

# CRIMINAL LABELS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE PRESUMPTION OF INNOCENCE

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## Key words

Presumption of innocence, criminal law, European Convention on Human Rights

## Abstract

This article explores whether the presumption of innocence is compromised by State declarations that a person is other than innocent, but which are neither predicated on nor equivalent to a criminal conviction. The task ultimately is threefold: in a descriptive sense, to establish the existing parameters of the presumption, in particular tracing its incremental expansion by the European Court of Human Rights; secondly, to present a normative argument as to what I believe the presumption should further entail, drawing on its recent doctrinal extension but moving beyond this in certain respects; and then finally to ascertain whether any labels or declarations by the State either before or absent a finding of criminal liability are problematic as regards the presumption of innocence as I propose it should be construed, and what ought to be done about this.

## I. Introduction

The conventional, contemporary understanding of the presumption of innocence as a principle of criminal law and procedure is that it embodies two elements, firstly prescribing that the State must bear the burden of proof in a criminal trial and secondly requiring that the guilt of the individual as regards a particular crime be proven beyond reasonable doubt. Such a construction generally is uncontroversial in common law legal doctrine and scholarship. Now, jurisprudence of the European Court of Human Rights

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has extended this central protective notion to preclude expressions of suspicion by the courts after acquittal and also declarations of guilt by agents of the State prior to trial. Moreover, a brief reference by the European Court seems to intimate that the presumption of innocence may go further still, and perhaps may apply to other stigmatising actions by the State.<sup>2</sup>

Various existing state practices, such as criminal accusation and prosecution, inclusion on ‘watch lists’, and publication of details of civil preventative orders, may be hard to reconcile with an expansive version of the presumption of innocence, on the basis that they involve the treatment as other than innocent of persons who have not been found to be criminally culpable. While it may first appear that these engage the presumption of innocence as defined in the European context, according to Article 6(2) of the European Convention on Human Rights (ECHR) the presumption cannot apply unless and until the individual is charged, thereby excluding some actions from its scope.<sup>3</sup> Nonetheless, intuitively it seems that certain official actions and statements do not comport with the ethos underpinning the presumption, which includes protecting the individual against the coercive power of the State.<sup>4</sup>

This article begins in section II by examining the steady extension of the reach of the presumption of innocence in the context of ECHR jurisprudence. Though we all may agree on the conventional core of the presumption and the reasons for its protection in the context of criminal procedure, in section III I posit and defend a new and broader reading premised on protecting the individual from State censure. Even under the wide-ranging European approach, the presumption does not accrue until an individual is charged with an offence; I propose an extension so as to protect individuals who are subject to State labelling but who have not been charged.

While there is a rich literature on official treatment of the individual that ostensibly breaches the presumption of innocence, such as pre-trial detention,<sup>5</sup> that is not the concern of this paper. My focus is narrower: here the emphasis is on official,

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<sup>2</sup> *S and Marper v United Kingdom* (2009) 48 EHRR 50 [119].

<sup>3</sup> Article 6(2) provides that ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’.

<sup>4</sup> See J. Jackson and S. Summers, *The Internationalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) 199.

<sup>5</sup> See, for example, S. Baradaran, ‘Restoring the Presumption of Innocence’ (2011) 72 *Ohio State Law Journal* 723.

censuring statements that replace rather than precede the criminal trial or accompany the ‘hard treatment’ of conviction. Instead of looking at treatment in terms of behaviour towards or consequences for the individual, this paper looks at what may be called ‘non-material’<sup>6</sup> matters, namely public declarations that induce belief in guilt, as a substitute for a criminal conviction.<sup>7</sup> Though the State labels may be accompanied or reinforced later by coercive acts or consequences, here I seek to consider the labels only.

Then, in section IV, numerous official actions that declare people to be other than innocent will be identified. By teasing out the intent behind and effects of these measures this paper seeks to construct a typology and thereby ascertain which, if any, of these are problematic as regards the extended presumption of innocence I propose. I use domestic case law to flesh out jurisprudentially the bones of a normative argument that the presumption is applicable in the context of certain State labels short of criminal trial or conviction. Ultimately, if accepted, this requires a reconsideration of the necessary standard of proof in certain instances.

## **II. The presumption of innocence and its European expansion**

According to the oft-quoted dictum in *Woolmington v DPP*, the presumption of innocence requires the prosecution to bear the burden of proof in the criminal trial that the defendant is guilty of the offence charged.<sup>8</sup> This placing of the onus on the State is underpinned by the imbalance of resources and power between the parties in the criminal process, and acknowledges the liberal conception of limited state intervention and individual autonomy. Though, strictly speaking, the presumption is silent as to the necessary standard of proof, many interpretations see it as encompassing that of ‘beyond reasonable doubt’. This understanding is by no means necessary, and as Ashworth notes, it is possible to conceive of a presumption that placed a less onerous burden on the prosecution.<sup>9</sup> Nonetheless, the rationale for requiring a demanding standard of proof lies in the need to avoid wrongful convictions, the disparity of resources and the unreliability

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<sup>6</sup> M. Redmayne, ‘Standards of Proof in Civil Litigation’ (1999) 62 *Modern Law Review* 167, 188.

<sup>7</sup> In fact, the treatment of pre-trial detainees may be problematic in terms of the presumption regardless of whether the public is aware of this practice, but this is beyond the scope of this paper.

<sup>8</sup> *Woolmington v DPP* [1935] AC 462.

<sup>9</sup> A. Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence & Proof* 241, 250.

of fact-finding, objectives that also underpin the aspect of the presumption that places the burden on the State.<sup>10</sup> Though a high standard of proof does not prescribe precisely how people should be treated, a primary reason for this second element of the presumption is to guard against illegitimate convictions, given that the condemnation and punishment of an innocent person is deemed to cause more harm than the avoidance of liability by a guilty person. Essentially, this aspect of the presumption of innocence seeks to reduce the likelihood and potential cost of error as regards wrongful conviction in the criminal trial.<sup>11</sup>

In the United States the presumption of innocence is read into the Fifth Amendment to the Constitution, and has been described not as a presumption ‘in the strict sense of the term [but]... simply a rule of evidence which allows the defendant to stand mute at trial and places the burden upon the government to prove the charges against him beyond reasonable doubt.’<sup>12</sup> The presumption does not apply to pre-trial proceedings in the US but rather ‘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 and not on the basis of suspicions.’<sup>13</sup> The presumption thereby places the onus on the State to prove a case and ultimately is addressed to the finder of fact, whether that is the jury or a professional judge.

Such a narrow reading forms the relatively uncontroversial heart of the presumption across common law jurisdictions, but more expansive procedural understandings have been posited, mostly in academic literature, but now also by the European Court of Human Rights. Overall, the key interpretive question regarding the presumption concerns the stage of the process at which it applies, because this indicates the persons to whom it accrues and the State agents it binds. As Ashworth notes, its scope and meaning are ‘eminently contestable’ given that it may operate at the level of the

Comment [C1]: fifth I think.

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<sup>10</sup> *Ibid.*

<sup>11</sup> Though the acquittal of the factually innocent is also an error, the aim is not to reduce the aggregate errors, so to speak, but to achieve overall a distribution of errors that favours the acquittal of the factually guilty over the conviction of the innocent, based on the normative conclusion that the former is less problematic than the latter.

<sup>12</sup> J.N. Mitchell, ‘Bail Reform and the Constitutionality of Pretrial Detention’ (1969) 55 *Virginia Law Review* 1223, 1231. See also F. Quintard-Mordnas, ‘The Presumption of Innocence in the French and Anglo-American Legal Traditions’ (2010) 58 *American Journal of Comparative Law* 107, 126 regarding the presumption’s progression to a rule of proof.

<sup>13</sup> *Bell v Wolfish* 441 U.S. 520, 533 (1979).

criminal trial only or in the criminal process more broadly.<sup>14</sup> In its conventional and least challenged form, the presumption is a procedural safeguard relevant only at trial, guarding against conviction if the prosecution has not proved the alleged offence to the requisite standard. Thus, it has no applicability before the criminal trial commences. At the opposite end of the scale, it may be regarded as applying at the pre-trial stage more broadly and as prohibiting all restrictions on the accused's liberty based on a view that she has a high risk of offending or disappearing,<sup>15</sup> or as precluding coercive measures by the State against the individual.<sup>16</sup> Furthermore, and more contentiously, the presumption of innocence has been conceived of as substantive in nature, and as prohibiting conviction where the person's conduct is of the kind that ought not to be criminal.<sup>17</sup>

In ECHR jurisprudence, the presumption of innocence as a procedural rule is interpreted in an increasingly generous fashion, and, of course, any development in European doctrine has ramifications for the traditional conception of the presumption in England and Wales, given the enactment of the Human Rights Act 1998.<sup>18</sup> Article 6(2) of the ECHR provides that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law' and so a court 'should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.'<sup>19</sup> Moreover, 'pre-trial procedures should be conducted, so far as possible, *as if* the defendant were innocent'.<sup>20</sup> Beyond this, the European Court has found the presumption to encompass what has been called a 'reputational' aspect, which aims to protect the image of the person<sup>21</sup> but also to defend him against the power of the State.<sup>22</sup> Lord Phillips in the

<sup>14</sup> Ashworth, n 9, 242. Also P. J. Schwickard, 'The Presumption of Innocence: What Is It?' (1998) 11 *South African Journal of Criminal Justice* 396.

<sup>15</sup> U. Ní Raifeartaigh, 'Reconciling Bail with the Presumption of Innocence' (1997) 17 *Oxford Journal of Legal Studies* 1, 4-5.

<sup>16</sup> Jackson and Summers, n 4, 199.

<sup>17</sup> Tadros describes this as the 'moral theory' of the presumption of innocence, and places his own interpretation as falling between the 'extremes' of this and the conventional 'classical' theory. See V. Tadros 'Rethinking the Presumption of Innocence' (2007) *Criminal Law and Philosophy* 193, 197; also see Jackson and Summers, n 4, 208. A substantive interpretation has not gained traction in a legal sense, nor in the academy.

