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The Presumption of Innocence as a Counterfactual Principle

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1. Introduction

The presumption of innocence is widely, if not universally, recognized as one of the central principles of criminal justice, which is evidenced by its position in all international and regional human rights treaties as a standard of fair proceedings.[1] Notwithstanding this seemingly firm normative position, there are strong indications that the presumption of innocence is in jeopardy on a practical as well as on a normative level.

The presumption of innocence has always been much discussed, but in the last decade the topic has generated a particularly significant extent of academic work, both at the national and at the international level.[2] The purport of the literature on this topic is twofold: many authors discuss developments in law and in the practice of criminal justice that curtail suspects' rights and freedoms, and criticize these developments as being violations of the presumption of innocence. Several other authors search for the principle's normative meaning and implications, some of whom take a critical stance on narrow interpretations of the principle, whereas others assert – by sometimes totally differing arguments – that the presumption of innocence has and should have a more limited normative meaning and scope than is generally attributed to it. An important argument for narrowing down the principle's meaning or scope of application is the risk involved in a broad conception and a consequently broad field of applicability, *viz.* that its specific normative value becomes overshadowed and that concrete protection is hampered instead of furthered.[3]

The ever-increasing international interest in the topic is reflected also in the regulatory interest in the topic on the EU level. After having delivered a Green Paper on the presumption of innocence in 2006,[4] the next step is the adoption of a Directive containing minimum rules as to certain aspects of the presumption of

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1 Art. 6(2) ECHR; Art. 48(1) EU Charter of Fundamental Rights; Art. 11(1) Universal Declaration on Human Rights.

2 To name but a few: A. Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (2010); V. Tadros, 'The Ideal of the Presumption of Innocence', (2014) 8 *Criminal Law and Philosophy*, pp. 449-467; V. Tadros, 'Rethinking the Presumption of Innocence', (2007) 1 *Criminal Law and Philosophy*, no. 2, pp. 193-213; V. Tadros & S. Tierney, 'The Presumption of Innocence and the Human Rights Act', (2004) 67 *The Modern Law Review*, pp. 402-434; A. Ashworth, 'Four Threats to the Presumption of Innocence', (2006) 10 *International Journal of Evidence and Proof*, no. 4, pp. 241-278; E. van Sliedregt, *Tien tegen* één. *Een hedendaagse bezinning op de onschuldpresumptie* (inaugural lecture, Free University Amsterdam) (2009); L. Stevens, 'Pre-trial Detention: The Presumption of Innocence and Article 5 of the European Convention cannot and do not Limit its Increasing Use', (2009) 17 *European Journal of Crime, Criminal Law, and Criminal Justice*, no. 2, pp. 165–180; A. Galetta, 'The Changing Nature of the Presumption of Innocence in Today's Surveillance Societies: Rewrite Human Rights or Regulate the Use of Surveillance Technologies?', (2013) 4 *European Journal of Law and Technology* no. 2; (the contributions to the) (2013) 42 *Netherlands Journal of Legal Philosophy*, no. 3, Special Issue on the Presumption of Innocence.

3 Stumer 2010, supra note 2, pp. 52-87; cf. R. Glover, Review of A. Stumer, 'The Presumption of Innocence: Evidential and Human Rights Perspectives', (2011) 15 *The International Journal of Evidence and Proof*, no. 1, pp. 89-92; L. Campbell, 'Criminal labels, the European Convention on Human Rights and the Presumption of Innocence', (2013) 76 *The Modern Law Review*, no. 4, pp. 681-691; T. Weigend, 'There is Only One Presumption of Innocence', (2013) 42 *Netherlands Journal of Legal Philosophy*, no. 3, pp. 193-204. Cf. footnote 46, infra.

4 Green Paper on the Presumption of Innocence, 26 April 2006 COM(2006) 174.

innocence, as part of the EU's procedural rights' agenda.[5] The underlying purpose of the currently proposed EU Directive, as was the case in the Directives that have previously been enacted, is the harmonization of safeguards in criminal procedure in the Member States with a view to interstate cooperation.[6] Similar to the other EU Directives concerning procedural rights, the proposal for the Directive on certain aspects of the presumption of innocence draws strongly from the case law of the European Court of Human Rights.

The fact that the EU chose to include the presumption of innocence in its harmonization efforts seems in part to have been instigated by the often heard complaint, voiced by experts and practitioners from EU Member States in the context of the EU's Green Paper on the presumption of innocence, that this principle is being eroded and that guilt presumptions are exceedingly being tolerated.[7] Indeed, a rough overview of the literature shows both critical writings in which recent criminal justice measures and competences are claimed to amount to violations of the presumption of innocence, and authors who maintain that the presumption of innocence is a principle of limited normative meaning, considering its restricted impact on criminal justice practice.

Considering that one of the essential problems addressed by the literature concerning the presumption of innocence is the lack of clarity or consensus as to what this principle essentially means and what standards flow from its rationale, it comes as no surprise that the EU's harmonization enterprise now also focuses on this principle. We can safely assume that this lack of clarity is at least partly caused by the paradoxical and abstract nature of the presumption of innocence. Considering that the elusive and thus ever debatable nature of the presumption of innocence prevents the academic discussion about the compatibility of certain aspects of today's criminal justice with the presumption of innocence from producing operational results that are acknowledged in practice, whereas a harmonized operationalization is the purpose of the proposed EU Directive, we consider it necessary to shift the discussion on the presumption of innocence (once again)[8] to a more fundamental level.

The last few decades have shown developments in criminal justice that as such raise important questions with regard to the presumption of innocence, but also, and more importantly, significant changes in society and shifts in perceptions of crime and criminal justice that are reflected in policy and legislation. Our assertion is that these changes and shifts fundamentally challenge or even jeopardize the presumption of innocence, since they bring in their wake a distortion of the 'traditional narrative' and corresponding framework of criminal law and criminal procedure. The presumption of innocence, abstract as it is, is embedded in this traditional narrative (or so we will try to show in this article).

This article's primary aim is to highlight the fundamental level on which the discussion on the presumption of innocence needs to take place, by taking into account the developments that fundamentally endanger the presumption of innocence. We thereby hope to provide insights into the principle's central normative meaning in today's criminal justice systems and thereby to contribute to preserving that meaning. The path we take is the following: first we discuss the values and functions that are attributed to the presumption of innocence in the relevant literature, in order to provide an acceptable outline of the central ideas it contains or is supposed to contain (Section 2). We then introduce the concept of 'counterfactuality' and explain that a counterfactual perspective can further clarify the nature and essence of the presumption of innocence (Section 3). Subsequently, we briefly discuss several fundamental shifts in society and criminal justice that affect the presumption of innocence and lend all the more urgency to disclosing its essence and normative power (Section 4). In the conclusion (Section 5) we argue that today's threats to the presumption of innocence are of a fundamental nature, and that attempts to preserve the principle's efficacy should focus on its context, while taking into account its counterfactual nature.

