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ARGUMENTS FROM IGNORANCE AND THE PRESUMPTION OF IGNORANCE

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1. *Introduction*

"There is one special context in which the appeal to ignorance is common and appropriate," Irving Copi writes, "namely, in a criminal court" (Copi and Cohen [1990], p. 94).[1] In saying this, Copi is making an exception — strictly speaking, the only exception — to his general prohibition on arguments from ignorance. Arguments from ignorance outside the courtroom, in other words, are fallacious,[2] according to Copi, while those inside the courtroom aren't.[3]

Before I go on to expose more of Copi's position and, as might be guessed, also criticize it, two minor points should be made. Copi's position is that

(1) An *ad ignorantiam* advanced outside the courtroom is fallacious,

and

(2) An *ad ignorantiam* advanced inside the courtroom isn't fallacious.

Textual evidence indicates that (1) is intended as a universal proposition. So interpreted, however, I have my doubts about it. Some, and I would venture to say a great many, everyday *ad ignorantiams* are perfectly in order. This isn't the place to argue the point, though, so I'll simply dogmatically state it and move on.[4] (2), on the other hand, is harder to interpret. Copi speaks in a categorical fashion about *ad ignorantiams* in a court of law, but if his claim is that

(3) No *ad ignorantiam* advanced in a court of law is fallacious,

then I think that it, too, is implausible. Even a rather strong-willed defender of *ad ignorantiam* like myself thinks that some *ad ignorantiams* are fallacious, and that one of the offenders might well show his ugly face in the courtroom. But Copi would also have to admit as much, I think, for an *ad ignorantiam* advanced in the courtroom might be put forward in an attempt to establish a matter of fact, e.g., that there were no functioning street lights at the corner at the time of the emergency. When a matter of fact and not a matter of law, e.g., guilt or innocence, is at issue, arguments inside the law and outside the law have the same function, and are subject to basically the same evaluative criteria. If anything, of course, legal standards are higher

or more stringent than extra-legal, everyday standards. Some everyday evidence is inadmissible in the courtroom, and standards for the establishment of a conclusion may well differ in the two contexts. Some courts have required that 'primary facts' be established beyond a reasonable doubt, for instance, though admittedly this is a hotly contested issue.

In any case, the main point is that if an argument like

> We have little good reason to think that the Walter was in the doghouse at the time; Therefore, Walter wasn't in the doghouse at the time,

is fallacious outside the law, as it may well be — for we may have no information at all about the doghouse or its potential occupants — then it would also be fallacious inside the law. That being so, Copi would also have to admit that an *ad ignorantiam* respecting a factual point is fallacious in the courtroom if, in some cases, its non-legal doppleganger is. And, of course, the non-legal doppleganger always is fallacious, according to Copi. What I conclude from all this is not, as might be thought, that Copi is wrong, but that since what Copi has written doesn't absolutely require us to interpret (2) as (3), an unqualified universal proposition, the best way to interpret it is as a qualified universal proposition:

> (4) No *ad ignorantiam* advanced in a court of law is fallacious if it concerns a point of law.

Even that may be too strong, however, as all Copi speaks of respecting points of law is guilt and innocence. Perhaps, then, (2) should really be interpreted as

> (5) No *ad ignorantiam* advanced in a court of law is fallacious if it concerns (a single point of law, namely) guilt or innocence.

Not only is this a weaker claim than (4), and thus a safer one; it also comports well with — and here I return to what is more properly the subject of this paper — Copi's rationale for making an exception in the case of *ad ignorantiams* advanced in a court of law.

2. *Presumed Innocence: An Agenda and a Defense of Copi*

The reason why an *ad ignorantiam* isn't necessarily fallacious in the courtroom is simply that "an accused person is presumed innocent until proven guilty" (Copi and Cohen [1990], p. 94). Invoked by Copi in this context, in other words, is the famous principle of the presumption of innocence:

(I) The accused is innocent until proven guilty.

In what follows, in sections 3–9, I'll be examining a number of points in respect to this principle. In particular, I'll be looking at

(A) whether (5) is well supported by (I);[5]

(B) what a presumption is, and what the *presumption* of innocence amounts to;

and

(C) whether (I) really does concern a presumption of innocence.[6]

In this section, however, I'd like to defend Copi against a charge that has been lodged against him.[7]

Gerald Massey has objected to Copi's claim that

> there is one special context in which [*argumentum ad ignorantiam*] is not fallacious — namely, in a court of law; for in a court of law the guiding principle is that a person is presumed innocent until proven guilty. The defense can legitimately claim that if the prosecution has not proved guilt, this warrants a verdict of not guilty (Massey [1982], p. 491).[8]

According to Massey,

> Copi confuses two concepts, innocence and legal innocence. The latter does not entail the former any more than apparent mistake entails mistake. Many legally innocent people are guilty of the charge on which they are exonerated. If fallacious anywhere, the inference from 'It has not been proved that x did y' to 'x did not do y' or 'x is innocent of y' is fallacious everywhere, courtrooms not excepted.[9] Verdicts of innocence are not incantations that turn guilty people into innocent parties (Massey [1981], p. 491).