<sup>18</sup> Art 6(2) is cited regularly before appellate courts in England and Wales, in cases relating to statutory reverse onus provisions especially.

<sup>19</sup> *Barberà v Spain* (1989) 11 EHRR 360 [77].

<sup>20</sup> Ashworth, n 9.

<sup>21</sup> S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) 164.

Supreme Court described this development as the expansion of a component of the guarantee of a fair trial into ‘something coming close to a principle of the law of defamation’, and regarded this as a ‘remarkable’ example of the Convention’s nature as a ‘living instrument’.<sup>23</sup>

**Comment [C2]:** add which judge (unless judgment of the court)

As Trechsel observes, complex problems surround the application of this interpretation of the presumption of innocence.<sup>24</sup> Nevertheless, ECHR case law has delineated a number of rules in this respect. Article 6(2) will be breached by judicial decisions or reasoning reflecting an opinion that an unconvicted person is guilty, such as orders requiring him to pay the cost of criminal proceedings and compensation, or statements that had a prosecution not been time-barred it would ‘very probably have led to ... conviction’.<sup>25</sup> Moreover, the presumption is infringed where a court expresses suspicion about an acquitted individual (rather than opining that he is guilty), such as by refusing compensation to him or by saying that suspicion has not been ‘dispelled’.<sup>26</sup> Refusing to grant a cost order to a person who was acquitted after a key prosecution witness failed to show at trial was found to breach the presumption also.<sup>27</sup> Furthermore, Article 6(2) was deemed to be contravened by a confiscation order that included the benefit derived from all the offences with which the individual had been charged, even those of which he had been acquitted.<sup>28</sup> Overall, ‘one of the functions of Article 6 § 2 is to protect an acquitted person’s reputation from statements or acts that follow an acquittal which would seem to undermine it’;<sup>29</sup> however ‘[t]he voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation.’<sup>30</sup> In other words, where criminal proceedings are discontinued, statements describing a state of suspicion, as

<sup>22</sup> Jackson and Summers, n 4, 205.

<sup>23</sup> *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 [58].

<sup>24</sup> Trechsel, n 21, 166.

<sup>25</sup> *Minelli v Switzerland* (1983) EHRR 554 [37]–[38]. Also see *Hussain v United Kingdom* (2006) 43 EHRR 22.

<sup>26</sup> *Sekanina v Austria* (1994) 17 EHRR 221 at [29]. Also see *Asan Rushiti v Austria* (2000) 33 EHRR 1331.

<sup>27</sup> *Hussain v United Kingdom* (2006) 43 EHRR 22.

<sup>28</sup> *Geerings v Netherlands* (2008) 46 EHRR 49.

<sup>29</sup> *Taliadorou and Stylianou v Cyprus* [2008] ECHR 1088 [26].

<sup>30</sup> *Sekanina v Austria* (1994) 17 EHRR 221 [30].

opposed to those expressing a determination of guilt, are not incompatible with the presumption.<sup>31</sup>

ECHR jurisprudence indicates that State actors other than judges may breach Article 6(2). In *Allenet de Ribemont v France*, statements made by the Minister of the Interior and senior police officers implicated the applicant in a murder, after his arrest but before trial.<sup>32</sup> This was ‘clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority’.<sup>33</sup> So, a pronouncement as to culpability by agents of the State transgressed the presumption, as it encouraged his fellow citizens to regard him as guilty and usurped the role of the judiciary.<sup>34</sup> There does not appear to be a requirement to prove intent on the part of the State, but here there is a degree of foreseeability regarding the likely effect of the declaration. Similarly, pre-trial comments by a prosecutor and senior staff regarding the ‘crimes’ and ‘personal qualities’ of the particular applicants, including their ‘cruelty and meaningless brutality’, ‘amounted to a declaration of the applicants’ guilt and prejudged the assessment of the facts by the competent judicial authority’.<sup>35</sup>

Notwithstanding this stretching of Article 6(2) to encompass both court scepticism regarding the innocence of an acquitted individual, and the ‘prejudging’ of guilt by other State agents, the European Court has highlighted that the presumption of innocence is not breached where a prosecutor makes statements about the guilt of an accused person ‘in the course of a reasoned decision at a preliminary stage of those proceedings, rejecting the applicant’s request to discontinue the prosecution’.<sup>36</sup> In *Daktaras v Lithuania*, the applicant was given access to his case file and requested the prosecution be discontinued due to lack of evidence of his guilt. His request was dismissed, and the reasons of the prosecutor stated that his guilt had been ‘proved’, based on the evidence. Though the European Court regretted the use of the term ‘proved’, it held that the prosecutor (and indeed the applicant himself) had been concerned with

**Comment [C3]:** is ‘judges’ better here?

<sup>31</sup> *Englert v Germany* (1991) 13 EHRR 392 [37]-[39].

<sup>32</sup> *Allenet de Ribemont v France* (1995) 20 EHRR 557 [36].

<sup>33</sup> *Ibid* [41].

<sup>34</sup> Also see *Daktaras v Lithuania* (2002) 34 EHRR 60 [41]-[43]; and *Butkevičius v Lithuania* [2002-II] ECHR 48297/99 [49].

<sup>35</sup> *Khuzhin v Russia* [2009] ECHR 13470/02 [95]-[96].

<sup>36</sup> *Daktaras v Lithuania* [44].

whether the case file involved sufficient evidence of guilt to justify proceeding to trial, and that these comments were not made in a context independent of the criminal proceedings, such as in a press conference.<sup>37</sup> So, while it may be difficult to reconcile this case with the earlier jurisprudence, what seemed to be relevant to the Court's decision were the context in which the statement was made, the nature of it, and its dissemination (or lack thereof). Moreover, the European Court has noted that there is a fundamental distinction between statements that someone is suspected of having committed a crime on the one hand, and clear declarations in the absence of a final conviction that an individual has committed the crime in question, on the other.<sup>38</sup>

Furthermore, the European Court remarked on the presumption in a more oblique fashion in *S and Marper v UK*, a case centring on the pre-trial collection and retention of DNA samples.<sup>39</sup> There, the Court briefly made reference to the notion of stigmatisation, as distinct from a declaration of guilt or expression of suspicion, in relation to criminal suspects. This case concerned S, an acquitted child, and Marper, an adult against whom proceedings were not initiated, who had sought judicial review of the decision of the English police to collect their DNA at arrest and then to retain the samples, despite the fact that neither individual had been convicted.<sup>40</sup> The Grand Chamber held that such 'blanket and indiscriminate' retention of DNA violated the Article 8 right to privacy.<sup>41</sup> It favoured limiting retention of DNA samples to a defined period of time and in relation to serious suspected offences only.<sup>42</sup> In addition to framing their objection in terms of the

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<sup>37</sup> *ibid* [44].

<sup>38</sup> *Khuzhin* [94].

<sup>39</sup> *S and Marper* n 2.

<sup>40</sup> Review was rejected by the Divisional Court on the basis that the decision did not contravene either the individual's right to a private life under Article 8 or his right not to be discriminated against under Article 14 of the ECHR (*R v Chief Constable of South Yorkshire Police, ex parte LS and Marper* [2002] EWHC 478 (Admin)). The Court of Appeal upheld this on the grounds that the risks to the individual were not great and were outweighed by the benefits of retention to society (*R v Chief Constable of South Yorkshire Police, ex parte LS and Marper* [2002] EWCA Civ 1275). Similarly, the House of Lords dismissed the appeal, finding that there was no breach of Article 8 but that if such a breach had occurred it constituted minor interference only, and moreover that retention was proportionate to its aims (*R v Chief Constable of South Yorkshire Police, ex parte LS and Marper* [2004] UKHL 39).

<sup>41</sup> *S and Marper* n 2 [119]. Article 8 provides that '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>42</sup> *S and Marper* [109]-[110].



right to privacy, the applicants in *S and Marper* had claimed that the retention of DNA in databases cast suspicion on unconvicted persons and implied that they were not ‘wholly innocent’.<sup>43</sup> Though ultimately the judgment centred on Article 8, the Grand Chamber acknowledged the ‘perception’ of the applicants ‘that they are not being treated as innocent’.<sup>44</sup> Moreover, the Chamber referred to the ‘stigmatization’ in state storage of innocent persons’ DNA in the same manner as convicted individuals.<sup>45</sup> The UK Government had argued that there was no stigma in DNA retention as there was no public articulation of suspicion;<sup>46</sup> though the Grand Chamber did not agree unequivocally, it concurred that ‘the retention of the applicants’ private data cannot be equated with the voicing of suspicions’.<sup>47</sup> While this distinction was not explored in the judgment, the absence of express communication of the fact of DNA retention seems to differentiate it from situations like in *Allenet de Ribemont* involving police statements at press conferences, and thus seems to exclude such State behaviour from the scope of the presumption of innocence as legally defined, even by the wide-ranging approach of the European Court. Indeed, Article 6 is not referred to expressly in the judgment in *S and Marper*, and the reference to stigma is not teased out adequately nor is the concept’s relationship to the presumption of innocence explored.

One could speculate that the Grand Chamber held an instinctive aversion towards non-conviction DNA retention, not only in respect of privacy but also in terms of the presumption of innocence, yet could not fit this sentiment into extant jurisprudence. Essentially, the Court seemed to have some sympathy for the view that while non-conviction DNA retention is not, strictly speaking, a declaration of guilt, nor does it constitute an expression of suspicion following acquittal, it denotes a degree of distrust on the part of State agents as to the future criminality of the person and her likelihood of re-offending, and thus seems to relate to the presumption of innocence loosely

**Comment [C4]:** you were ‘her’ earlier - can you render consistent as either ‘his or her’ (my favourite) or ‘her’, probably best to avoid ‘his’

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<sup>43</sup> *Ibid* [89].

<sup>44</sup> *Ibid* [122].