5 Proposal for a Directive of the European Parliament and of the Council on the Strengthening of certain aspects of the Presumption of Innocence and of the Right to be Present at Trial in Criminal Proceedings, COM(2013) 821/2 (hereinafter: the proposed EU Directive).

6 Explanatory Memorandum to the proposed EU Directive, Section 1: Context of the Proposal.

7 Explanatory Memorandum to the proposed EU Directive, para. 19.

8 We do not profess to be the first ones to advocate a discussion on the meaning of the presumption of innocence on a fundamental-theoretical level; nor do we submit that the views that we advocate in this article are entirely, or even largely, novel. See for example H.L. Packer, *The Limits of the Criminal Sanction* (1968), pp. 160-168.

2. The presumption of innocence: qualifications, implications, and functions

As was stated in the introduction, all of the attention for the presumption of innocence has not led to clarity or consensus as to what it essentially means, which requirements it sets within the sphere of the administration of criminal justice, and how these requirements should be implemented in practice. An analysis of the meaning that is attributed to it is too big an enterprise to complete, if that would entail research into the different norms and interpretations in different legal systems. In our (more limited) attempt to offer a description of the central ideas harboured by the presumption of innocence, we will instead bring together the main qualifications and rationales provided in recent literature that covers different Western criminal justice systems.[9]

In describing the meaning of the presumption of innocence, the first problem that comes up is its paradoxical nature. The paradoxical nature of the presumption of innocence is well captured in Weigend's words: 'It works against experience and intuition.'[10] After all, the presumption of innocence is supposed to apply to persons who are *suspected* of having committed a criminal offence; *prima facie* there is a profound conceptual contradiction between presuming a suspect to be innocent, on the one hand, and the fact that a suspect is someone in relation to whom a reasonable presumption of guilt exists, on the other.[11] This paradox is theoretically resolved in the general recognition of the non-factual, non-cognitive but instead *normative* character of the presumption of innocence.[12] However, the normative qualification of the presumption of innocence also differs among authors. Some qualify the presumption of innocence as an exclusively or at least primarily *procedural* norm that sets more or less firm standards for practice.[13] Others use 'softer' qualifications and consider the presumption of innocence to amount to a 'hypothetical point of departure for a fair trial', a 'source of inspiration', or a 'basic assumption'.[14]

As to the question of what, then, is the principal rationale and content of the presumption of innocence, we encounter several different considerations and categorizations. In the following we categorise the main rationales of the principle along the lines of three wide-ranging normative characterizations, which are broadly recognised in both the literature and the international case law: its portrayal as a safeguard against wrongful convictions (2.1), as a shield against intrusive state powers (2.2), and as a norm of treatment and mind-set (2.3).

2.1. A safeguard against wrongful convictions and the burden of proof

The most generally recognised qualification of the presumption of innocence is that it serves as a safeguard against wrongful convictions. This conception focuses on the dangers inherent in conviction as such. It is the very nature of the consequences of being found guilty of a criminal offence that is believed to necessitate the safeguarding of the defendant from wrongful convictions by, firstly, adhering to the *in dubio pro reo* principle and, secondly, by burdening the prosecution with proving guilt and thereby defeating the presumption of innocence. Ashworth takes this rationale to be the first and foremost reason for recognizing the principle.[15] To Van Sliedregt, the prohibition of wrongful convictions constitutes the core of the presumption of innocence;

9 We will pay no specific attention to the so-called 'proportionality inquiry' in connection with the justification of *limitations* on the presumption of innocence; for this, see Stumer 2010, supra note 2, pp. 119-151, Tadros 2007, supra note 2 and Tadros & Tierney 2004, supra note 2. Nor will we address the implications of the presumption of innocence for substantive criminal law, for instance with regard to the statutory design of criminal offences; see for this Tadros 2014, supra note 2 and R.A. Duff, *Answering for Crime* (2009), pp. 195-228, 239-242.

10 T. Weigend, 'Assuming that the Defendant is not Guilty: The Presumption of Innocence in the German System of Criminal Justice', (2014) 8 *Criminal Law and Philosophy*, no. 2, p. 287.

11 See for example G.J.M. Corstens, *Het Nederlands strafprocesrecht*, revised by M.J. Borgers (2014), pp. 45-47.

12 Weigend therefore finds the term 'presumption' to be flawed; it is an 'assumption', a legal fiction; see Weigend 2014, supra note 10, p. 287. See also N. Keijzer, 'Enkele opmerkingen omtrent de *praesumptio innocentiae* in strafzaken', in Ch.J. Enschedé et al. (eds.), *Naar eer en geweten* (*liber amicorum J. Remmelink*) (1987), p. 243; Stevens 2009, supra note 2, p. 168.

13 Weigend 2013, supra note 3; Weigend 2014, supra note 10; Keijzer 1987, supra note 12.

14 See for example Van Sliedregt 2009, supra note 2; and Y. Buruma, book review (review of E. van Sliedregt, 'Tien tegen één. Een hedendaagse bezinning op de onschuldpresumptie' (oratie VU Amsterdam)), (2009) *Delikt en Delinkwent*, no. 8, p. 859.

15 Ashworth 2006, supra note 2, pp. 246-247.

the rule of *in dubio pro reo* is a direct deduction of this.[16] Keijzer speaks of the *right to be acquitted* if the charge has not been legally and convincingly proved.[17]

In the common law legal doctrine the presumption of innocence is taken to be primarily a *rule of evidence,* setting standards for the decision on guilt.[18] Taken in this sense, the notion dictates that the *burden of proof* is on the prosecution authorities,[19] and it sets a standard with regard to the threshold of required proof: the presumption of innocence must be defeated by proof of guilt *beyond a reasonable doubt* before guilt can be regarded as established and a conviction can take place.[20]

Outside of the common law jurisdictions the presumption of innocence is related to evidential issues more loosely; general principles such as *in dubio pro reo* and 'the burden of proof is on the prosecution' are recognized as noteworthy aspects of the presumption of innocence, but the essential meaning of the principle is not pinpointed on matters of proof. Weigend, for example, considers that the presumption of innocence, on the one hand, and evidentiary standards, on the other, apply in different contexts and have different purposes; a violation of the presumption of innocence in the context of proof could only occur if the law would generally require defendants to disprove the charges against them, because such a law would imply that anyone who is charged is in effect presumed to be guilty.[21]

2.2. A shield against intrusive state powers

As we saw, the risk of wrongful convictions that is inherent in criminal proceedings fuels the normative power of the presumption of innocence. In addition to setting standards with regard to the burden of proof and the threshold of proof, the presumption of innocence is also widely acknowledged to stipulate a set of norms that provide a protective 'shield' against intrusive state actions, which, after all, might in the end turn out to be unwarranted. In this connection an important question is whether the presumption of innocence applies to the trial phase only, or to both the pre-trial phase and the trial phase.