That's for sure; but I don't think that Massey's charge is well founded.

Massey is right that the rules of a court of law, including overarching methodological principles such as the presumption of innocence, are like the rules of a game, and may have only a tenuous connection with the principles of correct reasoning employed in everyday life. And similarly with the concepts that the law employs, such as *innocence*. *Legal innocence* cannot be straightforwardly identified with *innocence simpliciter*, and thus the presumption of innocence invoked in the law may be, like the rule that it costs $ 50 to get out of jail in Monopoly, simply a rule of the game, without any import for extra-game behavior. Thus *legal innocence* is distinct from *innocence simpliciter*.

But is Copi really guilty of anything here? (I'd apologize for using the term "guilty" in this context, but honesty and a sense of humor prevent me from doing so.) I don't think so. There's no indication that Copi holds that the presumption of innocence applies to anything outside the courtroom. He doesn't say or imply, for example, that lack of legal proof means that a person is innocent, meaning innocent *simpliciter*. Rather, what he says it means is that "the defense can legitimately claim" — sounds like legal talk to me — that what is warranted is "a verdict of not guilty." As far as I can see,

nothing Copi says commits him to anything outside the legal context. In fact, his specific purpose in discussing the presumption of innocence is to distinguish and isolate the legal context from all others, and so he seems to be guarding against just such a commitment.

3. Ad Ignorantiam *and Two Presumptions*

Moving on to task (A), then: Is it true that

> (5) No *ad ignorantiam* advanced in a court of law is fallacious if it concerns (a single point of law, namely) guilt or innocence

is well supported by

> (I) The accused is innocent until proven guilty?

At least one parameter needs to be set on an argument from (I) to (5). Not every legal system operates with a presumption of innocence. Some have a presumption of guilt, and some, especially non-adversarial, truth-seeking legal systems, have neither a presumption of guilt nor a presumption of innocence. The argument from (I) to (5) thus has to be restricted to legal systems for which (I) is a rule of law.

Second, even so restricted, (I) doesn't support (5) as it stands. Guilt and innocence aren't symmetrical in (I), and thus (5), which does treat them symmetrically, doesn't follow from it. To support (5), an additional premise, on the order of

> (G) If there's no proof that the accused is innocent, then the accused is guilty

would have to be added. However, if (G) is interpreted to mean

> (H) The accused is guilty until proven innocent,

as it probably should, then, absent any further qualifications, a legal system that incorporated both (I) and (G)/(H) would be inconsistent, containing both a presumption of innocence and a presumption of guilt as it would. The admittedly purely hypothetical case of neither the defense nor the prosecution presenting any evidence makes this clear. The defense would cite the presumption of innocence and claim victory, and the prosecution would cite the presumption of guilt and do the same.

4. *Two Options*

Unlikely as it might seem, however, a presumption of guilt and presumption of innocence could be built into the same legal system, at least if the two principles were lexically ordered, or the term 'proof' understood in a certain way. The presumption of innocence (let's say) could be given lexical priority

to a presumption of guilt, or 'proof' could be understood to include 'negative evidence' (a term to be explained in a minute) as well as positive evidence. How would that work? In the first case (a lexical ordering of the two principles, with the presumption of innocence taking precedence), if there weren't proof of guilt, then the presumption of innocence would take precedence, and a verdict of not guilty would be rendered, whether or not there was *proof* of innocence. If neither side presented any evidence, or neither side established (proved) its claim, the defendant would be declared innocent. I have to admit, however, that though such a system is conceptually possible, it's of no interest, philosophical or legal. For, if the presumption of innocence — (I) — is overridden in any particular case, that could only be because guilt was proved. In that case, though, there is no need for a lexically secondary principle, the presumption of guilt. Guilt would have already been proved.