<sup>45</sup> *Ibid* [122].

<sup>46</sup> *Ibid* [94].

<sup>47</sup> *Ibid* [122].

speaking.<sup>48</sup> Nevertheless, this was not examined by the Court explicitly and thus does little to advance the debate regarding the parameters of the presumption.

As this outline of ECHR case law indicates, the presumption of innocence has been extended beyond its boundaries as traditionally accepted in the common law to constitute a broader protective device; however it remains limited to persons charged with an offence, and it precludes certain forms of State declarations only. In addition to these cases pertaining to the criminal justice process, the European Court views Article 6(2) as relevant in the balancing exercise relating to the right to freedom of expression under Article 10.<sup>49</sup> The presumption has been taken into account by the Court in cases where an individual's reputation was at stake as a result of newspapers publishing allegations of criminal acts without substantiation and without the possibility of rebuttal.<sup>50</sup> Similarly, in *Constantinescu v Romania* the Court deemed the presumption to be relevant as regards freedom of expression after a representative from a workers' union used a term denoting guilt to describe some colleagues.<sup>51</sup> Thus, the presumption of innocence, in the European doctrinal context, is also a norm to be taken into the balance when determining whether limitations on freedom of expression are justified and proportionate. This broader and arguably more nebulous view of the presumption takes it to govern the relations between individuals. In other words, in this respect it has horizontal effect and relates to the behaviour of the media and individual persons, rather than agents and bodies of the State only.

### III. The reach of the presumption – a normative proposal

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<sup>48</sup> See S. J. Clark 'The Juror, The Citizen, and The Human Being: The Presumption of Innocence and the Burden of Judgment', paper presented at *The Presumption of Innocence in Contemporary Criminal Law*, Robina Institute of Criminal Law and Criminal Justice, University of Minnesota Law School, May 2012.

<sup>49</sup> Article 10 provides that '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

<sup>50</sup> *Flux v Moldova* (2010) 50 EHRR 34 [25]; *Alithia Publishing Company v Cyprus* [2008] ECHR 17550/03 [63]-[64].

<sup>51</sup> *Constantinescu v Romania* (2001) 33 EHRR 33 [72]-[76].

Where State agents describe a person as suspect, as problematic, as risky, or as criminal, an official view is being conveyed that separates **her** from the ‘law-abiding’ majority. Such labels may be imposed through criminal accusation and prosecution, by means of inclusion on ‘watch lists’, or through the publication of details of civil preventative orders like anti-social behaviour orders, for example. Though public preconceptions about individuals who come in contact with the justice system may be unavoidable, as Husak has said ‘it is one thing to have such feelings, and quite another to express them through an institution’.<sup>52</sup>

Comment [C5]: see C4

Some of these State practices suggest that we may need to reframe our perception of liability: rather than the dyad of culpability that is thought to attach to the criminal process, in fact there seems to be a continuum ranging from innocent through to guilt in relation to suspected criminal behaviour, with interim positions involving State expressions of suspicion and ascriptions of blame. This may imply that some of the traditional protections that relate to the criminal trial, strictly speaking, are valuable or necessary in a wider context. The presumption cannot, however, be engaged, still less breached, by such statements if we conceive of it as a purely procedural device that relates to the trial only. Thus, it may be necessary to justify a more expansive reading of the presumption than is accepted currently, in terms of its relevance beyond the criminal trial and so ultimately to expand the people who may avail of its protection. Furthermore, I must defend relying on it over alternative individual rights.

#### *a. The purposes of the presumption*

We are all likely to agree on the presumption’s traditional scope and the reasons for its significance in the context of the criminal trial. While extending its protections outside of this setting by definition requires us to view the presumption as more than a procedural constraint, I argue that this remains in keeping with its purposes.

There are various rationales for the presumption, centring on the protection of the individual from the coercive power of the State and the avoidance of erroneous

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<sup>52</sup> D. Husak, ‘Why punish the deserving?’ (1992) 26 *Noûs* 447, 456.

convictions, through to policy concerns about maintaining the legitimacy of the criminal justice system.<sup>53</sup> Dennis describes these as the presumption's epistemic and non-epistemic values: while the former dimension requires the prosecution to prove the allegation against the accused, the latter gives effect to a person's claim to fair treatment by the State and to the principle that a liberal polity should treat its citizens as law-abiding until it proves otherwise.<sup>54</sup>

Drawing on both the epistemic and non-epistemic dimensions of the presumption, I suggest that its protections should apply to determinations of facts by the State in a manner that declares responsibility for criminal behaviour, even if this occurs outside the criminal trial. Epistemically, the uncontested core of the presumption in the criminal trial requires us to exercise caution as regards establishing evidence to a certain level of proof, due to the particular moral harm in a criminal conviction.<sup>55</sup> Here, the presumption guards against illegitimate conviction and the consequent punishment, which involves the imposition of deprivation or hard treatment on a person because he has committed a wrong in a way that expresses disapprobation for the conduct.<sup>56</sup> The former 'hard treatment' may take the shape of imprisonment, community service or a financial penalty. The latter element, censure, is the expression of a judgment that a person has acted in a reprehensible manner and the attendant sentiment of disapproval; this reprobationary function distinguishes a tax from a fine.<sup>57</sup> Unlike denunciation, which concerns a particular act, censure is directed to the individual specifically and conveys to her that she has something to answer for in a moral way.<sup>58</sup> Given the implications for the rights of the individual, the presumption prevents the imposition of such hard treatment and censure, unless the prosecution proves guilt to the requisite high level. The potential consequences therefore influence both the placing of the burden and the requisite standard of proof, explaining why in civil cases a lesser standard suffices.

Comment [C6]: see C4

<sup>53</sup> Schwikkard, n 14, 407.

<sup>54</sup> I. Dennis, 'The Human Rights Act and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 333, 354.

<sup>55</sup> See Jackson and Summers, n 4, 207, referring to R. Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (Oxford: Clarendon Press, 1985).

<sup>56</sup> A. von Hirsch, *Censure and Sanctions* (Oxford, Clarendon Press, 1993) 9.

<sup>57</sup> *Ibid.*

<sup>58</sup> U. Narayan, 'Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment' (1993) 13 *Oxford Journal of Legal Studies* 166, 171-172.

As well as seeking to prevent wrongful convictions, the presumption as a procedural rule has non-epistemic importance. It is grounded in general values of political morality,<sup>59</sup> deriving from but also preserving and concretising the trust and respect between the State and its citizens.<sup>60</sup> Moreover, the presumption can be seen as part of what has been called the ‘principle of civility’,<sup>61</sup> demonstrating our commitment to a sense of community and respect for fellow members.<sup>62</sup> If we consider the trial process and criminal conviction as involving a communicative dimension,<sup>63</sup> then we can view the constituent rights as involving an expressive component, as well as serving deontological ends. In this way, we can consider the presumption as being directed at more than the immediate adjudicator, and as conveying to the citizenry that an individual may be depicted and censured openly as criminal only with proof to the requisite level.

Drawing from these insights, I wish to move beyond viewing the presumption as a procedural rule of the criminal trial on the one hand and a mere rhetorical aim on the other. Here, I argue that the presumption as a legal rule is relevant to State determinations about contested facts that speak to a person’s criminal responsibility. The interests at the heart of my concern are those protected by the presumption in its traditional form: namely trust in and respect for the person, and protection from the State. Here I seek to use these values to underpin my proposed mechanism in concrete terms, to permit the presumption to be used as an analytical tool and also as a reminder of the appropriate standard of proof in processes of determinations about criminality, regardless of whether this happens outside of the criminal trial.

The incremental extension of the presumption proposed here centres not on reputation as Trechsel states in relation to ECHR case law,<sup>64</sup> but on the appropriate

**Comment [C7]:** is ‘outside of better?’

<sup>59</sup> W. Twining, *Rethinking Evidence: Exploratory Essays* (Cambridge: Cambridge University Press, 2006) 222.

<sup>60</sup> See R.A. Duff, ‘Pre-Trial Detention and the Presumption of Innocence’ in *Preventive Justice*, A.J. Ashworth, L. Zedner and P. Tomlin (eds) (Oxford: Oxford University Press, forthcoming).

<sup>61</sup> D.A. Nance, ‘Civility and the Burden of Proof’ (1994) 17 *Harvard Journal of Law and Public Policy* 647.

<sup>62</sup> *Ibid*, 690.

<sup>63</sup> R.A. Duff, *Punishment, communication, and community* (Oxford: Oxford University Press, 2001) 61. Duff describes crimes as public wrongs as they merit a public communal response and the public interest incorporates a communicative condemnation of such wrongs.

<sup>64</sup> See above n 21. Given the construction of the presumption of innocence in the United States, ‘reputational’ protection, if any exists, would fall within the Due Process Clauses of the US Constitution

relationship between the State and the individual. Reputation may be defined as the general estimation in which the public holds a person,<sup>65</sup> and in the context of Art 8, the right to reputation has been described as ‘part of ... personal identity and psychological integrity’.<sup>66</sup> Framing the extension of the presumption in this way with the focus on reputation leads to attention being placed on the effect on the individual, rather than looking specifically at the wrong in the State declaring a person to be something or to possess certain qualities. Ultimately my suggested interpretation of the presumption seeks to prevent the State from castigating someone as criminal before a finding of guilt and without a certain level of proof.

Though in *S and Marper* the European Court referred to the ‘stigmatisation’ of people who are treated as not ‘wholly innocent’,<sup>67</sup> this does not advance the current argument about the reach of the presumption. While stigma is a valuable sociological concept<sup>68</sup> and may be regarded as one factor separating criminal law from other forms of state coercion,<sup>69</sup> not every offence entails stigma.<sup>70</sup> Moreover, stigma is generated in and by the community and does not speak to the State’s acts *per se*. Thus, stigma is neither a sufficient nor decisive component of a criminal offence, and so its presence or the likelihood of its generation does not demand the protections of the presumption without more.