For Weigend, the fact that the presumption of innocence is a rule of procedure means that it applies 'from the initiation of a criminal process to its final conclusion'. According to him, the very aim of the presumption of innocence is to protect the suspect from overbearing situations as a consequence of state actions.[22] Therefore it prohibits state agents from taking action that necessarily presupposes that the suspect is in fact guilty. In this context Weigend defines the presumption of innocence as a 'counterweight' against all the real risks involved in an individualized suspicion (it puts his social status in jeopardy, it submits him to the State's vast powers, and it sets in motion processes possibly leading to conviction and detention).[23]

Ashworth concludes that the application of the presumption of innocence to the pre-trial phase is dictated by the same aim that also underlies the interpretation of the presumption of innocence as a rule of evidence, that is: following up on the State's duty to recognize the defendant's legal status of innocence prior to conviction.[24] This is so because subjecting the individual to the vast state powers that are part and parcel of the criminal procedure seems to contradict the notion that only the court's decision occasions the consequences of the status of a guilty person.

16 Van Sliedregt 2009, supra note 2, p. 39.
17 Keijzer 1987, supra note 12.
18 Campbell 2013, supra note 3, p. 683; Duff 2009, supra note 9, pp. 19-22, 195-228.
19 For which it is often cited from *Woolmington v DPP,* in which Viscount Sankey stated that this principle is part of the common law of England, labelling it as 'one golden thread' in the web of English criminal law, [1935] AC 462. See Stumer 2010, supra note 2, pp. 152-189.
20 R.A. Duff, 'Who must Presume whom to be Innocent of What?', (2013), 42 *Netherlands Journal of Legal Philosophy*, no. 3, p. 170; Campbell 2013, supra note 3, p. 681. The standard 'beyond reasonable doubt' is also reflected in the case law of the ECtHR. Ashworth argues, however, that this particular standard is not dictated by the presumption of innocence; not setting the standard lower than this is an implication of the values underpinning the presumption of innocence; see Ashworth 2006, supra note 2, p. 250; see also Weigend 2014, supra note 10. See also the proposed EU Directive, Art. 5; it should be noted that this proposed Art. 5(2), which summarizes the relevant ECtHR case law, is heavily disputed behind the scenes: see <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0407%28COD%29> for pro-posed amendments (last visited October 2015).
21 Weigend 2014, supra note 10, pp. 291-292; see also S.A.M. Stolwijk, *Onschuld, vrijspraak en de praesumptio innocentiae* (valedictory lecture, University of Amsterdam) (2007), pp. 15-17.
22 Weigend 2013, supra note 3; Buruma 2009, supra note 13, p. 855, likewise describes the essence of the presumption of innocence as 'a shield against burdening of the suspect'.
23 Weigend 2013, supra note 3; we will come back to the notion of a 'counterweight' in Sections 3 and 4, infra.
24 Ashworth 2006, supra note 2, p. 244.

The idea that the presumption of innocence implies a norm for the pre-trial phase that the defendant should be treated as innocent is, however, not generally recognised under the common law doctrine of the presumption of innocence,[25] although this idea is generally embraced in the literature[26] and in the European Court of Human Rights' case law.[27]

This does not alter the fact that the conceptualization of the presumption of innocence as a shield against (unjustified) punishment and as protection against state intrusion before conviction has a firm historical basis.[28] Quintard-Morénas relates it to society's acknowledgment – founded on the *contrat social* prohibiting private vengeance and guaranteeing the right to an impartial tribunal – that 'there is a time for innocence and a time for guilt'.[29] The presumption of innocence's roots in antiquity give the impression of an elementary rule of justice that follows up on the fact that one can be accused of a crime without in fact having committed it. Ancient maxims and rules maintain that allegations must be proven by those who make them, and the accused must be considered innocent, and must therefore normally not be deprived of status and liberty in the interval between accusation and judgment.[30]

Quintard-Morénas describes how the maxim *non statim qui accusator reus est* gained ground in the early French universities and in French law practised by the Parliaments, even throughout the *ancien regime* when many practices contradicted this rule – the legalization of torture being the ultimate violation of the presumption's long tradition.[31] In the pre-revolutionary writings and during the build-up to the Revolution, the position and treatment of suspects were among the most important topics in the discussion on criminal justice reform. Beccaria invoked the presumption of innocence ('no man has the right to consider someone guilty as long as the court has not reached a verdict' and 'in the eye of the law every man is innocent whose guilt has not been proved') in order to make a case against pre-trial torture and for the better treatment of suspects, especially those in pre-trial detention.[32] Unsurprisingly, the 'shield' notion of the presumption of innocence is also clearly reflected in its subsequent expression in the *Déclaration de droits de l'homme* (Article 9): 'Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi.'

Although, as was stated earlier, the idea that the presumption of innocence implies a norm for the pre-trial phase is not currently generally recognised under the common law doctrine of the presumption of innocence, Quintard-Morénas and Baradaran explain that the presumption of innocence as a pre-trial 'shield' is not unfamiliar to the common law history; for also in the common law tradition, the principle has been especially referred to in the context of the protection against pre-trial detention. Restrictions on imprisonment before trial and the possibility of bail were already laid down in the *Magna Carta* and this long-standing common law tradition of restricted pre-trial detention has always been related to the presumption of innocence.[33] Not surprisingly, the United States Supreme Court's case law, determining that the presumption of innocence requires no more than that the prosecution must produce proof beyond a reasonable doubt[34] and the lack of discussions as to its practical results in terms of the number of defendants

25 Campbell 2013, supra note 3, p. 685. Van Sliedregt concludes that the presumption of innocence does not actually regulate the pre-trial phase and she therefore concludes that it only protects against 'excessive' state burdening or overbearing; Van Sliedregt 2009, supra note 2, pp. 42-43.

26 Keijzer 1987, supra note 12; Corstens/Borgers 2014, supra note 11, p. 46; Weigend 2013, supra note 3, p. 296; Ashworth 2006, supra note 2, p. 251; Campbell 2013, supra note 3, pp. 685 and 689.

27 See Stevens 2009, supra note 2; Stumer 2010, supra note 2, pp. 88-118.

28 This historical angle is taken by Keijzer 1987, supra note 12, Stolwijk 2007, supra note 21, and especially F. Quintard-Morénas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions', (2010) 58 *The American Journal of Comparative Law*, pp. 107-150.

29 Quintard-Morénas 2010, supra note 28.

30 Ibid., pp. 109-110.

31 Ibid., p. 120.

32 C. Beccaria, *On crimes and punishments* [1764] (1971), pp. 343-344.

33 See S. Baradaran, 'Restoring the Presumption of Innocence', (2011) 72 *Ohio State Law Review*, pp. 729-730 and citations; Quintard-Morénas 2010, supra note 28, pp. 127-130.