Moving on to the second option, then: with that option, the concept of a proof itself has to be understood so that an inference based on negative evidence alone is admissible and, in certain circumstances, regarded as proof. In other words, under certain circumstances, an inference from

There's no proof that p

to

Therefore not-p,

would by itself be considered a proof. This is something that the law doesn't consider inherently problematic. In addition, however, in order to avoid the inconsistency noted above, proofs of the above sort have to be thought of as asymmetrical: such an argument, it would have to be stipulated, constitutes a proof when, but only when, the premise is true and p is on the order of 'X is guilty.' The contradictions inherent in the 'no evidence presented' cases mentioned above, and others of a like sort (e.g., cases in which the evidence is balanced, and thus there is no proof on either side), can thus be avoided. A legal system of this sort is a real possibility but, like the one sketched in the preceding paragraph, is needlessly complicated, and is not only materially equivalent to a legal system in which there's simply a presumption of innocence, period, but also, when explicitly spelled out as I have here, conceptually equivalent to it as well.[10] Thus there's really no point in pursuing the option.[11]

I conclude, then, that if there's to be a presumption of innocence or guilt at all, there should be only one such presumption, even if a legal system with more than one is logically possible.

5. Ad Ignorantiam *Vindicated in the Courtroom*

To return to issue (A), duly revised and reconstructed in light of sections 3 and 4: consider the inference from

(I) The accused is innocent until proven guilty

to

(6) No *ad ignorantiam* advanced in a court of law is fallacious if it concerns (a single point of law, namely) innocence,

where 'concerns innocence' means that the conclusion is that the accused is not guilty. Is this argument any good? (I) tells us that an argument of the form:

There's no proof that p;
Therefore, not-p

is sound (assuming its premise true) if, but (other principles aside) only if, p is 'the accused is guilty' and — something I haven't emphasized so far, but have simply accepted and will continue to accept for the sake of argument — 'not guilty' means the same thing as 'innocent.' Taking 'not guilty' to mean 'innocent' once again in (6), (6) states exactly the same thing, at least if the premise of an *ad ignorantiam* is understood in terms of the proof of a proposition, as it is here.[12] The inference from (I) to (6) is thus about as good as an inference gets, since (I) and (6) turn out to say the same thing. And the inference would be even better — if that were possible — if '*ad ignorantiam*' were interpreted in terms of its premise stating not that there's no proof that p, but that there's no reason to think that p is true. If there's no reason, there's no proof. Thus if guilt requires proof — which is what (I) says — then the argument

There's no reason to think that X is guilty;
Therefore, X isn't guilty

must also be a good argument.[13]

With matters duly specified and clarified, then, the presumption of innocence does support the claim that in the courtroom, some *ad ignorantiams* are good arguments.

6. *Presumption: Walton's Views*

But what *is* the presumption of innocence? What is a presumption, even? Let me pursue the second question here first, in this and the next two sections. I'll return to the presumption of innocence in section 9.

Although a commonly employed concept, there is, curiously enough, almost no philosophical or legal literature on presumption. Luckily, though, whenever a concept of interest to the theorist of argument, legal or otherwise, finds itself in such a sorry state, Douglas Walton jumps into the breach and writes a book or two about it. Actually, in this case it's only an article — so far. Still, Walton has given us a fairly full account of the concept.

According to Walton, presumption is a "distinctive kind of speech act half way between assertion and (mere) assumption (supposition)" (Walton

[1993], p. 125).[14] It should be understood dialectically, he thinks, that is, in the context of a two- or more- person series of exchanges in a dialogue governed by a set of rules, in which the parties reason together toward a common goal. Presumption thus functions in the context of practical or pragmatic reasoning (Walton uses the two terms interchangeably), or, what is the same thing, goal-directed reasoning. This, I take it, is opposed to purely theoretical reasoning, in which the goal is not action or some extrinsic end, but knowledge for knowledge's sake, understanding for understanding's sake, or some such epistemic and, as Aristotle would say, intrinsic end. The extrinsic goal of dialectical reasoning is, at the least, agreement. In any case, presumption, in Walton's view, is not only inherently practical but operates under conditions of uncertainty. Knowledge sufficient to answer the question — what to do, how to achieve the goal — is lacking. Epistemically — though that's a term Walton never uses — a presumption establishes a channel of default reasoning in a given context, by setting the burden of proof on a certain proposition, namely, the denial of the one presumed. To use terminology closer to his, presumption shifts the burden of proof from one party to the other. Obviously *presumption* is closely related to *burden of proof* in this account, just as it should be. And it's also closely related, if we concentrate only on the particular presumption of interest in this paper, to the adversarial nature of the law.