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(5<sup>th</sup> and 14<sup>th</sup> Amendments). See R. J. Haines, ‘Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis’ (1977) 30 *Stanford Law Review* 191-239.

<sup>65</sup> See R. C. Post, ‘New Perspectives in the Law of Defamation: The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 *California Law Review* 691.

<sup>66</sup> *Pfeifer v Austria* (2009) 48 EHRR 8 [35].

<sup>67</sup> *S and Marper* [122].

<sup>68</sup> The sociological connotation of the term, as used by Goffman in his eponymous book, consists of the relationship between an ‘attribute and a stereotype’, where the attribute is ‘deeply discrediting’ E. Goffman, *Stigma: notes on the management of spoiled identity* (Englewood Cliffs, N.J.: Prentice-Hall, 1963) 3. A stigma ‘constitutes a special discrepancy between virtual and actual social identity’: thus it betrays an incongruity between the person’s identity and his conception of this, and that which is encountered, understood or interpreted by the public. So, while a particular characteristic may be considered to be a stigma, in fact it is the label ascribed on the basis of the perception of that trait that forms the stigma. It goes without saying that a person’s perception of a label is subjective, and may be determined by his personality, status or role in society. A person may feel stigmatised, but in fact this does not fit with Goffman’s definition if society does not actually devalue or discredit the person. Accordingly, what constitutes a stigma is contingent on societal norms, geographical and temporal factors rather than on the person’s subjective perception of the label only: it needs to involve ‘social obloquy’. Also see B. G. Link and J. C. Phelan, ‘Conceptualizing Stigma’ (2001) 27 *Annual Review of Sociology* 363-385, 367.

<sup>69</sup> *Sweet v Parsley* [1970] AC 132. See J. Stanton-Ife, ‘Strict Liability: Stigma and Regret’ (2007) 27 *Oxford Journal of Legal Studies* 151-173.

<sup>70</sup> *Ibid.*

It may be argued that extension beyond its traditional procedural parameters makes the presumption do too much, as it were, and thus risks diluting its potency. The danger of extending the presumption in the context of the criminal trial is that it may overshadow or supersede cognate rights like the right to silence, making it more likely that they could be balanced away.<sup>71</sup> Here I accept the need to restrain the presumption's scope in the context of the trial itself and do not call for it to encompass other dimensions of the right to a fair trial. The more pressing objection in the present context is that a broader interpretation may eclipse the normative value of the narrower procedural protection,<sup>72</sup> and turn the presumption into a 'vaporous euphemism for fairness in the administration of criminal justice'.<sup>73</sup>

Certainly, profligate use of the presumption as a nebulous aspiration or a policy directive<sup>74</sup> risks undermining its concrete protections in terms of criminal procedure. Nonetheless, I suggest that the presumption is apposite both as an interpretive lens and a justiciable right in the context of expressions of suspicion by agents of the State regarding the individual,<sup>75</sup> and that this perspective need not compromise its core status as a procedural right. My suggested use is not to imply that the presumption necessarily is infringed by any such declarations but that it provides a valuable means of framing the debate about and highlighting potential problems with certain methods of crime control. If we first grant its heuristic value, we can later move to consider whether the presumption as a legal safeguard beyond the criminal trial is breached and if so whether this could be remedied by amendment of the standard of proof. In this instance, the presumption can regulate the devising of legislation that involves the ascription of liability in a way that involves censure, and it also constitutes a justiciable right for the affected individuals who are labelled as criminal on the basis of the civil standard of proof.

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<sup>71</sup> Jackson and Summers, n 4, 207, Schwikkard, n 14, 404.

<sup>72</sup> Jackson and Summers, n 4, 207.

<sup>73</sup> P. Healy, 'Proof and policy: No golden threads' (1987) *Criminal Law Review* 355, 365.

<sup>74</sup> Schwikkard, n 14.

<sup>75</sup> Indeed, some would argue that the proposed right in this paper should be as a renamed as a novel right or norm, rather than seeking to shoehorn it into the presumption of innocence. I continue to use the term, rather than adopting a reclassification, as the role and value of the presumption in the criminal process speaks to the objections I raise to certain State labels.

The rights to privacy, to dignity and equality do similar work to the presumption in this context, and may seem more apposite given the concerns previously mentioned. It is true that Article 8 concerns the way the State engages with and treats its citizens, but focusing on the private life of the individual neglects the core problem with certain official statements that involve a particular public portrayal of the individual.<sup>76</sup> Only the presumption captures the essence of this particular wrong against the person and the expression of the statement that depicts a person in a certain manner. Similarly, the right to equality remains focused on consequences rather than on expression.<sup>77</sup> In essence what is advocated here is the applicability of the presumption when the individual is liable to be described in a censuring way by the State. Relying on the presumption in this way shines a light on the core of the wrong, and in turn pushes us towards an appropriate standard of proof.

*b. The scope of the presumption*

As a matter of doctrine, an individual cannot enjoy the protection of the presumption in the European context if she has not been charged; Article 6(2) is explicit about this.<sup>78</sup> Nonetheless, Trechsel questions the necessity of this limitation, contending that the presumption should accrue to ‘everyone’, regardless of her involvement or otherwise in the criminal process.<sup>79</sup> Indeed, under Article 7 of the African Charter on Human and Peoples’ Rights ‘every individual’ has the right to be presumed innocent until proved

Comment [C8]: C4

Comment [C9]: C4

<sup>76</sup> For example, *Cliff v Slough BC* [2010] EWCA Civ 1484 involved a libel action and a successful challenge to the circulation of certain ‘soft information’ about the violence of the applicant on the grounds that such information sharing was disproportionate as regards Article 8. Nonetheless, the limited basis for using defamation law against public bodies assists my decision to rely on the presumption in this context.

<sup>77</sup> Having said that, expressivist interpretations and critiques of possible violations of the Equal Protection Clause in the US Constitutional context look not at the intent or effect of laws but the meaning they express. Expressivists do not limit themselves to law’s prescriptive meanings, but are concerned fundamentally with whether State action denotes contempt or prejudice or stigma towards a particular group, and with whether performing an act to further a particular goal express rational or morally right attitudes toward people. See, for example, D. Hellman, ‘The Expressive Dimension of Equal Protection’ (2000) 85 *Minnesota Law Review* 1; M. D. Adler, ‘Expressive Theories of Law: A Sceptical Overview’ (2000) 148 *University of Pennsylvania Law Review* 1363; E. S. Anderson and R. H. Pildes, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 *University of Pennsylvania Law Review* 1503, 1510.

<sup>78</sup> In *S and Marper* [122] the Court stated that the applicants ‘are entitled to the presumption of innocence’, though S had not been charged. Given that the consideration of the presumption was tangential to the decision, his status was not examined.

<sup>79</sup> Trechsel, n 21, 155.



guilty by a competent court or tribunal.<sup>80</sup> Moreover, while there are no cases centring on Article 6 where the European Court viewed the presumption as applying to those not yet charged, as noted, jurisprudence on Article 10 views the presumption as relevant to the balancing of the right to freedom of expression.<sup>81</sup>

The risk of such extension, so that the presumption protects ‘everyone’, is that it could conflate a credal or factual conception of the presumption with the adjudicative or deliberative one. As Roberts reminds us, the presumption is not credal as it does not relate to belief but rather is a deliberative standard.<sup>82</sup> Of course, the presumption entails the treatment of someone as legally rather than factually innocent, a distinction made more generally by Packer.<sup>83</sup> Treating someone as factually innocent means just that, namely, presuming that he has not committed a crime. Though one may choose personally in a moral or ethical sense to view fellow citizens in this way, the presumption as a legal rule is not predicated on such an understanding. It is trite to say that the presumption does not prevent us (be that as citizens or even officials of the State) from believing someone to be factually guilty, but rather requires the State and its agents to adjudicate when all the while presuming her innocence. For these reasons I do not suggest an extension of the presumption to everyone as such, but to any person whose liability is determined by the State, even beyond the criminal trial.

Comment [C10]: C4

When the State accuses, arrests or charges someone, when it includes someone in a ‘watch list’, or when it publicises details of a civil preventative order, it seems that the State is expressing or declaring something both to and about that person. In the first instance, it may be argued that the person is ‘not being treated as innocent’<sup>84</sup>: in other words, an agent of the State is likely to believe her to be other than innocent, and acts towards her in an official way based on that belief. Nonetheless, as is explored in more detail below, this has no relevance to the presumption of innocence, in any of its guises. What the European Court has found to be problematic are court expressions of suspicion after acquittal, and also State declarations of guilt that encourage the community to view

<sup>80</sup> See Jackson and Summers, n 4, 219.

<sup>81</sup> See text accompanying n 49.

<sup>82</sup> P. Roberts, ‘The Presumption of Innocence Lost... and Found?’ paper presented at *Fraying the Golden Thread: The Presumption of Innocence in Contemporary Criminal Law*, University of Aberdeen, 24-25 February 2012.

<sup>83</sup> H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) 172.

<sup>84</sup> *S and Marper* [122].

her as guilty and arrogate the appropriate judicial role. Moving beyond this second conception, I argue that the presumption ought to apply to individuals who have not been charged but who are dealt with by the State in a quasi-criminal fashion. If the State seems to be using the civil process to circumvent the criminal trial, this may suggest that the requisite standard of proof may need to be re-examined. The relevance of the presumption here affects the standard of proof required for establishing liability and implies that the balance of probabilities should be reconsidered in relation to certain official labels. Though the absence of ‘hard treatment’ implies that proof beyond reasonable doubt is too onerous a standard, I suggest that at least ‘clear and convincing evidence’ ought be required when the presumption is affected in these contexts.<sup>85</sup>

#### **IV. A typology of State practices – gradations of suspicion**

This paper now focuses on a series of expressions of belief and official labels like that of ‘suspicious’, ‘risky’, ‘dangerous’, or ‘criminal’, and it examines whether the attribution of such labels by the State before or without conviction and on the civil standard of proof contravenes the previously outlined concept of the presumption of innocence. The jurisprudence of the European Court suggests that the presumption is breached where an agent of the State expresses a view on a charged person’s culpability so as encourage the public to believe him to be guilty and where there is a prejudgment of the assessment of the facts by any competent judicial authority.<sup>86</sup> Drawing on this, the distinct normative argument put forward is that when the State ascribes a label of criminal to a person while circumventing the usual trial process, the presumption and its underpinning values require more than proof on the balance of probabilities. Given that the official label may not be accompanied by hard treatment, I refrain from calling for proof beyond reasonable doubt in such circumstances. Nonetheless, I suggest that the civil standard of proof is too easy a threshold for the State to surmount before publically depicting and categorising citizens in certain ways.