34 *Bell v. Wolfish*, 441 US 520 (1979): 'the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials (…). But it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun.'

held in pre-trial detention,[35] have evoked strong criticism by authors recalling this long-standing meaning of the presumption of innocence as a shield against all forms of 'punishment' before conviction.[36]

The actual application of the notion of the presumption of innocence as a 'shield' against state powers causes difficulties in the face of the uncontested fact that investigation and prosecution authorities cannot do without coercive powers. In this connection, some authors argue that the presumption of innocence primarily warns against imposing *irreparable* measures.[37] Pre-trial detention being the clearest example of such a measure, the European Court of Human Rights' interpretation, requiring due regard for the presumption of innocence in deciding on pre-trial detention, can be considered to attest to that idea. The fact that the ECtHR has not deduced any concrete restrictions as to the application of pre-trial detention from the presumption of innocence[38] does not negate the principled function of the presumption of innocence in the context of pre-trial detention. On a more general level, the presumption of innocence is also considered to be one of the normative foundations of legal restrictions on exercising investigative powers.[39] The proposal for the EU Directive provides a clear example of that idea, in that it expressly connects the presumption of innocence to the privilege against self-incrimination.[40]

2.3. The right for the accused to be treated as innocent

Thirdly and relatedly, the presumption of innocence is widely held to also imply norms with regard to the *treatment* of suspected individuals, both during the pre-trial phase and during the trial phase of criminal proceedings. Whereas the conceptualization of the presumption of innocence as a protective shield against intrusive state measures (as discussed under Subsection 2.2, supra) primarily involves 'overt acts' performed by state officials, the third rationale of the presumption additionally implies a *mental* requirement, *viz.* the requirement that criminal law officials have and keep an 'open mind' with regard to the guilt or innocence of the suspect or defendant. This third rationale can be regarded as a 'front runner' of the conceptualization of the presumption of innocence as a rule of evidence safeguarding against wrongful conviction; it links the idea of a shield against intrusive state powers with the idea of safeguarding against a wrongful conviction.

The prohibition for the court and other criminal law officials to show any conviction as to the guilt of the defendant at trial is considered to be derived from this requirement of open-mindedness.[41] According to Corstens and Borgers, this rule also entails another important procedural consequence: the court must provide ample opportunity for the defendant to say what he/she has to say and must pay due attention to this narrative.[42] In other words: the presumption of innocence preserves room for the defence to exercise its procedural rights (we will come back to this in Section 3, infra). Along similar lines, Keijzer argues that the function of the presumption of innocence amounts to providing a 'counter-poison': it must counter the influence exerted by the results of the preliminary investigations and by the experience that most defendants are in fact guilty.[43] This conception of the presumption of innocence as a 'counter-poison' also implies that it works against anything prejudicial, such as expressions on guilt made by the authorities and in the press.[44]

Even though Weigend, like Keijzer, qualifies the presumption of innocence as a rule of procedure, he considers that this rule does not restrict anyone (e.g. the media) but the judicial authorities in expressing an opinion as to the guilt of the defendant. The fact that the presumption of innocence is a rule of procedure means that it applies 'from the initiation of a criminal process to its final conclusion' and only addresses

35 Baradaran 2011, supra note 33, p. 725.
36 Quintard-Morénas 2010, supra note 28, pp. 107-150; Baradaran 2011, supra note 33.
37 Corstens/Borgers 2014, supra note 11, pp. 46-47, claiming that the presumption of innocence demands that pre-trial detention should be executed distinctively from post-conviction imprisonment; cf. (also for the ECtHR's perspective) Stevens 2009, supra note 2.
38 L. Stevens, 'The Meaning of the Presumption of Innocence for Pre-trial Detention. An Empirical Approach', (2013) 42 *Netherlands Journal of Legal Philosophy*, no. 3, pp. 239-248.
39 Keijzer claims that legal restrictions to investigative powers as well as the privilege against self-incrimination are determined by the presumption of innocence; see Keijzer 1987, supra note 12, pp. 245-250.
40 See the proposed EU Directive, Arts. 6 and 7.
41 See also Weigend 2013, supra note 3, p. 194: the presumption of innocence does not protect against any actual 'bias'.
42 Corstens/Borgers 2014, supra note 11, pp. 37-38.
43 Keijzer 1987, supra note 12, p. 242.
44 Ibid.

the judicial authorities in their dealings with the suspect/defendant.[45] Likewise, Ashworth finds that the principle's aim – due respect for the legal status of innocence, necessitated by the harm done by a conviction and the proper relationship between State and individual[46] – also prevents public officials from making statements on the guilt of the defendant.[47]

A similar line of thought is followed by Campbell on the basis of what she considers to be the traditional protected interests of the presumption of innocence: respect for the person and protection from the State. Her interpretation seeks to prevent the State from 'castigating someone as criminal before a finding of guilt and without a certain level of proof'.[48] This interpretation is premised on the proper relationship between State and citizen combined with the particular censure that conviction entails, requiring that official statements that usurp the criminal court's role and evade the procedural protections are prevented. Like Weigend's, Campbell's conception pinpoints the applicability of this aspect of the presumption of innocence to state officials.[49] This implication of the presumption of innocence is one of the aspects that is laid down in the proposed EU Directive (Article 4), following up on the ECtHR case law finding a violation of Article 6(2) in cases in which public officials had made public declarations on the accused's guilt.[50] The ECtHR explains the finding of a violation by pointing out that these statements encourage the public to believe the suspect to be guilty before conviction and prejudge the court's assessment. The proposed EU Directive repeats (and thus endorses) this reasoning, which seems to refer to the importance of maintaining the court's authority to decide on guilt, while maintaining an open mind and material impartiality.

3. The presumption of innocence as a counterfactual principle

Our exposition in the previous section of the different contrasting views of the role and function of the presumption of innocence in the sphere of the positive criminal law may lead one to assume that this principle does not actually amount to much more than an empty shell. We think that it does not, or at any rate that it should not. Reflecting on the three main normative characterizations of the principle that are reflected in the literature we discussed in the previous section – a safeguard against wrongful convictions, a shield against irreparable intrusive state powers, and norms regarding the treatment of suspected individuals – the essential rationale of the presumption of innocence, in our estimation, is that it constitutes a counterweight against the different movements inherent in criminal proceedings starting from the investigative phase and culminating in a possible conviction.

Consequently, the presumption of innocence represents a pre-eminently *counterfactual* notion, which is linked to a certain view of the *structure of the criminal trial*: the trial functions as a forum where the opposing parties have equal opportunities to air their views and to challenge the other's conflicting views (*audiatur et altera pars*; in French this is commonly referred to as: *le principe de respect du contradictoire*). A trial thus provides the possibility for a critical evaluation of the facts, and allows the citizen a protected position in his conflict with the powerful State. In this section we will first explain what we mean by the term counterfactuality in relation to the criminal law and to law generally (3.1); we will subsequently account for our view of the counterfactual nature of the presumption of innocence (3.2).