A word more on presumption and burden of proof. Both are obligation-related notions, Walton thinks, and all participants in a dialogue have obligations, if only to play by the rules of the goal-directed game. Burden of proof is actually "a sub-category of obligation," he says, and in a dialogue in which the goal is to "prove ... something," the obligation of a participant to prove it is "matched with a *weight*, a rough rating (heavy, medium, light) which is an estimate of how difficult or easy it is to prove that particular proposition in [that particular] context of dialogue" (Walton [1993], p. 133). Burden of proof is thus

> an important and useful idea where conclusive resolution of a disputed issue by appeal to decisive evidence (knowledge) is not possible. The problem, in such a case, is that argumentation pro and con could go on and on, and never reach a resolution. Burden of proof is a practical solution to this problem which works by setting a required weight of strength of argumentation as sufficient to prove (disprove) the contention, and thereby close the dialogue off from further argumentation (Walton [1993], p. 134).

But, given Walton's dialectical framework, how is burden of proof set in a dialogue? Walton's answer is that

> At the global level [that is, in considering the dialogue as a whole, and in keeping in mind its ultimate goal] burden of proof can be set

> in various ways — by preponderance of evidence, by convincing evidence, or beyond reasonable doubt, for example — on a scale of increasing heaviness of the burden. At the local level [that is, in considering one stage or sub-stage of a dialogue, and its more immediate goal], some ways of apportioning burden of proof are relatively clear, e.g., he who asserts must prove (Walton [1993], p. 134).

Presumption thus "seems to function as a way of absolving or excusing a sub-argument from the usual demands of burden of proof" (Walton [1993], p. 135), and "essentially means that the proponent of the proposition in question does not have a burden of proof, only a burden to disprove contrary evidence [a burden to rebut], should [such contrary evidence] arise in the future sequence of dialogue" (Walton [1993], p. 136). As I understand it, then, the two notions, presumption and burden of proof, are correlative but functional opposites: in a given dialogue or stage of a dialogue, a burden of proof on one proposition is a presumption in favor of its denial, and a presumption in favor of one proposition is a burden of proof on its denial.[15] However, presumptions always carry at least one obligation with them, namely, an obligation to rebut contrary evidence. That, in fact, leads Walton to say that "the key idea [of presumption] is the shifting of burden of rebuttal."

I don't think that this last remark is quite right, though. To make one quick critical point: as the prior concept, the one that determines what needs to be rebutted, is burden of proof, the essential concept, even if not the only key one, is still burden of proof, even on this account.

7. *Problems with Walton's Account*

And I say "even on this account," for insightful as it is in many respects, I don't think that it's correct, either in overall outline or in many of its details.[16] This isn't the place to argue the point at length, however, so let me just make some very general comments.[17]

First, I don't think that presumption is a speech act, not ever. To presume is just to take for granted, in particular to take a proposition's truth for granted. To be sure, there's a suggestion — an overrideable suggestion — carried by the word "presume," that what's presumed is or may be underdetermined by the evidence, can be or should be questioned, or is or may be questionable. If my neighbor were to ask me where my brother was right now, I would say that I presume that he's at work. So saying, I would be responding to the unusual nature of the question by admitting, via the (conversationally) implicated suggestion that what I say may be underdetermined by the evidence I have. A presumption itself is just the read-out of the act or state of presuming: it's what is presumed (a proposition as true) or, in reifying the

verb, the act or state of presuming itself. In no case does it have any inherent connection with speech acts of any kind. *A fortiori*, presumption needn't be, and shouldn't be, understood in terms of a theory of argumentation that is through and through dialectical, or can be understood only in terms of a two- or more-person series of exchanges, however idealized.[18] As the common-sense gloss on the notion tendered above has it, presumption is essentially epistemic, not dialogical, in nature.

Secondly, assumption and supposition aren't speech acts either, and for much the same reason, even if assertion is. More importantly, if a difference between assumption and presumption is drawn at all — and differences between the two recorded in ordinary usage are slender and few in number, when they're detectable at all — it will have to be based on the evidential warrant backing the proposition assumed or presumed. It's not based, as Walton seems to have it, on how strenuously we would have to defend a proposition put forward in a dialogue with an opponent (suppositions not at all; presumptions somewhat; assertions quite a bit) — that is, unless Walton's claim here is simply meant to record the epistemic backing behind any such public, dialogical defense. An assumption, pure and simple, needn't have any backing, but a presumption, if distinguished from an assumption, has to have some. A presumption, moreover, needn't have moderate to negligible warrant, and needn't be incorrect. My presumption that my brother is at work could well be supported by gobs of evidence, and could well be true. Independently of my objection regarding the speech-act setting for presumption, then, that a presumption needs to operate in an area of uncertainty, or "where access to evidence that would definitely resolve the question is lacking" (Walton [1993], p. 142), seems incorrect.