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<sup>85</sup> This third burden of proof is applied in some civil law cases in the US, such as in medical law suits and patent disputes, and it lies between the civil and criminal standards in the UK. See *Addington v Texas* 441 US 418 (1979), *Cruzan v Director, Missouri Department of Health*, 497 US 261 (1990).

<sup>86</sup> *Alenet de Ribemont* n 32 [41].

To illuminate the previous conceptual argument, I now turn to look at a range of pre-trial measures and civil orders that, ostensibly, seem to breach the presumption of innocence. In doing so I devise a typology to ascertain what a particular label expresses and on this basis I conclude if the presumption is relevant in fact to any of these given situations. At one end of the spectrum lie State expressions of suspicion regarding factual innocence, which may lead to a perception on the part of the person that she is not being treated as innocent and which may entail stigma but where there is no State declaration regarding criminal liability. The next type of label concerns State practices that may lead to a perception of being treated as other than innocent, where stigma may accrue, and where there is an official expression of belief regarding criminal propensity. It will be posited that while both types of label may be dubious broadly speaking, only the latter engages the presumption of innocence as it is construed here. Next, the paper considers situations where the State declares a view about the person which encourages the public to believe her to be equivalent to a criminal, but where this occurs in the civil context rather than being predicated on an assessment of the facts by a criminal court. It will be argued that such practices engage the presumption, and require reliance on more than the civil standard of proof.

**Comment [C11]:** have I got this right? It was hard to follow as it stood

*a. Expressions of suspicion*

Where a person is arrested or charged, where she is searched, detained and accused, and where information relating to her is retained after such State intervention, she has been distinguished in a certain way and thus is not being treated as innocent. As Lacey *et al* noted, widespread institutional and social practices like the treatment of suspects at police stations and prejudicial reporting by the media ‘sit unhappily’ with the presumption of innocence; nonetheless these practices ‘do not threaten to displace it, and rarely even call forth critical comment’.<sup>87</sup> This observation highlights the apparent tension that exists between overt State intrusion in a person’s life based on suspicion, and the individual’s

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<sup>87</sup> N. Lacey, C. Wells and D. Meure, *Reconstructing Criminal Law* (Weidenfeld and Nicolson: London, 1990) 155.

right to be presumed innocent. Nevertheless, it will be argued that these actions do not breach the presumption.

Arrestees, through search, detention and interrogation, and people detained under mental health legislation, for example, experience coercive treatment at the hands of the State and this differentiates them from people who are not suspected of a crime or of other behaviours. This perception may be compounded by community stigma relating to accusations for certain offences, to ‘unresolved accusation[s] of wrongdoing’,<sup>88</sup> or even mere involvement in criminal justice system.<sup>89</sup> As a result, it has been argued that ‘the collateral damage inflicted by publicity following charge’, especially in less serious cases, warrants anonymity in certain instances as a means of protecting the ‘vulnerable suspect’.<sup>90</sup> More radically, calls have been made for the anonymity of all arrestees before charge,<sup>91</sup> and for rape defendants specifically on the basis that a distinct stigma accrues in such instances.<sup>92</sup>

Charging an individual indicates that both the police and the prosecuting agency believe on reasonable grounds that she has a case to answer. The arresting officer must consider there to be reasonable suspicion about her behaviour, as otherwise the State would not be entitled to intrude in her life.<sup>93</sup> The officer’s suspicions may mean that he or she views the individual as other than factually innocent, but this does not necessarily involve regarding her as legally guilty and so obviously it does not encroach on her legal innocence. Thus, such actions of the police do not infringe the presumption, given the distinction between factual and legal innocence, and its deliberative or adjudicative rather than credal nature.

Concerns about the presumption in relation to arrest are grounded on the notion that the public will conclude that an arrested individual is actually guilty, that there is no

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<sup>88</sup> *Arizona v Washington* 434 US 497, 503-505 (1978).

<sup>89</sup> M. Feeley *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage, 1979).

<sup>90</sup> R. Munday, ‘Name suppression: an adjunct to the presumption of innocence and to mitigation of sentence: Part 2’ (1991) *Criminal Law Review* 753, 762. Indeed, there is a historical precedent for this in mediaeval France. See Quintard-Mordnas, n 12, 116.

<sup>91</sup> See Anonymity (Arrested Persons) Bill 2010-11 (Private Members’ Bill), Sponsor: Anna Soubry.

<sup>92</sup> See C. McGlynn, ‘Rape, Defendant Anonymity and Human Rights: adopting a ‘wider perspective’’ (2011) *Criminal Law Review* 199; P. Rumney, ‘Rape, Defendant Anonymity and Evidence-Based Policy Making’ (2013) 76 *Modern Law Review* 108.

<sup>93</sup> Police and Criminal Evidence Act 1984, s 24. See J. Thaler, ‘Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial’ [1978] *Wisconsin Law Review* 441, 443.

smoke without fire, so to speak.<sup>94</sup> While Lord Rodger in the Supreme Court asserted that the public is ‘more than capable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt’,<sup>95</sup> this seems to ascribe an undue degree of subtlety and thoughtfulness to popular discourse on suspects and crime, especially given the nature and tenor of some media coverage.<sup>96</sup> It is plausible that a significant proportion of the public extrapolates that arrest is a likely judgment of guilt.

Nevertheless, while the experience surrounding arrest can be unpleasant, undoubtedly is coercive, and may be associated with community stigma, such official treatment does not constitute punishment for a given act, nor is a person’s guilt being determined. Public belief or distrust is not sufficient for the presumption to be engaged, even if this is prompted by State intervention. What is critical in this respect is that which is being generated or expressed in an official way. At this juncture the State and its agents, namely the police and prosecutors, articulate suspicion about criminality, but are not expressing belief regarding criminal liability in such a way as to induce public belief of guilt, nor do such actions constitute a ‘prejudging’ of the facts, to use the language of the European court.

Moreover, though pre-trial publicity may in fact impinge on the right to privacy of a person, it cannot be seen as dubious in terms of the presumption of innocence, even in the broader sense advocated in this paper. As Antony Duff has said, to summon a defendant to trial is to address and treat her as a fellow citizen.<sup>97</sup> Arrest and then criminal charge begin a process where the State calls someone to account in relation to an alleged past act and treats her as a rational member of the polity, but does not give a determination as to her culpability. While we may feel unease at pre-trial publicity regarding a suspect, and though defendants may be branded through court appearance

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<sup>94</sup> Moreover, the very fact of arrest may lead to discrimination: individuals accused but acquitted of assault have almost as much trouble finding an unskilled job as those convicted of the same offense. R. D. Schwartz and J. Skolnick ‘Two Studies of Legal Stigma’ (1962) 10 *Social Problems* 133, 136. Also see T. Valvani, ‘Discrimination on the Basis of Arrest Records’ (1971) 56 *Cornell Law Review* 470.

<sup>95</sup> *Re Guardian News and Media Ltd* [2010] UKSC 1.

<sup>96</sup> For instance, two newspaper groups were found guilty of contempt of court for publishing potentially prejudicial coverage of a former suspect in the Joanna Yeates murder investigation in Bristol. See *Her Majesty’s Attorney-General v MGN Ltd and News Group Newspapers Ltd* [2011] EWHC 2074. Another man was subsequently found guilty of her murder and sentenced to life imprisonment.

<sup>97</sup> R.A. Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007) 191.

and media reporting of trials, the proper administration of justice and the rule of law warrant public judicial processes, generally speaking. Moreover, I argue, contrary to ECHR case law, that media speculation as to criminal liability must be distinguished from State declarations of guilt. The former is not unproblematic as a potential civil wrong between two individual or private parties; however the presumption of innocence relates to the State/individual relationship and is a part of the counterweight that mitigates the inherent imbalance of power in this respect. Though media depiction may be egregious in terms of the effect on the person and the gravity of the declaration to the public and may sometimes exceed the impact of State labelling, it is of a different quality because of the parties involved.

Whether State omissions in this context may lead indirectly to labels of judgment that breach the presumption is more contentious. Where the State fails to act after a private party castigates an individual for a ‘crime’, it may appear that this represents official acquiescence, as the person is labelled without a finding of guilt. Nonetheless, this really speaks to the person’s reputation rather than constituting an express State declaration as to liability, and so is excluded from the reach of the presumption as advocated here.

*b. Stigmatising expressions regarding criminal propensity*

The next type of labels may be regarded as encompassing the State’s belief about a person’s potential behaviour. The retention of DNA, the use of enhanced criminal records checks, and the creation of ‘watch lists’ treat the individual as less than innocent in a way that may sometimes be stigmatising, but it is questionable as to whether these constitute declarations of guilt as such. Thus, while the presumption may shed light in analysing these measures, it is less clear whether it is breached.