3.1. The notion of counterfactuality

What do we mean by this intriguing, albeit somewhat pretentious term 'counterfactuality'? To begin with, it should be noted that counterfactuality is essentially an *epistemological* concept: it concerns the way in which we gain a certain cognitive access to reality. In the case of law, counterfactuality concerns the

45 Weigend 2014, supra note 10, p. 289.
46 Duff 2013, supra note 20, argues for a rather broad conception of the presumption of innocence, grounded on the notion of 'civic trust' that citizens owe to each other, and that the State owes to its citizens. This 'horizontal' broad conception is contested by Weigend 2013, supra note 3, and by Stumer 2010, supra note 2, pp. 52-87; in the remainder of this article we will not occupy ourselves with this discussion; instead, we will advocate a 'vertical' deepening of the notion of the presumption of innocence.
47 Ashworth 2006, supra note 2, p. 244.
48 Campbell 2013, supra note 3, p. 691.
49 Campbell 2013, supra note 3, pp. 693-694; Stumer 2010, supra note 2, pp. 90-92.
50 See particularly ECtHR 10 February 1995, appl. no. 15175/89, *Allenet de Ribemont v France*.

relation between juridical terms (i.e. norms, doctrinal concepts) and reality. We want to make this relation between juridical terms and reality somewhat clearer in three steps: with reference to the notion of order, the artificial nature of the juridical order, and the positivity of law.[51]

First: the notion of *order*. It is a rather trivial fact that law consists of a system of norms and concepts that are employed to produce normative judgments on empirical, social actions and states of affairs. If we view the law as a specific system of ordering states of affairs in society, then we need to gain an adequate insight into the way in which juridical norms and concepts are related to phenomena in the social domain. The law authoritatively subjects the social life-world to a normative order – we could call it a 'symbolic' order – in that the law spreads out a vast screen of norms and normative concepts over the everyday social world, by means of which differing social facts are attached to juridical labels and invested with the juridical meanings that lie behind these labels; as a result, the language of law institutes a legal 'world' that is by definition not identical to the pre-legal, social world.[52] So, in a trivial and uncontroversial sense, all juridical terms, all legal concepts, are 'counterfactual' in that they function as terms and concepts that are *applied to* facts, and hence *not identical to* facts. This, of course, is self-evident.

But – and this is the second step – legal concepts and norms are counterfactual also in a less trivial sense: legal concepts and norms constitute an *artificial* conceptual framework. And this artificiality is very important with respect to the goals pursued by law. It is precisely by virtue of the fact that law, so to speak, 'filters' social reality through the screen of *its own* norms and concepts that it is able to carve out an ontological domain of its own.[53] Within this domain every person is provided with one common set of procedures, one framework of concepts with the help of which every person is enabled to participate in the process of shaping the public realm on an equal footing with all the others – despite the actually existing lack of freedom and lack of equality. In this way, the law prevents our potentially endless deliberations on what would constitute or advance a just ordering of society from culminating in a pure exercise of power or force.[54]

This functional and 'happy' feature of law's artificiality leads us, thirdly and lastly, to the deepest, and most controversial sense in which legal norms and concepts are essentially counterfactual. The fact that people can generally agree in their answers to the question whether or not some social fact is in accordance with a given legal norm can solely be the result of the *interposing* of a 'ground' or a 'foundation' on the basis of which this kind of intersubjective agreement is possible. Counterfactuality, in other words, refers to the idea that law is always and necessarily *posited*.[55] This implies that the legal concepts and norms that together make up a legal system are always and necessarily constitutive of a partially *contingent* legal order; and within a given jurisdiction, the criminal law can be conceived of as the aggressive tailpiece of this entire legal order.

Every operation within a legal system refers, at least implicitly, to a background narrative that contains several reminiscences of the way in which the polity in question has given shape to views concerning its

51 It should be noted that our exposition of the philosophical concept of counterfactuality is akin to but does not coincide with more 'classical' definitions of the concept, such as the one offered by Habermas in his work on 'ideal speech situations' and communicative interaction. Habermas distinguishes a number of conditions for ethically and rhetorically adequate discourses. These conditions function as counterfactual presuppositions in the sense that 'actual discourses can rarely realize – and can never empirically certify – full inclusion, non-coercion, and equality. At the same time, the idealizing presuppositions have an operative effect on actual discourse: we may regard outcomes (both consensual and non-consensual) as reasonable only if our scrutiny of the process does not uncover obvious exclusions, suppression of arguments, manipulation, self-deception, and the like. In this sense, these pragmatic idealizations function as "*standards* for a self-correcting learning process"'; J. Bohman & W. Rehg, 'Jürgen Habermas', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2014), available online at <http://plato.stanford.edu/archives/fall2014/entries/habermas/> (last visited October 2015). See for example J. Habermas, *Wahrheit und Rechtfertigung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, [1998] (2014), pp. 35-39, 138-143, 674-677.

52 R. Foqué, 'Legal Subjectivity and Legal Relation. Language and Conceptualization in the Law', in F. Fleerackers et al. (eds.), *Law, Life, and the Images of Man. Modes of Thought in Modern Legal Theory* (*liber amicorum J.M. Broekman*) (1996), pp. 329-333; P.W. Kahn, 'Freedom, Autonomy, and the Cultural Study of Law', in A. Sarat & J. Simon (eds.), *Cultural Analysis, Cultural Studies, and the Law. Moving beyond Legal Realism* (2003), pp. 164-177.

53 P.W. Kahn, *Political Theology. Four new Chapters on the Concept of Sovereignty* (2011), p. 33: '(…) the entire legal order is on view from every point in the whole. Every norm gives us access to the entire legal world. In this sense, law is like a language. Standing within such a system, one never gets beyond it. Thus, of every proposed action, we can ask, "Is it legal?".'

54 B. van Roermund, 'Dualisme en dualisme is twee', in B. van Roermund et al. (eds.), *Symposium strafrecht. Vervolg van een grondslagendebat* (1993), p. 273.

55 B. van Roermund, *Law, Narrative and Reality. An Essay in Intercepting Politics* (1997), pp. 178-183.

origin and identity. This holds true for the criminal law as well:[56] by rendering certain values the protection of the criminal law, a given polity canonizes these values, because the violation of these values would constitute an assault on the very conditions for an enduring peaceful coexistence. In this sense, these criminally protected values are expressive of the *self-image* of the polity as a just society. This narrative unavoidably affords dominance to a certain conception of collective identity, and it does so necessarily at the expense of possible alternative conceptions.[57]

The counterfactual nature of the criminal law's concepts, thus, refers to the idea that the narrative that expresses a given polity's self-portrayal is essentially an artefact. It owes its existence to a human intervention or choice, to which a rest of contingency always appertains.[58] The point we are trying to make is that any given legal order is by definition a *posited* order, an artefact, and that we have no way of knowing what a universally justifiable legal order – if at all conceivable – would look like.[59] However, it is precisely due to their counterfactual nature that the concepts of the criminal law maintain a critical distance, not only vis-à-vis the everyday life-world, but also vis-à-vis the existing juridical order to which the life-world is subjected.[60] The concepts and norms of the criminal law are thus also, so to speak, turned against themselves.