Third, and again independently of my objections to Walton's overarching dialogical framework, I have my doubts about a two-tiered approach to questions of burden of proof. As mentioned several paragraphs back, Walton thinks that at one level ("the global level") the burden of proof may be set in one way — by proof beyond a reasonable doubt, say — while at another level ("the local level") it could be set another way — by assigning a burden of proof to whoever asserts. I don't think that's so. In the most basic sense, no matter what level you're on, and no matter what claim is at issue, he who asserts must prove — or, as I would prefer to say, he who believes must have sufficient warrant.[19] Every belief — and presumption is a kind of belief, as I'm using the term — stands in need of backing. If a belief doesn't have sufficient backing, our obligation — not our dialectical obligation but our epistemic obligation — is unfulfilled. This is not to say that the correct *method* for verifying or validating a claim (or a proposition) is the same no matter what the claim may be. Obviously different claim demand different methods. Nor is it even to say that the method of verifying or validating p is always the same as the method of verifying or validating not-p. Rarely,

if ever, is it. But it is to say that there's only one basic epistemic rule, and that means in the courtroom as well as everyday life. Thus in a fundamental sense, both sides in a dispute have a burden of proof, an obligation to show that their side is correct. What Walton cites as *how* burden of proof is set at the global level — preponderance of evidence, convincing evidence, proof beyond a reasonable doubt — doesn't really concern how it's set so much as the evidential standard needed to meet it, or what counts as fulfilling the requirement of burden of proof, however it's set.

8. *Is the Presumption of Innocence a Presumption?*

But where does that leave the presumption of innocence? Isn't the presumption of innocence, cited as a global rule by Walton, and clearly with the courtroom in mind, precisely an exception, a counterexample, to what I've just been saying about presumption in general? Isn't a more finely differentiated treatment of burden of proof, and thus presumption, needed to account for the facts, even if Walton's particular way of doing business — a global level/local level distinction, with presumption being explicated in terms of speech act theory — is rejected? I don't think so. Explaining why will conclude my discussion of issue (B) and also cover issue (C).

Strictly speaking, the presumption of innocence isn't a presumption at all. Presumptions are basically beliefs. The presumption of innocence, on the other hand, is a rule, or, as I referred to it back in section 2, a methodological principle, applicable only in the courtroom. It isn't a belief, in the sense of something that functions as a premise in an argument,[20] *a fortiori* a legal argument, the way that a presumption does. What the presumption of innocence does is legitimate inferences, just as modus ponens does, or universal instantiation does. It doesn't function as a premise — and a well-nigh universal premise, present in virtually all criminal cases, as it would have to be — or else, among other things, it wouldn't underwrite (some) *ad ignorantiams* in the courtroom, something I argued it does back in section 5. If the presumption of innocence did function as a premise, what are *ad ignorantiams* would be simple deductive arguments of the form:

(7) The prosecution hasn't proven (beyond a reasonable doubt) that the accused is guilty.
(8) The accused is innocent (not guilty) until the prosecution has proven (beyond a reasonable doubt) him guilty;
(9) Therefore, the accused is innocent (not guilty).

Instead, the argument is really (7); therefore (9). (8), the presumption of innocence, is the inference ticket that permits passage from (7) to (9).

Let me explore the implications of this point further. Call the argument

(7); therefore (9),
"M." There are a number of curious things about M — and therefore about the presumption of innocence in the law. First, M is deductively valid. (I), the presumption of innocence, assures us of that. But even though there are very, very strong *ad ignorantiams* of the M or M-related sort outside the law,[21] none is or could be deductively valid. The logically privileged status of *ad ignorantiam* in the law is, at first glance, very odd and curious. But if what I've been arguing in this paper is correct, the explanation of its deductive validity, and thus its privileged status, is, in a sense, simple and straightforward. The presumption of innocence is on a par with a rule of a game. Logically speaking, it's a convention, a rule operative in a certain game-like context and not necessarily anywhere else, with no extra-game import. That sets it in contradistinction to the rules of logic as such, as philosophers understand them — or at least as philosophers have traditionally understood them. As it is traditionally conceived, logic is context independent[22] and fitted into reality in a relatively intimate way, a way that precluded it from being arbitrary, or at least arbitrary in the way that a mere set of conventions is. On a traditional understanding of logic, then, legal *ad ignorantiams* buy their deductive validity at the price of a restricted conventionality, and have to sell their hope of extra-legal applicability to raise the necessary capital.[23]