As regards the retention of DNA in databases, the applicants in *S and Marper* claimed that this cast suspicion on unconvicted persons and implied that they were not ‘wholly innocent’.<sup>98</sup> In contrast to the Court of Appeal, which asserted that a police constable could destroy DNA evidence if the person were free from ‘any taint of

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<sup>98</sup> *S and Marper* [89].

suspicion’,<sup>99</sup> the European Court expressed its concern that unconvicted persons, who ‘are entitled to the presumption of innocence, are treated in the same way as convicted persons’.<sup>100</sup> The treatment of these distinct cohorts in an equivalent manner does not imply a view as to factual or legal guilt of those yet to be convicted but encapsulates the State’s opinion of such persons as more risky than the rest of the population. The State is not judging guilt but rather speculating as to propensity; moreover, there is no publicity of the fact of retention, and genetic material usually is stored in code form that may be read with expertise only.<sup>101</sup> Thus any stigma is felt in a subjective manner only, and there is no cultivation of community condemnation. So, while a person whose DNA is retained rightly may feel singled out as not ‘wholly innocent’, the State is expressing concern about risk rather than declaring guilt, and given that inclusion is not publicised, the State’s action does not encourage the public to view her in a particular manner. This suggests that a DNA database including unconvicted individuals does not compromise the presumption of innocence.

Of course, as well as retaining DNA in limited instances, the police keep arrest records more generally, on the basis that a previous arrest might provide a lead to solving a current case.<sup>102</sup> The reasons a person was arrested but not prosecuted may range from a lack of evidence, through non-cooperation of witnesses to the person’s intimidation of such witnesses, the fact that the arrest was grounded on harassment or other improper police conduct, and so on.<sup>103</sup> There is a qualitative difference between these cases, yet all lead to the same result, that is, the creation of a criminal record. Though such a record appears to characterise the individual in a certain light and depict him as less than innocent, in actuality it is merely a factual account of criminal justice intervention, and

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<sup>99</sup> *Ibid* [14].

<sup>100</sup> *Ibid* [122].

<sup>101</sup> A DNA sample contains a range of intimate personal and family information. In contrast, a DNA profile, generated from a sample, is a set of identifying characteristics from regions of DNA that are not known to provide for any physical characteristics or medical conditions of the person. It consists of a list of numbers based on specific areas of DNA known as short tandem repeats and a gender indicator, and thus may only be read and interpreted with the aid of technology (see Parliamentary Office of Science and Technology, *Postnote: The National DNA Database* (London: Stationery Office, 2006) 1).

<sup>102</sup> J. Jacobs ‘The Jurisprudence of Police Intelligence Files and Arrest Records’ (2010) 22 *National Law School of India Review* 135, 145. In England, Wales and Northern Ireland, details of all arrests are held on the Police National Computer, and the Scottish equivalent is the Criminal History System maintained by the Scottish Police Services Authority.

<sup>103</sup> *Ibid*.

does not entail any declaration of guilt. The creation and maintenance of such records is a formal registration of official intervention in a person's life based on State suspicion. What the State is expressing through arrest is a concern regarding suspected past behaviour, and the retention of records embodies an openness towards the possibility that the information may be of use to the State in future.

Beyond this, the circulation of arrest records may lead to stigma, through the publication of the State's suspicions. Such records are available to police and other State agencies, although after a certain period of time, depending on the gravity of the suspected offence and the age of the individual, they are 'stepped down' so as to be available to the police only.<sup>104</sup> Nonetheless, non-conviction or 'soft' information contained in police records may continue to be made available as the result of 'enhanced' criminal record checks (through a process also known as enhanced disclosure),<sup>105</sup> which are carried out where people apply for certain positions, such as those involving interaction with children. In such situations an application for a record check is made by the individual, signed by her prospective employer, and the Secretary of State issues this after requesting the information from the chief officer of the police.<sup>106</sup> So, while the person must consent to the check, she may not be aware of the content of her record. This reveals to an employer all conviction information, both spent and unspent, and crucially any non-conviction information viewed as relevant by the chief officer.<sup>107</sup>

In *R (L) v Metropolitan Police* the UK Supreme Court examined the compatibility of enhanced criminal record checks with the ECHR, after certain past accusations against L had been disclosed in relation to her employment.<sup>108</sup> L's appeal against disclosure was dismissed, with argument centring on Article 8; thus the key element was the

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<sup>104</sup> See Association of Chief Police Officers, *Retention guidelines for nominal records on the police national computer: Incorporating the step down model* (Hampshire, ACPO, 2006) [3.5], available at <http://www.acpo.police.uk/documents/PoliceCertificates/SubjectAccess/Retention%20of%20Records06.pdf>

<sup>105</sup> Part V of the Police Act 1997, as amended by Pt V of the Serious Organised Crime and Police Act 2005 (applies across the UK). See House of Commons Children, Schools and Families Committee, *Fifth Report: Allegations Against School Staff* (London: Stationery Office 2009) [100].

<sup>106</sup> Police Act 1997 s115.

<sup>107</sup> The Association of Chief Police Officers guidelines indicate that data are released to police as intelligence by the chief officer under relevance test whereas they are released to non-police agencies after application to panel chaired by the ACPO lead for recording and disclosure of conviction: see Association of Chief Police Officers n 104 [1.3] and [1.6].

<sup>108</sup> *R (on the application of L) (FC) v Commissioner of Police of the Metropolis* [2010] 1 AC 410.



proportionality of the checks made into the accusations.<sup>109</sup> The Court held that the applicant should be given opportunity to make representations, not in all cases, but where there is room for doubt as to whether information that is considered to be relevant should be disclosed.<sup>110</sup>

Viewing this case and enhanced criminal record checks generally through the lens of the presumption of innocence brings the true nature of the State action **usefully** to the fore. Not only is evidence regarding convictions relevant here, but accusations and other ‘soft’ information may be disclosed. So, the fact that a person has been accused of a crime may feed into a decision as to whether to employ **her** in a certain role, implying that **she** is risky in some respect. Moreover, that initial accusation or other information may not be predicated or established to any particular standard of proof. In such an instance, the person is being treated as not ‘wholly innocent’ by the employer, and the State seems to acquiesce in this by permitting enhanced criminal record checks to affect the determination of suitability for a position of employment. Moreover, a chief police officer makes a determination as to relevancy, and then the information is issued by order of the Secretary of State, arguably not the appropriate authorities to determine such a matter. This suggests that the affected individual ought to be able to make representations in all such instances, so as to counterbalance the impact on **her** reputation and private life as protected by Article 8. Nevertheless, though some members of the public may be induced to view the person as risky through the information revealed in such a record check, the absence of any official expression as to guilt means that the presumption is not relevant in this instance.

Comment [C12]: helps with sense?

In a similar fashion, ‘watch lists’ exist in the UK, such as that governed by Part VII of the Care Standards Act 2000 which facilitated the placing of care workers in hospitals, nursing homes and residential care homes on a register of people considered unsuitable to work with vulnerable adults.<sup>111</sup> To be included in the ‘Protection of Vulnerable Adults’ (POVA) list, the Secretary of State needed to be of the opinion that a particular care provider reasonably considered a worker to be guilty of misconduct that

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<sup>109</sup> *Ibid* [42].

<sup>110</sup> *Ibid* [45]-[46]. Also see *R (J) v the Chief Constable of Devon and Cornwall* [2012] EWHC 2996.

<sup>111</sup> The Protection of Vulnerable Groups (Scotland) Act 2007 provides an equivalent scheme in Scotland.

has harmed or risked harming a vulnerable adult, and this is based on the civil standard of proof.

Watch lists like this involve the labelling of a person in a particular manner and embody a determination about **her** previous ‘misconduct’ and also suspicion about **her** propensity to commit harmful behaviour. The ‘considerable’ stigma of inclusion on the POVA list was stressed by Baroness Hale in *R (Wright) v Secretary of State for Health*, on the basis that ‘[e]ven though the lists are not made public, the fact is likely to get about’.<sup>112</sup> Moreover, inclusion may lead to certain consequences: this scheme may result in an individual losing **her** job and indeed the prospect of every having any job of that kind.<sup>113</sup> In *R (Wright)* the House of Lords considered watch lists in relation to Article 6(1), which entitles everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal in the determination of his civil rights or criminal charge, as well as Article 8. A declaration of incompatibility with the former was found on the basis that the initiation of the process did not given the care worker a fair opportunity to answer the allegations ‘before imposing upon her possibly irreparable damage to her employment or prospects of employment’.<sup>114</sup> Thus, the House of Lords concluded that the scheme could be remedied by permitting a possibility of countering the assertions against her. Indeed, this scheme has been replaced by the Safeguarding Vulnerable Groups Act 2006, which puts responsibility for determining inclusion on the ‘barred list’ on the newly created Independent Barring Board, after reference from the Secretary of State.<sup>115</sup> Critically, the particular individual now may make representations against this decision; nonetheless inclusion on the ‘barred list’ automatically precludes her from certain positions of employment.

Though the primary intention behind the enactment of watch lists (insofar as legislative intent may be ascertained) is public protection, a likely side effect is stigmatisation through the conveyance of a warning to the community regarding the person, through the prohibition on her taking particular professional positions. This label certainly speaks to the State’s view of the danger or risks she may pose, but also

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<sup>112</sup> *R (Wright) v Secretary of State for Health* [2009] UKHL 3; [2009] 2 WLR 267 [36].

<sup>113</sup> *Ibid* [22].

<sup>114</sup> *Ibid* [28].

<sup>115</sup> Schedule 3. Further means of review are included in the Protection of Freedoms Act 2012.

constitutes a declaration of guilt regarding previous ‘misconduct’. Ultimately, the analysis here indicates that these types of watch lists breach the presumption of innocence, given the determination regarding prior misconduct on the balance of probabilities and the likelihood of this being revealed and circulated. Though employment is affected, that is not the critical dimension rather it is the message that is being conveyed. The effect that watch lists have on the presumption of innocence has not been remedied by the new scheme introduced under the 2006 Act. In contrast, enhanced criminal record checks and other stigmatising expressions regarding criminal propensity do not engage the presumption of innocence, though they are problematic in other respects.