The foregoing implies that law, also the criminal law, can never claim to have an *ultimate*, absolute justification for its operations, not even in the face of the biggest of evils: 'vis-à-vis the positive law, the criminal (and even more so the defendant) is always in the right to a certain – however small – degree; he can say with some justification that the law's claim to universality or generality is never completely redeemed.'[61] It follows that counterfactual legal concepts harbour a kind of reservation or 'caveat' with respect to the justifiability of their application and with respect to the claim to absolute validity of the prevailing ideal of a just society.[62] By this route, the legal concepts constitute *topoi* which open the possibility for a procedural arrangement that secures that there is room for a plurality of views.[63] The doctrinal concepts of the criminal law fixate differing social facts in their juridical meanings; however, this fixation is not necessarily permanent, precisely because legal concepts are characterized by a semantic potential within the limits of which they are amenable to new interpretations in changed circumstances. In this sense, the system of legal concepts constitutes an always shifting normative horizon.

3.2. The counterfactual essence of the presumption of innocence

The question is now: what do all these abstract reflections have to bear on our primary topic, the presumption of innocence? After all, a somewhat awkward and at first sight permissive aspect of the notion of counterfactuality is its rather limited concrete expressiveness. What exactly do we mean when we maintain that the core value of the presumption of innocence lies in its 'counterfactual' nature? The analyses and descriptions presented in Section 2 show us that the presumption of innocence is found to be operative primarily on two levels: at trial, addressing the ultimate decision-maker on guilt and innocence, and throughout the criminal process encompassing the pre-trial phase, working as a shield against the State's power, addressing all judicial authorities involved. When we view both levels at which the presumption of innocence is found to be operative together, we may note that the presumption of innocence emphasizes the proper relation between citizen and State in the context of the criminal process, in view of the fact that

56 See R.M. Cover, 'The Supreme Court, 1982 Term. Foreword: *Nomos* and Narrative', (1983) 97 *Harvard Law Review*, no. 4, pp. 4-68; P.W. Kahn, *Legitimacy and History. Self-government in American Constitutional Theory* (1992), pp. 196-200; P. Schiff Berman, 'Telling a Less Suspicious story: Notes toward a Nonskeptical Approach to Legal/Cultural Analysis', in A. Sarat & J. Simon (eds.), *Cultural Analysis, Cultural Studies, and the Law. Moving beyond Legal Realism* (2003), pp. 133-140.

57 R. Foqué & A.C. 't Hart, *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie* (1990), pp. 52-64, 138-140, 344-369; F. de Jong, *Straf, schuld & vrijheid. Pijlers van ons strafrecht* (2012), pp. 70-73.

58 Of course we do not mean to imply that law is *completely* contingent. For an interesting analysis of the role of conventionality in law, see A. Marmor, *Social Conventions. From Language to Law* (2009), especially pp. 155-175.

59 It is worth noting here that it might or might not be intelligible to suppose that a legal order could exist which does in fact satisfy all of the requirements necessary to be objectively and universally justified or legitimate – that is to say: we do not here submit any view as to whether such a legal order could in fact exist. Scholars within the natural law tradition have to be committed to the view that such an order can exist. See for example S.J. Shapiro, *Legality* (2010).

60 Foqué & 't Hart 1990, supra note 57, pp. 138-140; De Jong 2012, supra note 57, p. 72. Cf. J. Habermas, *Faktizität und Geltung* (1992), p. 37.

61 Van Roermund 1993, supra note 54, p. 272; see also Van Roermund 1997, supra note 55, p. 182.

62 Van Roermund 1993, supra note 54, pp. 279-280.

63 R. Foqué, *De ruimte van het recht* (inaugural lecture, Erasmus University Rotterdam) (1992).

the State is entitled to exercise overwhelming powers over the individual, having potentially harsh and long-lasting consequences, before the individual's guilt has been determined in the proper way. The core of the presumption of innocence is therefore the *counterweight* that it offers against the inherent[64] tendencies of the criminal process, in its progression from suspicion until the judicial determination of guilt.

By this we mean to say, in the first place, that the meaning of the notion of the presumption of innocence is 'underdetermined' by the different norms and regulations in which the notion is given shape on the level of positive law. Taken in the abstract, the presumption does not per se prescribe the performance (or the omission) of any specific act – therefore, every concrete specification of the regulations that are taken to ensue from this principle will potentially always be controversial. What is more: the counterfactual nature of the presumption of innocence is exactly what prevents the meaning of this principle from ever being fully exhausted by existing regulations on the level of the positive criminal law. It goes without saying that a highly abstract notion such as the presumption of innocence strongly depends for its efficacy on more or less concrete and sufficiently clear regulations that flesh out the normative ideas that are taken to lie at the heart of this principle. However, to our mind, these concrete regulations in which the presumption of innocence takes shape on the level of positive law do not – and can never – lay bare the principle's entire normative core meaning.[65]

Secondly and more importantly, the characterisation of the presumption of innocence as a counterfactual concept is meant to highlight the *critical potential* of the notion. It is exactly this critical potential that cannot be fully exhausted by existing regulations on the level of positive law. The presumption of innocence is not to be equated with a *factual* presumption and is therefore not inconsistent with factual suspicions that usually trigger the commencement of criminal proceedings.[66] The presumption of innocence does not force upon the authorities an actual presumption that the suspect is innocent and therefore does not conflict with the presumption of guilt with which the criminal process commences.[67] On the contrary, the presumption of innocence is rather *symbiotic* with the factual presumption of guilt.[68] As such, the presumption of innocence impels the relevant authorities to act 'as if' the defendant is innocent in order to suspend any definitive judgment on the defendant's culpability. The presumption functions as a normative *counterforce or counterweight* in opposition to factual suspicions or reasonable presumptions of guilt that, after all, may be falsified during proceedings.

The term presumption of innocence misleadingly suggests that it is primarily concerned with actual innocence as a counterpart of actual culpability; rather, however, it is concerned with the *idea* of a 'not yet established culpability'.