But the presumption of innocence and the *ad ignorantiams* that it underwrites have a number of other curious logical features. M is a proof with a meta-level premise and an object-level conclusion — the premise concerns proof of guilt; the conclusion guilt. Moreover, the premise and the conclusion are different in other logically important ways. The premise is negative, logically compound (i.e., it contains at least one proposition as a proper part), intensional (i.e., the truth value of the whole isn't a function of the truth-values of its component parts), and has a component proposition whose quality is positive.[24] The conclusion is also negative, but it's logically simple (it contains no other propositions as proper parts), and extensional (the substitution of co-designative terms doesn't affect its truth value). There are other arguments with certain of these features, of course:

X has proved that the square root of 2 is irrational;

Therefore, the square root of 2 is irrational is a fine argument, for example, and a deductively valid one, if proof is understood appropriately. Like M, its premise is meta-level, logically compound, and intensional, and its conclusion is object-level, logically simple, and extensional, and the quality of the premise's component proposition is positive. Ostensibly, the chief difference between the two is that the quality of both the premise and the conclusion is positive in this case, while the quality of both is negative in the case of M. But that's not really to the point. It's just as easy to set up the above argument with a negative conclusion — e.g., 'it's not possible to trisect an

angle using only a straight-edge and compass' — as it is with a positive conclusion. Indeed, if 'irrational' is interpreted as 'not rational,' the conclusion is already negative. The important difference between the two arguments, logically speaking, is that the proposition proved — the conclusion — is the denial of the premise's embedded, component proposition in M. The quality of that proposition changes, in other words. More closely related to M are:

It's not necessary that Walt is barking;
Therefore, Walt isn't barking,

and especially

No one has proved the Goldbach Conjecture;
Therefore, the Goldbach Conjecture is false.

Both of these arguments are invalid.[25] Looking closely at M and its nearest relative, the Goldbach Conjecture Argument — call it "G" — what we see is this: contrary to the principles of normal epistemic logic, what the presumption of innocence does in the law is permit a proposition that is universally quantified ('everyone', i.e., 'the plaintiff' — 'everyone relevant in the case') with a negative epistemic operator ('not proved') ranging over an embedded proposition ('the accused is guilty,' 'the Goldbach Conjecture' — the isomorph in the invalid argument) to be read as a proposition that is particularly quantified ('someone') with a positive epistemic operator ('proved') ranging over the formerly embedded proposition, with the quality of that formerly embedded proposition changed ('the accused is not guilty,' 'the Goldbach Conjecture is false'). In effect, this is to say, though this is hardly news, given what was said three and four paragraphs back, that the presumption of innocence is a rule of inference, and that it legitimates, or makes valid, arguments in its context of application (the law) that are otherwise (outside the law) invalid. The above-described logical features of legal *ad ignorantiams* show how it does this, and why it's so.

9. *Are Burden of Proof and Assumption of Innocence Correlative?*

I hope that the above helps to clarify, explain, and defend the rather counterintuitive-sounding claim that the presumption of innocence isn't really a presumption at all, strictly speaking. Perhaps a bit more of the counter- can be taken out of the counterintuitiveness by emphasizing the 'strictly speaking.' I say this because in a secondary sense of the term, the presumption of innocence is a genuine presumption. It's a presumption in the sense of that which warrants and tends to generate presumptions in the first sense; for, as an inference rule it underwrites many presumptive judgments — that is, presumptions — on the order of 'this accused person is not guilty,' 'that accused person is not guilty,' 'this third accused person is not guilty,' and so on.

Where does that leave *burden of proof*? If what has been said above is correct, then strictly speaking (that phrase again) *burden of proof* and *presumption* aren't correlative concepts. Presumption is one kind of thing, basically, belief epistemically situated in a certain way; but the only thing said about burden of proof so far is that all claims are subject to it, including, I hasten to add, the claim that the accused isn't guilty. More on that below. The point to note here is that strictly speaking, *presumption* doesn't have a correlative. There's no ontological inverse of belief, no conceptual mirror image of a certain kind of psychological state. In any case, what I'm speaking of here is presumption and burden of proof as such, not the presumption of innocence and the burden of proof in the law. Walton's and other people's view that the concepts of presumption and burden of proof are correlative is probably based on — and this is a somewhat speculative explanation — (a) thinking of the two in law, to the virtual exclusion of other contexts, and (b) a misunderstanding of, or better, a lack of analysis of, the presumption of innocence in the law.