*c. Declarations of guilt regarding criminality*

The next category to be explored in this typology involves public labelling by agents of the State, which expresses a view on the person’s criminality in general rather than responsibility for a particular act. I suggest that the presumption is germane here given that these State classifications entail a communicative, communal condemnation of a wrong and a declaration regarding guilt.<sup>116</sup> The relevance of the presumption of innocence indicates that proof on the balance of probabilities is not sufficient when the State ascribes the label of ‘criminal’ to a person. Nonetheless, given the absence of hard treatment the paper stops short of calling for proof beyond reasonable doubt in all such instances, and accepts that an intermediate standard like ‘clear and convincing evidence’ would suffice as a protective measure.

The circulation of the details of anti-social behaviour orders fits into this class of declarations regarding criminality, as does the publicised imposition of control orders and civil recovery orders. As will be articulated below, these civil preventative orders seem of a different nature to measures like arrest and DNA retention. In this context not only can stigma accrue, but there is also an intention to label, to deter others from the particular behaviour through expression of suspicion regarding culpability, and to condemn the person’s pattern of behaviour or lifestyle. This constitutes a declaration of guilt, albeit in relation to criminality in general rather than one specific crime, based on the civil

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<sup>116</sup> R.A. Duff, *Punishment, communication, and community* (Oxford: Oxford University Press, 2001) 61.

standard of proof. Nonetheless, I argue that these issues are not irremediable, given that altering of the standard of proof and requiring anonymity would provide sufficient protection for the individual involved.

Across the UK, a court may make a civil anti-social behaviour order (an ASBO) restricting the actions of a person who has been found responsible for anti-social behaviour, namely that which caused or is likely to cause harassment, alarm or distress.<sup>117</sup> As Ashworth notes, the use of civil law procedures circumvents the rights usually conferred on accused persons,<sup>118</sup> thereby evading the presumption of innocence as a procedural rule.<sup>119</sup> ASBOs are presented as regulatory rather than punitive measures and thus as not operating in the criminal realm.<sup>120</sup> Even so, breach of the order is a criminal offence, punishable by up to five years' imprisonment. Though this means of criminalisation may be seen as objectionable, that is not the concern of this paper: the focus here is on public depiction and labelling through ASBOs.

In England and Wales, local authorities and police forces distribute leaflets with pictures of people who are the subject of ASBOs, including children who may be as young as ten years old.<sup>121</sup> Such a tactic was approved of in *R (Stanley, Marshall and Kelly) v Metropolitan Police Commission*,<sup>122</sup> where ASBOs had been issued by the police and the local authority to a group of youths. Notice of these ASBOs was published in the press and on the authority's website (which referred to them as 'thugs' and 'bully boys', and mentioned their 'animalistic' behaviour), and flyers with photos and personal details of the boys were circulated. The leaflet spoke of 'keeping crime off the streets', and stated that the claimants were part of a group that had committed identified offences.<sup>123</sup> The applicants sought judicial review of the decision to publicise the imposition of these

**Comment [C13]:** and anonymity, as was routinely the case with control orders and maybe also TPIMs

<sup>117</sup> Crime and Disorder Act 1998; Antisocial Behaviour etc. (Scotland) Act 2004. The ASBO may be replaced by a civil injunction called the Crime Prevention Injunction: see Home Office, *Putting Victims First: More Effective Responses to Anti-Social Behaviour* Cm 8367 (London: The Stationery Office, 2012).

<sup>118</sup> Ashworth, n 9.

<sup>119</sup> See K. Ferzan, 'Prevention, Proof, and the Presumption of Innocence', paper presented at *Fraying the Golden Thread: The Presumption of Innocence in Contemporary Criminal Law*, University of Minnesota, 4-5 May 2012, regarding the 'substantive priority question', namely whether civil regimes run 'afoul of the spirit of the PoI', by circumventing the possibility of a criminal trial.

<sup>120</sup> See A. Crawford 'Governing through anti-social behaviour: regulatory challenges to criminal justice' (2009) 49 *British Journal of Criminology* 810.

<sup>121</sup> See P. Squires and D. Stephen 'Rethinking ASBOs' (2005) 25 *Critical Social Policy* 517, 523.

<sup>122</sup> *R (Stanley, Marshall and Kelly) v Metropolitan Police Commission, London Borough of Brent and Secretary of State for the Home Department (intervening)* [2004] EWHC 2229 (Admin).

<sup>123</sup> *Ibid* [23].

ASBOs and a declaration that the publicity was in breach of Article 8. The High Court dismissed their claim, and stated that while publicity about ASBOs could infringe Article 8 and thus the necessity and proportionality of the measures would need to be considered, in this instance there was no breach. The publicity was deemed to aid in enforcing and ensuring compliance with the order, and therefore such colourful language was seen as apposite.

This paper seeks to reposition the consideration of this case and look at it through the lens of the presumption of innocence. Indeed, it is fruitful to recall the judgment in *Khuzhin v Russia* where pre-trial comments by the prosecution regarding the ‘crimes’ and ‘personal qualities’ of the applicants were found to have breached the presumption of innocence.<sup>124</sup> Given that the leaflet publicising these ASBOs was also framed in the language of crime, a direct parallel may be drawn. The only difference lies in the fact that the young people in *R (Stanley, Marshall and Kelly)* had not been charged. Though this is significant to be sure, as previously argued this is not insurmountable if our focus is on the principles behind the presumption.

The imposition and subsequent publication of ASBOs involves State labelling and stereotyping, and empirical work shows subjective perceptions of stigmatisation: ‘Notions of discriminatory policing and feelings of general stigmatization were entrenched among local young people; feelings which the intensification of policing and, potentially, the use of tools such as ASBOs ... would serve to exacerbate.’<sup>125</sup> Nevertheless, this subjective interpretation is not relevant to the presumption of innocence. It is more difficult to establish the intention of the State in this respect. Cobb notes that what he calls ‘the ethopolitics of shame’ regarding ASBOs is denied by the government; however it is acknowledged and propounded by local authorities.<sup>126</sup> Though the intention of the State’s legislative branch may be unclear, the deliberate publication of the fact of these orders, and the almost permanent record online, entrenches the stigma

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<sup>124</sup> *Khuzhin v Russia* n 35 [95]–[96].

<sup>125</sup> J. Sadler, ‘Implementing the Youth ‘Anti-social Behaviour’ Agenda: Policing the Ashton Estate’ (2008) 8 *Youth Justice* 57, 70.

<sup>126</sup> N. Cobb, ‘Governance through Publicity: Anti-social Behaviour Orders, Young People, and the Problematisation of the Right to Anonymity’ (2007) 34 *Journal of Law and Society* 342–373, 360.

and serves to ‘other’<sup>127</sup> the individuals involved through a declaration regarding responsibility for criminal acts or problematic behaviour.

Such State labelling of the individual through ASBOs does not equate to criminal punishment, either in terms of the substance of the label or the possible consequences – no hard treatment is involved, and the declaration does not denote a criminal conviction. Moreover, the agent of the State may not be declaring guilt as to one particular suspected act. Nonetheless, it is acting in a way as to induce a certain community view of the person, and to judge **her** in the absence of a criminal conviction. Notably, the House of Lords held that while ASBOs are civil orders a court must be satisfied to what is essentially the criminal standard of proof that anti-social behaviour took place.<sup>128</sup> So, the alleged behaviour need not constitute a criminal act, but it must be proven beyond reasonable doubt to be anti-social behaviour. This is what Ferzan describes as ‘procedural symmetry’,<sup>129</sup> where the standard of proof for what is strictly speaking a civil measure is elevated to the criminal one. This provides a careful threshold to surmount before an ASBO is imposed, and one could view the judgment in *McCann* as the House of Lords protecting the underlying ethos of the presumption of innocence by enforcing the higher standard of proof.

More particularly, if the language of ‘crime’ is used explicitly in a given case, as in *Stanley, Marshall and Kelly*, and if such declarations are predicated on the civil standard of proof, then the presumption is breached. Again, any publically articulated official condemnation of an individual must be predicated on a high standard of proof. While clear and convincing evidence arguably could suffice, the approach required by the House of Lords is commendably cautious in its protection of the individual against the State.

The use of ‘control orders’ against persons suspected of being involved in terrorist offences also is relevant in unpacking this extended version of the presumption. The Prevention of Terrorism Act 2005 permitted a civil order to be made by the Secretary of State against an individual, restricting his liberty, association and/or employment so as to

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<sup>127</sup> D. Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001) 135 *et seq.*

<sup>128</sup> *Clingham (formerly C (a minor)) v Royal Borough of Kensington & Chelsea, R v Manchester Crown Court ex parte McCann* [2002] UKHL 39; [2003] 1 AC 787.

<sup>129</sup> Ferzan, n [119422](#).

protect the public from a risk of terrorism. The order could be made if the Secretary of State had reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity, and the High Court was required to approve this determination. Like ASBOs, breach of a control order is an offence. These orders have now been replaced by Terrorism Prevention and Investigation Measures,<sup>130</sup> which are more limited in terms of the obligations that may be imposed but retain most features of control orders.

It has been argued that such orders are punitive, given that the alleged activities that may give rise to them are mostly serious criminal offences; some of the consequences are as onerous as criminal punishment; and breach results in imprisonment.<sup>131</sup> Zedner thus concludes that the civil standard of proof is not appropriate.<sup>132</sup> Though the problem with control orders lies primarily in their encroachment on the liberty of the individual, their imposition seems analogous to decisions about criminal liability and so the State label that is imposed is also relevant. While it may be argued that the determination here is akin to the situation with DNA databases, where there is a speculation as to propensity or a judgment of risk, in fact the Secretary of State must possess a certain belief as to past or present behaviour. So, control orders involve a determination as to responsibility. Accordingly, the presumption of innocence requires us to revisit the requisite standard of proof in this instance, given that person is being depicted as a terrorist without a criminal trial and on the balance of probabilities. Rather, proof ought to be established beyond reasonable doubt, or at the very least to a 'clear and convincing' degree, before such orders may be imposed. If the latter intermediate standard were adopted, anonymity would provide a further safeguard for the individual.