The efficacy of the principle of the presumption of innocence impresses the realization that a given suspicion may prove to be false or undeserved.[69] The presumption of innocence is effective when the judicial authorities allow themselves to be guided, and when necessary to be corrected, by the constant

64 Émile Durkheim and Max Weber, for example, viewed the criminal process as an originally purely repressive and excluding instrument with which a given community reacts to the damage that is caused by a criminal act to the moral consensus or the collective moral conscience of the group. By implication, the criminal process principally served as a means to regenerate society as a moral community, at the cost of the degeneration of the criminal individual. Over the course of centuries, the criminal law systems in Western societies have gradually developed into more rational and humane forms of state-governed administration of criminal justice. In the modern era, the 'primitive' function of public chastisement has therefore faded into the background, become 'residual', and been partly taken over by the media; see É. Durkheim, *De la division du travail social* (1967), pp. 70-71; M. Weber, *Rechtssoziologie* (1967), pp. 117-140. Yet, it has never disappeared entirely. The 'natural' inclination to outcast delinquents, to consider them as non-humans without any entitlement to humane treatment, must be combatted continuously. The Dutch criminal law scholar Peters therefore believed that construing a legally secured artificial space within which suspects are protected by powerful procedural safeguards was the best and most efficient means to combat this always lurking 'natural' tendency; see C.J.M. Schuyt et al. (eds.), *Recht als kritische discussie. Een selectie uit het werk van A.A.G. Peters* (1993), pp. 97-98; F. de Jong & C. Kelk, 'Overarching Thought. Criminal Law Scholarship in Utrecht', in F. de Jong (ed.), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School* (2015), pp. 53-55, 60-66.

65 Cf. on Peters' view of principles as open-ended phenomena: Schuyt et al. 1993, supra note 64, pp. 15-34; De Jong & Kelk 2015, supra note 64, p. 66.

66 See also: Weigend 2013, supra note 3, pp. 193-194; Ashworth 2006, supra note 2, pp. 249-250.

67 The term 'innocence' in this respect is very important however since it reflects the more fundamental notion that the State must regard and encounter its citizens alike and with due trust and respect, and in the context of the principle highlights that nothing has yet happened to change this; cf. Duff 2013, supra note 20.

68 This term is also used by Weigend 2013, supra note 3, p. 196. See for a similar view Packer (1968), pp. 160-162.

69 Corstens/Borgers 2014, supra note 11, pp. 45-46.

awareness of the fact that appearances can be deceiving.[70] This awareness needs to be externalized in criminal proceedings: in the investigations conducted by the judicial authorities, in the attitude adopted by the officials towards the suspect, and in the unprejudiced and detached attitude of the trial judge who proves to be receptive to the views that the defendant wishes to submit, before he reaches his final judgment. To our mind, one of the things that this implies, in more concrete terms, for the investigative phase of criminal proceedings is that the judicial authorities ought to constantly work with symmetrical pairs of hypotheses concerning the suspect's possible involvement in a criminal offence and his possible culpability: all truth-finding measures should be carried out, and all obtained evidence should be scrutinized on the basis of, a dialectical opposition of the working hypothesis that the suspect is guilty and the contrasting hypothesis that he is innocent of the crime.[71]

In order to make room for the desired awareness, the presumption of innocence effectuates a *delay*, a deceleration, and it stresses the inherently *provisional* nature of all dealings that take place *before* the court's final and authoritative judgment on the defendant's criminal liability. The court's judgment marks the moment when provisionality or temporariness changes into definitiveness. For this reason we wish to emphasize the (historical) connection between, on the one hand, the key position of the judge or court at the end of the criminal proceedings and, on the other, the efficacy of the presumption of innocence in the earlier stages of the proceedings: only the binding judgment of the court can authoritatively discriminate between culpability and innocence.[72] Every preceding step is geared towards this decision, but is for that very reason essentially preliminary. It is here, in the artificially instantiated and prolonged interval between provisional suspicions and definitive judgment, that the presumption of innocence is able to effectuate its critical potential, that is: its function as a counterforce in opposition to the different movements inherent in criminal proceedings starting from the investigative phase and culminating in a possible conviction.

Whereas an important part of the counterfactual function of the presumption of innocence can be made operative by the measures such as the hypotheses mentioned above, which implement the provisional nature of the pre-trial investigation, during trial it is mainly the court that has the task of securing the efficacy of the presumption of innocence, by showing openness towards the defence and procedural rights. Precisely in its capacity as a counterforce, the presumption of innocence carves out an artificial space in which the defendant is enabled to employ his procedural rights. These procedural rights do not merely constitute a set of tools with which the defence is equipped and that have to be respected (this is self-evident); additionally and more fundamentally, the defendant needs to be brought to a *position* wherefrom he is able to exercise his rights in an effective and non-illusory manner. This position is what the presumption of innocence essentially seeks to bring about. To be sure, our exposition of the critical potential of the presumption of innocence is by no means novel. Already in 1968, Packer characterized the rationale of the presumption of innocence in a similar vein:

> 'By opening up a procedural situation that permits the successful assertion of defenses having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment.'[73]

The characterisation of the presumption of innocence as a counterfactual notion means, thirdly and lastly, that it functions, on a deeper level, as a counterweight in opposition, not only to any factual suspicion, but also to the dominant narrative of the 'image of a just society' with which the polity identifies itself, and on the basis of which the criminal law system claims, however implicitly, the legitimacy of its different operations.[74]

70 See S.J. Clark, 'The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment', (2014) 8 *Criminal Law and Philosophy*, pp. 421-429. See also Buruma 2009, supra note 14, who discusses the organisation of evoking 'internal objections' within the Public Prosecutor's Office as an aspect of the presumption of innocence.

71 Cf. the recent discussion that has arisen in the Netherlands in the wake of a number of miscarriages of justice that have come to light; see for example K. Rozemond, 'Slapende rechters, dwalende rechtspsychologen en het hypothetische karakter van feitelijke oordelen', (2010) 39 *Rechtsfilosofie en Rechtstheorie*, no. 1, pp. 35-51.

72 Stolwijk 2007, supra note 21, p. 15. For the sake of brevity we leave aside the different possibilities for the Prosecution Service to settle cases out of court (in the Netherlands on the basis of Arts. 257a and further of the Dutch Code of Criminal Procedure).

73 Packer 1968, supra note 8, p. 167. We are grateful to one of the anonymous reviewers for reminding us of this important work.

74 See A.C. 't Hart, *Recht als schild van Perseus. Voordrachten over strafrechtstheorie* (1991).

Earlier on we noted that law can never claim to be able to provide an *ultimate* or absolute justification for its operations. Even in the face of the biggest of evils, the law must confront itself with the insight that its reaction to this evil can never be fully legitimated, exactly because law is always and necessarily 'posited' and hence the result of a human intervention or choice, to which a residue of contingency always appertains.

The counterfactual notion of the presumption of innocence precisely expresses a reservation or caveat with respect to the dominant conception of the self-image of the polity as a just society. By means of the presumption of innocence, the law implements and puts into effect the idea that it has to, temporarily, *suspend* its own claim to legitimacy. By implication, also and even in cases where there is seemingly no room for the slightest doubt concerning the defendant's wrongdoing and culpability, it is necessary to presume his innocence. Under the aegis of the presumption of innocence, the defendant is promoted to the rank of a full and autonomous agent in the proceedings against him, and is enabled to insert his own views and narrative into the criminal law system, which in turn has to hold these views and narratives *against itself*, before the judgment is finally reached.

