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In Theory | Opinion

The presumption of innocence exists in theory, not reality

By Keith Findley January 19

Each week, In Theory takes on a big idea in the news and explores it from a range of perspectives. This week we're talking about the right to a fair trial. Need a primer? Catch up here.

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If, as the Supreme Court has consistently declared, the presumption of innocence is among the most fundamental principles in our criminal justice system, it is also among the most fragile.

The presumption is under constant assault from jurors' natural assumption that if someone is arrested and charged with a crime, he or she must have done something wrong. It is also vulnerable to the media frenzy around high-profile cases, the fear-driven politics of crime, the highly punitive nature of our culture and the innate cognitive processes that produce tunnel vision and confirmation bias.

Indeed, research suggests that the presumption of innocence exists more in theory than reality. In studies, mock jurors predict a 50 percent chance of voting to convict — before hearing any evidence. Other research shows that while simulated jurors initially assign low probabilities of guilt, they abandon the presumption of innocence promptly as prosecution evidence is introduced.

[*The presumption of innocence doesn't apply to my child*]

Given these natural inclinations, one would think a system built on the presumption of innocence would protect and reinforce that presumption. But in many ways, it does not.

Pretrial bail policies, for example, are not based on assessments of any likelihood of innocence or the need for innocent people to prepare for their defense, but solely on the risk that the (presumably guilty) accused might not appear for trial. On this score, the presumption of guilt accelerated in the early 1970s when notions of preventive detention — that is, complete denial of bail — emerged as part of the Nixon administration's mission to control "criminals" before they committed crimes.

The presumption of innocence is undermined in practice, as well. Police are trained to act on a presumption of guilt in ways that exacerbate natural tendencies toward confirmation bias. Police are trained, for example, to make quick assessments of guilt and to interrogate suspects, not to learn information about the case, but to obtain a confession that confirms their suspicions.

It need not be that way. Police in other countries, most notably the United Kingdom, are trained not to interrogate as if they know the answers to their questions. Instead, they embrace "investigative interviewing," in which they employ probing, non-accusatory questions designed to elicit information. Unlike police in the United States, they are not permitted to lie to suspects about evidence to trick them into confessing. And yet this process does not impede their ability to investigate crime; suspects in the United Kingdom confess at roughly the same rate as suspects in the United States.

All of these assaults on the presumption of innocence — and the systemic failures to resist them — are on vivid display in the Netflix documentary series "Making a Murderer," about the murder trials of Steven Avery and his nephew, Brendan Dassey. Regardless of whether Avery and Dassey are actually innocent or guilty — on that question I make no claims here — the series effectively shows how seriously compromised was the presumption of innocence.

[*Americans are bargaining away their innocence*]

The public reaction to the case today is 180 degrees from the public's reaction to Avery's arrest in Teresa Halbach's murder in 2005. As much as the public today is horrified by the apparent rush to judgment and questionable tactics used to convict Avery and Dassey, the outrage was aimed squarely at Avery and Dassey at the time of the investigation. Public judgment was swift and vicious. The crime was horrific, and the lust for retribution was palpable. The presumption of innocence had no chance.

The outrage led local prosecutor Ken Kratz to hold press conference after press conference, in which he and local

law enforcement investigators detailed the grisly details of their theory of the crime and the evidence, as if guilt was a given and a trial was unnecessary. It was that mood — and the attending media frenzy — that made it virtually impossible for Avery and Dassey to get affordable bail or an untainted jury anywhere in the state. The presumption of guilt was on full display.

Much can be done to protect the presumption of innocence, starting with enforcing the ethical rules against prejudicial pretrial publicity, changing the way police interrogate suspects and recalibrating pretrial release decisions to allow the innocent to prepare a defense. Following nearly any controversial case will offer many lessons about our criminal justice system. Perhaps chief among them is the feebleness of the presumption of innocence in our system today, and the need to find ways to reinvigorate that bedrock principle.

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