Burden of proof also isn't an implicitly exclusive disjunctive concept on my analysis, as it is on Walton's. What I mean by this is in saying that there's a burden of proof on A to show that p is the case, I don't thereby exonerate his opponent, B, from having a burden of proof to show that not-p is the case. Walton has it that a proponent's burden of proof is an opponent's presumption, and vice versa. Not so. Both have a burden of proof, for a burden of proof is simply an obligation to prove. Everyone has that, no matter what the claim and no matter what the context. That includes the legal context.

That last statement may itself seem highly counterintuitive, but the defense really does have a burden of proof, an obligation to prove, in the strict sense of the term. It's just that it's so much easier for him to shoulder that burden than it is for the prosecution to shoulder his, thanks to the presumption of innocence, a rule that dictates that what it is that has to be done by the defense and the prosecution to discharge their obligations are two very different things. All the defense has to do is put forward argument M — and the premise of that argument can be had simply by rebutting the arguments of the prosecution, or showing that they don't add up to evidence of guilt beyond a reasonable doubt. That's all.

We say that the burden of proof is on the prosecution for two reasons, I think. The less important one is that his job is so much harder. That's true even if the standard of evidence needed for a verdict of guilty were set much lower by the presumption of innocence than it is, say, at level of *balance of evidence* rather than *proof beyond a reasonable doubt*. No matter where it's set, there needs be no corresponding job to gather *positive*, independent evidence of innocence on the part of the defense, as long as, but only as long as, the presumption of innocence is in place. Besides, rebutting or showing

insufficient — a job that the defense frequently has to take up — is generally much easier than positively establishing proof beyond a reasonable doubt, or even providing a preponderance or balance of evidence. Above a certain very low level of proposition (e.g., 'this is my foot'), doubt is a much cheaper epistemic purchase than confident, well-warranted belief. The situation is all too familiar in philosophy, of course: strong positive arguments in favor of philosophical theories is a much, much rarer and more expensive commodity than destructive criticism.

But second and more importantly, we say that the burden of proof lies on the prosecution because the job of the defense per se — the burden of proof on the defense — is logically (and temporally) parasitic on that of the prosecution, and in effect defined in terms of it. The prosecution looks and tries to find; the defense as such needs do no more than say of that looking and that attempt to find, that they don't work. Again, this asymmetry is due to the presumption of innocence. Given that that's the logic of the situation; given that, logically speaking, the defense is riding on the prosecution's back, with his burden of proof, his work, logically parasitic on the prosecution's burden of proof, his labor, we're tempted to say no more than that the burden of proof lies on the prosecution. Indeed, the logic of the situation being what it is, there's a secondary sense of the term 'burden of proof' (just as there is for 'presumption of innocence') in which it's simply true that the burden of proof lies on the prosecution and not the defense. There is an asymmetry, then, to burden of proof in that sense.[26] In the primary sense, however, it still remains true that a burden of proof attaches to all claims.[27]

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NOTES

[1] I attribute this remark to Copi alone because remarks very similar to it occur in previous editions of *Introduction to Logic*, and Copi is the sole author of those editions. I should also note, though, that although I'll be concentrating exclusively on Copi in this paper, I do so only because Copi is very well known and presents his position with great force and clarity. Many other philosophers hold roughly, or even exactly, the same views that he does on *ad ignorantiam* in a court of criminal law. Among them are Halverson [1984], p. 63, Davis [1986], pp. 59–60, and Hurley, [1985], p. 111.

[2] See, for example, the 7th edition of Copi's text, p. 94, where this is fully explicit.

[3] When I speak of the courtroom, or a court of law in this paper, I mean the criminal courtroom, or a court of criminal law. I restrict matters in this way because Copi does. As far as I can tell, however, what Copi says about the criminal law applies *mutatis mutandis* to the civil law.

[4] I have argued for it at length elsewhere, however, namely, in Wreen [1987, 1989, 1996].

[5] Actually, I'll be considering whether (6), a proposition not yet introduced, is well supported by (I). See below, section 5.

[6] A fourth issue of note, but one I can't pursue in this paper, is: (D) whether (I) is justifiable. Copi's rationale for (I) is that "the error of convicting the innocent is far more terrible than that of acquitting the guilty," but a full discussion of (D), or even of Copi's argument, would take us far afield, into morality and the proper purposes, aims, and functions of the law.

[7] I've lifted the next few paragraphs from Wreen [1996]: 351–353.

[8] Massey is quoting from the 6th edition of Copi's text, p. 102.