The use of civil recovery orders is another tactic adopted by the State that entails a stigmatising declaration regarding criminal liability, and thereby engages the presumption of innocence.<sup>133</sup> Such orders may be made against property worth at least £10,000 in the UK that is deemed to be the proceeds of crime, namely obtained through

<sup>130</sup> Terrorism Prevention and Investigation Measures Act 2011.

<sup>131</sup> L. Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' [2007] *Current Legal Problems* 174, 196.

<sup>132</sup> *Ibid.*

<sup>133</sup> Tadros and Tierney also refer to the stigma in confiscation following conviction, but this paper is concerned with non-conviction stigma and censure only. V. Tadros and S. Tierney 'The Presumption of Innocence and the Human Rights Act' (2004) 67 *Modern Law Review* 402, 406 and 431.

**Comment [C14]:** I think you need to address the question of whether in these cases anonymity makes any difference....

unlawful conduct.<sup>134</sup> The civil standard of proof is used here. It is not necessary for proceedings to have been brought for an offence in connection with the property,<sup>135</sup> and property need not be related to a particular crime on the basis that this would make the scheme ‘useless and unworkable’.<sup>136</sup> In other words, there is no predicate offence. Indeed, the very rationale is to facilitate recovery of assets where a conviction and thus criminal confiscation is not possible, because of circumstances such as lack of evidence.<sup>137</sup>

Domestic and European courts have found that such recovery of assets on the civil standard of proof is not a criminal matter attracting due process protections.<sup>138</sup> In one respect, civil recovery may be viewed as preventative, as it ensures that illegal profits cannot be accumulated and used to fund criminality or corrupt democratic institutions. Another interpretation is that it seeks to redress an imbalance by seizing assets accrued as a result of criminal activity and therefore is reparative.<sup>139</sup> I suggest that while the ostensible rationale is to recoup unlawfully acquired assets, and while these orders are directed at the property rather than the person, recovery also incorporates a substantial stigma<sup>140</sup> and incorporates the blame that distinguishes criminal from civil measures, with the former connoting ‘should not do’.<sup>141</sup> Certainly, moral responsibility and social blame accrue as a result of judicial determination that property represents the proceeds of crime.<sup>142</sup> Civil recovery in fact places the label of criminal on a person without due

<sup>134</sup> Proceeds of Crime Act 2002 s 240(1). The Home Office suggested that this could be amended to include property retained by unlawful conduct, or ‘assets obtained by or in connection with unlawful conduct’. Home Office, *Asset Recovery Action Plan: A Consultation Document* (London: Home Office, 2007) [3.4].

<sup>135</sup> Proceeds of Crime Act 2002 s 240(2).

<sup>136</sup> *Director of Assets Recovery Agency v Green* [2005] EWHC 3168 (Admin) [2005] All ER (D) 261 [17]; *Director of the Assets Recovery Agency v Szepietowski* [2007] EWCA Civ 766, [2007] All ER (D) 364 para 26.

<sup>137</sup> See Attorney General, *Attorney General’s guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002* (London: Attorney General’s Office, 2009) presumption of innocence nt 5.

<sup>138</sup> *Director of the Assets Recovery Agency v Customs and Excise Commissioners and Charrington* [2005] EWCA Civ 334 [17]; *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6 [23].

<sup>139</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185, 218.

<sup>140</sup> A. Ashworth, ‘Social control and ‘anti-social behaviour’: the subversion of human rights?’ (2004) 120 *Law Quarterly Review* 263.

<sup>141</sup> C. Steiker, ‘Punishment Theory and the Criminal-Civil Procedural Divide’ (1997) 85 *Georgetown Law Journal* 775, 804; A. Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 232.

<sup>142</sup> M. Stahl, ‘Asset Forfeiture, Burdens of Proof and the War on Drugs’ (1992) 83 *Journal of Criminal Law and Criminology* 274.



process protections: while the legislation refers to unlawful conduct, the assets seized are described as the ‘proceeds of crime’, both in relevant legislation and by the courts. This represents a declaration that encourages the public to believe the owner of the property to be guilty of criminality, broadly speaking.

Civil asset forfeiture often follows acquittal, but the argument that the presumption of innocence thereby is breached has been raised unsuccessfully in the UK courts. In *Director of the Assets Recovery Agency v Kean* Stanley Burnton J emphasised that the respondent’s acquittal was not a reason to prevent the Assets Recovery Agency from relying on the evidence in question, given that his so-called ‘guilt’ could be proved on the balance of probabilities.<sup>143</sup> This statement is troubling with respect to the presumption of innocence, given the judicial conflation of criminal notions of guilt and civil liability. Moreover, the UK Supreme Court, in the first civil recovery case it heard, held that the courts may consider evidence that formed the basis of charges abroad of which the appellant was acquitted,<sup>144</sup> and that while this may represent an expression of suspicion by the State regarding his guilt this does not breach the presumption of innocence as it does not reflect a judicial opinion that a person is guilty. Similarly, the respondent in *Scottish Ministers v Doig* contended a breach of Article 6(2) on the basis that averments relating to a recovery order stated he was involved in the supply of controlled drugs although he had been acquitted of those charges.<sup>145</sup> The Court of Session rejected his line of argument, stressing that recovery and criminal proceedings are entirely separate, and that the averments did not invite or assert a finding of guilt of a particular offence, but rather contended that the conduct was unlawful.<sup>146</sup> This was found not to offend Article 6(2).

As previously noted, the European Court has stressed that Article 6(2) seeks to safeguard an acquitted person’s reputation from statements or acts that would seem to undermine the acquittal.<sup>147</sup> Viewing these cases in light of the presumption more broadly illuminates the State’s declaration of guilt in a way as to shape public opinion, regardless of the conclusion of the criminal courts, or indeed whether a trial will occur at all. While

<sup>143</sup> *Director of the Assets Recovery Agency v Kean* [2007] All ER (D) 286 [64].

<sup>144</sup> *Gale v Serious Organised Crime Agency* [2011] UKSC 49.

<sup>145</sup> *Scottish Ministers v Doig* [2009] CSIH 34; 2009 SC 474.

<sup>146</sup> *Ibid* [32].

<sup>147</sup> *Taliadorou and Stylianou v Cyprus* n 29 [26].

**Comment [C15]:** see now *R v Varma* [2012] UKSC 42. Does it add anything?

**Comment [LC16]:** I don’t think so. The Supreme Court there held that the Crown Court may make a confiscation order against a defendant following conviction for an offence even if he or she receives an absolute or conditional discharge for that offence. The difference is that s/he has been convicted but the court did not impose punishment. Do you think a footnote outlining this is necessary?

the State's response would be that the aim is to remove funds after the perpetration of unlawful acts is established, the dissemination of a condemnatory opinion engages the presumption of innocence. So, rather than the reliance on evidence from an acquittal being problematic, I suggest that what is contentious here is the State declaration of guilt through the seizing of assets described as the proceeds of crime, but without proof beyond reasonable doubt. While the coercive tactic of seizing property itself is not unproblematic, the troubling issue in the context of this paper is the label and the publicity involved.

Here the State is depicting a member of the polity to her fellow citizens as enjoying property generated through criminal behaviour. Given that the nuances of the standard of proof may be lost on the average person, the declaration is that the person is responsible for criminal acts. The policy implications of this insight are that in the context of asset forfeiture a higher standard of proof should be required, as occurs in relation to ASBOs. Having said this, the absence of hard treatment in the form of punishment *per se* implies that a 'clear and convincing' would suffice, rather than necessitating proof beyond reasonable doubt. Moreover, the implications for the individual indicate that anonymity should be preserved.

## V. Conclusion

Labels in the criminal justice system have a declaratory function; offences thus need to be named and classified appropriately.<sup>148</sup> Similar caution and fairness is imperative in the official classification and naming of persons based on their actions, given the meaning it may express to fellow citizens. Such labels or measures may be desirable: there is a weighty consequentialist argument for stigmatising certain behaviours on the basis that this is beneficial to society in terms of deterrence and retribution.<sup>149</sup> Nevertheless, ascribing the label of 'criminal' risks breaching the presumption of innocence and its underlying values, even when this occurs outside of the criminal process.

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<sup>148</sup> J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217; V. Tadros, 'The Homicide Ladder' (2006) 4 *Modern Law Review* 601, 618; A. Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 2009). Ashworth describes this as the 'public communication' function of fair labelling: 89.

<sup>149</sup> R. J. Arneson 'Shame, Stigma, and Disgust in the Decent Society' (2007) 11 *Journal of Ethics* 31, 33.

Moving from the traditional dichotomous conceptions of guilt and innocence, in this article I have drawn on an understanding of the criminal justice system that sees it as involving a continuum of culpability and associated labelling. Using the presumption as an interpretative device allows us to get to the core of what is troubling about certain State practices. Beyond this, I have presented an expanded interpretation of the presumption, one that takes in persons who have not been charged, and in doing so have drawn upon both its epistemic purposes and its broader significance in terms of the relations and trust between the State and its citizens.

Building on this understanding, the paper has sought to determine whether certain expressions of suspicion through official labels or declarations of guilt engage or breach the presumption of innocence. At first blush, it might seem that attaching the label of arrestee, suspect, or accused to a person speaks to the State's suspicion of his culpability or likelihood to offend, and thus distinguishes him from 'truly' innocent people who have never come to the attention of the police. By devising a typology focusing on censure, state intention and public dissemination, this paper concludes that while the unfortunate effect of some measures by the State may stigmatise a person, this is not in breach of the presumption of innocence. Rather, the presumption is compromised only where the declaration involves a public expression of censure on the balance of probabilities, given that such State action usurps the role of the criminal courts and evades the associated protections through the creation of a 'shadow criminal law'.<sup>150</sup>

**Comment [LC17]:** I use 'article' in other instances – which is preferred?

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<sup>150</sup> *Allen v Illinois* 478 US 364, 384 (1986) *per* Stevens J (dissenting).