lower courts to change old habits appears real enough

²⁶⁵ Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. Chi. L. Rev. 901, 903 (2015).

²⁶⁶ See *id.* at 912–18.

²⁶⁷ See Joe S. Cecil, et al., *Fed. Judicial Ctr., Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules 12–13* (2011), <https://www.fjc.gov/content/motions-dismiss-failure-state-claim-after-iqbal-report-judicial-conference-advisory-0> [<https://perma.cc/75FT-F24D>].

²⁶⁸ See William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. Legal Stud. 35, 36–37 (2013).

²⁶⁹ See *id.* at 40.

²⁷⁰ *Id.*

²⁷¹ See, e.g., Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 Ky. L.J. 235, 239 (2012) (“[T]he number of dismissals [in housing discrimination cases] on the grounds that the pleadings were not sufficiently specific has risen dramatically after that decision, a fact that is missed by looking solely at dismissal rates, and not the volume of dismissals.”); Theodore Eisenberg & Kevin M. Clermont, *Essay, Plaintiphobia in the Supreme Court*, 100 Cornell L. Rev. 193, 196–97, 211–12 (2014) (arguing that total pretrial adjudication victories for defendants increased substantially after *Twombly* and *Iqbal* and also that the decisions failed to select for cases that would be more meritorious at trial).

to cause concern, creating some need for auxiliary buttressing of the Supreme Court's decisions.

One possible strategy would be to amend the Federal Rules themselves. A presumption of civil innocence might be explicitly incorporated into Rule 1, and its practical implications expanded in Rules 12 and 56. Speaking directly to judges, Rule 1 outlines the Rules' guiding purpose and governs the application of all other Rules.²⁷² It finds its counterpart in Rule 2 of the Federal Rules of Criminal Procedure.²⁷³ Amending Rule 1 would require all federal courts to observe a presumption of civil innocence, thereby codifying *Iqbal's* extension of the *Twombly* standard to all areas of law. The amended Rule might read as follows:

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding *and to uphold the presumption that an accused party is innocent until proven otherwise.*

To make the presumption even more concrete, Rules 12 and 56 might be amended to incorporate key language from *Twombly*, *Iqbal*, and the trio of summary judgment cases the Court decided in 1986.²⁷⁴ For example, a new Rule 12(d) might be inserted below the defenses listed in Rule 12(b)(1)–(7) and the motion for judgment on the pleadings acknowledged in Rule 12(c). Echoing *Iqbal*,²⁷⁵ a new Rule 12(d) might direct as follows: “When ruling on motions filed under Rule 12(b)(6) or 12(c), the court shall grant the motion *unless* the complaint contains sufficient factual matter, taken as true, to state a claim to relief that is

²⁷² See Fed. R. Civ. P. 1.

²⁷³ See Fed. R. Crim. P. 2 (“These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.”).

²⁷⁴ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (applying a heightened evidentiary standard of proof in a libel action to the judicial assessment of the propriety of summary judgment); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–27 (1986) (finding that a party moving for summary judgment need only show that the opposing party lacks evidence sufficient to support its case); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–98 (1986) (holding that an antitrust plaintiff with an inherently implausible claim should be dismissed at summary judgment).

²⁷⁵ 556 U.S. at 678.

plausible on its face.” Using the word “unless” recognizes that the default posture of the court should be to dismiss. “Unless” a plausible claim for relief is shown, the presumption of civil innocence has not been adequately rebutted and discovery therefore shall not be allowed.

Even if discovery is allowed, a plausible complaint rebuts the presumption only temporarily, not permanently. The presumption reasserts itself at the summary judgment stage. Here it might again be more explicitly protected within the text of Rule 56(a):

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *The mere existence of some alleged factual dispute shall not defeat an otherwise properly supported motion for summary judgment. Summary judgment is appropriate whenever a party bearing the burden of proof at trial fails to make a showing sufficient to establish the existence of an element essential to their case.* The court should state on the record the reasons for granting or denying the motion.

Amending the Rules in this way would harmonize the text of the Rules with the language of *Anderson v. Liberty Lobby*²⁷⁶ and *Celotex Corp. v. Catrett*.²⁷⁷ This statement would underscore the Supreme Court’s holdings that not just any flimsy case is enough to drag a defendant through the vicissitudes of protracted process. Nor does a defendant bear the burden of negating unsupported accusations. Rather, only a “genuine” issue of “material” fact is enough to rebut the defendant’s presumption of civil innocence to the extent that further application of legal process backed by the power to subpoena and sanction becomes appropriate. “Genuineness” and “materiality” are not just two words whose endless incantation has numbed us to their significance. Imbuing them with meaning is essential to giving the presumption of innocence a semblance of life.