[9] This remark, incidentally, seems to commit Massey to the view that there are invalid arguments forms, that is, that arguments can be shown to be invalid in virtue of instantiating a certain form. That contradicts his own view, that there are no invalid argument forms, and thus that there can be no theoretical backing for judgments of formal invalidity. See Massey [1975a, 1975b, 1981]. Moreover, Massey's claim that there are no invalid argument forms isn't quite correct, but more importantly, even if it were, it wouldn't support his claim that judgments of formal invalidity are without theoretical backing. See Wreen [1996].

[10] See two paragraphs hence.

[11] The alternative sketched one paragraph back is materially but not conceptually equivalent to a simple presumption of innocence system, I take it, even if it, too, is of little philosophical or legal interest.

[12] But isn't always. See the next footnote.

[13] I bring up no-reasons *ad ignorantiams* because I myself tend to interpret the argument form that way. See Wreen [1987, 1989, 1996].

[14] See also Walton [1993], p. 136, for a very similar remark. Walton's views on presumption are also presented in sections of several of his books, including his [1992]. See especially pp. 56–61.

[15] This, of course, isn't the way Walton puts it.

[16] A fair number of which haven't been exposed here.

[17] In Wreen [1997], however, I do examine a number of components of Walton's theory of argumentation at some length.

[18] My objections to the specific dialectical theory of argumentation that Walton basically buys into, the pragma-dialectical theory, are aired in Wreen [1994].

[19] Shades of Clifford [1879]? Yes, but with the reminder that reasons for p may be very different from reasons for not-p, and that not everything we advance as a reason for a belief may be publicly available. A sensation, for example, isn't. And I should also mention that standards for the adequacy of reasons for belief may well themselves be contextually determined.

[20] In some sense it is a belief, obviously. All principles of inference, including modus tollens and existential generalization, can be formulated as propositions, and function as beliefs in our cognitive life. For more on this issue, see Stalnaker [1987].

[21] At least if Walton, myself, and several other theorists of argument are correct.

[22] Massey, for example, apparently conceives of logic this way.

[23] I realize that many philosophers do regard the rules of logic (e.g., contraposition or modal negation) as mere conventions, but conventions that, some of them, help us navigate the world, both cognitively and practically. Logic is conventional on this view, but context independent and not fully arbitrary, since some rules, but not others, help us make our way about. This isn't the place to discuss conventionalism in logic, however, nor is such a discussion necessary in this context. I say this because even if logic is conventional in the sense described, a distinction would still have to be drawn between the presumption of innocence in the law and the rules of logic generally. Even if logic is conventional, then, most of the remarks in this paragraph hold even so, and those that don't would require only slight modification to be fully accurate.

[24] I'll somewhat arbitrarily take the 'The accused is guilty' to be a positive claim.

[25] The claim that the second argument here is invalid needs qualification. The reason why is this. First, on the usual understanding of deductive validity, an argument is deductively valid if, and only if, necessarily if its premises are true, its conclusion is true. If the conditional after the word 'necessarily' in the above definition is interpreted as truth functional, terms, which is how philosophers typically interpret it, then any argument with a necessarily true

conclusion is deductively valid. Second, if the Goldbach Conjecture is false, it's necessarily false: as a mathematical proposition its modal status is necessary, and so whatever truth value it has, it has necessarily. Thus the conclusion of the Goldbach Conjecture Argument, that the Goldbach Conjecture is false, is, if true, necessarily true. Third, and putting these two points together, if the Goldbach Conjecture is false, then the conclusion of the Goldbach Conjecture Argument is necessarily true, and the argument is therefore deductively valid, indeed deductively sound. Moreover, if 'proof' amounts to no more than deductively validity, the argument is also a proof of the Goldbach Conjecture. On one understanding of deductive validity, then, the argument in question isn't invalid if the Goldbach Conjecture is false, and in fact is a proof of it.

I think the above line of reasoning can be safely ignored, however. It largely depends on a reading of *validity* (or *proof*) that incorporates what are known as the paradoxes of strict implication. A consequence of this is that the resultant notion of validity (or proof) is also somewhat paradoxical and at odds with our work-a-day notion, and certainly with the notion that's operative in the courtroom.

[26] See also Wreen [1996], especially section I.

[27] My heartfelt thanks to the editor of *Logique et Analyse*, Jean Paul Van Bendegem, and not just for useful comments on an earlier draft of this paper. His patience stretched over five years, as little by little a stubborn philosopher's resistance to learning how to produce a text in a readable format broke down.