²⁷⁶ 477 U.S. at 255–57.

²⁷⁷ 477 U.S. at 322.

In short, the above amendments to Rules 1, 12, and 56 could solidify that presumption by protecting the Supreme Court's past wisdom from future reversal and by reminding lower courts of its principles during critical procedural crossroads. Together they would help ensure that a defendant would not suffer grievous government coercion unless, like the accused in many ancient systems and like criminal defendants today, the presumption of innocence was sufficiently overcome.

While the Court's typical role is to apply the language as written by the Rules' drafters, the above proposal reverses the process: it asks the drafters to codify through amendment the Court's interpretation of procedural standards. Though the Court is well-positioned to recalibrate procedural thresholds to account for changing litigation practices, the Rules amendment process²⁷⁸ could lend democratic legitimacy to the Court's interpretive shifts. Amendments to the Rules must go through several steps. Proposed amendments are reviewed by the Advisory Committee on Civil Rules, which then seeks permission to publish proposed rules from the Standing Committee on Rules of Practice and Procedure. With the Standing Committee's permission, the proposed amendment and its explanatory note are circulated for public comment and hearings. After the six-month comment period, the Advisory Committee reconsiders the proposal in light of public input. If both the Advisory and Standing committees then approve the proposed amendment and note,²⁷⁹ they are forwarded along with any revisions to the Judicial Conference. The Supreme Court reviews amendments accepted by the Conference. If the Court gives its blessing and Congress does not reject, modify, or defer the proposal, the amended rule is adopted.²⁸⁰

This multi-stage process, with its opportunities for public input and congressional review, would foster a healthy debate on the presumption of civil innocence. It would put any presumption on a more secure

²⁷⁸ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1103–04 (2002); Admin. Office of the U.S. Courts, *The Federal Rules of Practice and Procedure*, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/26CG-2KVS>].

²⁷⁹ See sources cited *supra* note, 278; see also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1663–75 (1995) (describing in detail the current rulemaking structure and procedure).

²⁸⁰ *Id.* at 1673.

footing. And regardless of outcome, a robust discourse reaching beyond the federal judiciary and academic circles would provide valuable democratic engagement on the basic proposition that no man stands presumptively guilty before the law. The Court in turn would have the chance to consider the amendments' codification of *Twombly* and *Iqbal* and offer its feedback as needed. Indeed, by combining judicial expertise and democratic accountability, the two-step process of Court-led interpretations followed by ratification through Rules amendments may become a useful template for future procedural change.

Of course, simply amending the Federal Rules will not restore the damage that has been inflicted these past eighty years. Additional steps are necessary to vindicate civil liberty and weave the presumption of civil innocence into our broader social fabric and understandings. Another possible reform is to require judges to remind jurors of the presumption of innocence during jury instructions. Recent studies have shown that jurors often fail to understand what judges mean by the term "preponderance of the evidence."²⁸¹ Reminding civil jurors that defendants enjoy a presumption of innocence would clarify the plaintiff's burden and emphasize that jurors should not invoke the awesome power conferred upon them unless they are firmly convinced that the plaintiff has overcome the default presumption and shown that the defendant has committed the act of which he is accused.

Alas, it is always risky to open things up. But this is no judicial activism. The presumption of civil innocence serves the purpose of judicial restraint by disallowing suits whose merits are insubstantial to serve as platforms for judicial forays into public policy.²⁸² The real danger of my suggestion is that the whole reforming exercise might produce a public outcry to string up unpopular parties with something approaching a presumption of guilt. It is worth the risk. The present system is badly in need of a good airing. And if yet further damage to the basic principle of innocence is inflicted, one would hope that, in America, at least the Due Process Clause would stand in the way. For if we have truly regressed from civilized standards in the presumptive

²⁸¹ See John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 *Am. Crim. L. Rev.* 1187, 1198–1208 (2002).

²⁸² The Supreme Court recognized this problem in *Pearson v. Callahan* when it cautioned against unnecessary pronouncements on matters of constitutional policy in the context of suits which were bound in all events to fail. 555 U.S. 223, 236–42 (2009).

2018]

The Presumption of Civil Innocence

655

power we accord to accusation, a modern corrective is constitutionally overdue.

Will a presumption of civil innocence solve all our problems? Of course not. I simply suggest it as a way to remind ourselves of the toll that any judicial proceeding takes upon human liberty and the need for some unifying recognition of that point in both the civil and criminal justice systems. We have strayed far from that in civil litigation. And the result has been disheartening. Without the abiding presence of a presumption of innocence in all legal proceedings, our great land will always be less free.