The presumption of innocence, in short, functions as a mirror: in it, the court sees reflected the insight that whatever judgment is reached, there will always remain a sediment of contingency and hence non-justifiability that sticks to the grounds upon which the judgment is based. Therefore, and to that extent, not only the defendant is brought up for trial, but also the court or the judge himself is on trial. In this sense, the presumption of innocence can be understood as, as Stevens has aptly put it, the *conscience* of criminal proceedings.[75]

4. Threats to the traditional narrative underlying the presumption of innocence

To a large extent, the positive (criminal) law can be viewed as a solidified fragment of morality.[76] As we will see in the present section, however, morality in society has become rather fluid and has started to drain away from underneath its legal solidification. To the extent that this is true, it becomes all the more urgent that the criminal law somehow manages to reflect the conclusion we drew from our reflection on the notion of counterfactuality in Subsection 3.1, *viz.* the idea that the criminal law cannot provide a complete and definitive legitimation for the substance of its norms and doctrinal concepts, and neither for the way in which they are applied in concrete cases. In this section we discuss a number of developments in the overall administration of criminal justice that pose considerable threats to the efficacy of the presumption of innocence.

In order to explain why and how these developments endanger the normative force of the presumption of innocence on a very fundamental level, we take a perhaps peculiar detour: first we discuss some aspects of what we view to be a 'traditional' narrative surrounding the administration of criminal justice (4.1). This narrative is subsequently taken as a starting point for our discussion of a number of recent developments or tendencies within the administration of criminal justice that can be discerned in many Western countries, which emphasize the importance of a counterfactual reading of the presumption of innocence (4.2).

4.1. A 'traditional' narrative of criminal justice

Before we go on to discuss a number of tendencies within the administration of criminal justice, we first want to shed some light on the contents of the communal 'background narrative' that underlies the 'traditional' conception of criminal justice. With the term traditional justice, we mean to refer, in a very rough sense, to a number of characteristic and traditional traits of criminal procedures in Western democracies. It goes without saying that we will march through this narrative with seven-league boots. In what follows, we do not aim or pretend to do full justice to the multifarious facets of the main tenets of traditional criminal justice

75 L. Stevens, 'Strafzaken in het nieuws. Over ontsporende media en de verantwoordelijkheid van het Openbaar Ministerie', (2010) *Nederlands Juristenblad*, no. 11, pp. 660-665, p. 661.

76 Cf. J.G.J. Rinkes et al. (eds.), *Van Apeldoorn's Inleiding tot de studie van het Nederlandse recht* (2009), pp. 61-64. Again – see also footnote 59 supra – we do not here wish to submit any view with regard to the highly controversial question of whether or not law has any *necessary* conceptual relation with morality. Our proposition here is a rather uncontroversial and trivial one: the (criminal) law incorporates moral concepts in that legal norms and concepts often reflect moral preoccupations.

systems in the Western world; undoubtedly, many different accounts of 'traditional' criminal justice can be given. Our perforce somewhat caricatural presentation purports to offer nothing more than a conceptual tool with which we hope to put some contemporary developments that we think can be discerned in the criminal law of many Western countries in perspective. Our presentation of this background narrative is primarily based on the continental European tradition of criminal justice, though we expect that our exposition should prove to reflect relevant states of affairs in other Western legal traditions as well. We draw attention to two sides of the narrative: the legitimation of sanctions in the light of the (social) function of criminal law, and the structures of criminal procedure.

In the first place, the traditional narrative regarding the foundations of the criminal law concerns the old question of whether and how state-inflicted punishment can be justified. The answers that are given to this question are directly related to prevailing views of the principal social function of criminal law as such. In this connection, it is useful to briefly digress on a rather typically European debate on these and related topics between the adherents of the so-called Classical School and the adherents of the so-called Modern School.[77] The Classical School (chiefly inspired by the writings of Beccaria and Montesquieu) focused its attention primarily on the *criminal act*, and not, or only obliquely, on the delinquent.[78] Whereas the old philosophers that have retroactively been designated as the 'founding fathers' of the Classical School were hardly, if at all, concerned with the concept of retribution as a justifying ground for punishment,[79] this changed rather dramatically under the influence of the deontological Enlightenment philosophies of primarily Kant and Hegel.[80] In the so-called neo-classical thought, the justifying ground for the imposition of criminal sanctions was primarily found in the retrospective concept of *proportional retribution*: a just and 'deserved' punishment is commensurate with the seriousness of the committed crime and the culpability of the offender.

The Modern School of criminology (inspired by the writings of Lombroso, Ferri and Garofalo), on the other hand, was less concerned with the criminal act, but all the more with the *delinquent individual*.[81] This notable shift of focus was accompanied by an equally important shift in the ideology regarding the function of the criminal law: the emphasis no longer fell on the function of protecting citizens against possibly arbitrary interferences by the State, but on the function of defending society against crime and delinquents (*défence sociale*). The justifying ground for the imposition of criminal sanctions was primarily found in the prospective concepts of (special) deterrence and prevention.

Now, of course, the classical and the modern views have exerted varying degrees of influence on the different criminal justice systems in Europe. Therefore, hardly any generally valid observations can be made with regard to the 'traditional' narratives underlying the continental European criminal justice systems. But what could be submitted is that, in fact, ultimately some form of a 'united theory' that combines the views of the Classical School and the Modern School – to the effect that the sharp edges of both approaches have been softened – has become the dominant view in many Western jurisdictions. In the Netherlands a combined theory has prevailed at least since the middle of the twentieth century.[82]

The united theory – in whatever shape it has taken – is roughly based on a conceptual distinction between the justificatory *ground* for punishing, on the one hand, and the different possible *aims* of punishing, on the other. On the one side, proportional retribution is considered as the one and only justifying ground for

77 See De Jong & Kelk 2015, supra note 64, pp. 23-25. It should be noted that the terms Classical School and Modern School have gained noteworthy prominence as designations of specific bodies of thought within primarily continental European traditions of criminal law theory; see C. Fijnaut, *Criminologie en strafrechtsbedeling. Een historische en transatlantische inleiding* (2014), pp. 59-82 and 223-322. In the Anglo-American tradition, the debate on the justifying foundations of punishment has traditionally been framed according to the distinction between retributivist and consequentionalist or utilitarian theories of punishment (and their different intermediate qualifications); see for example M.N. Berman, 'Two Kinds of Retributivism', in R.A. Duff & S.P. Green (eds.), *Philosophical Foundations of Criminal Law* (2011), pp. 433-457; R.A. Duff, *Punishment, Communication, and Community* (2001), pp. 3-34.

78 W.P.J. Pompe, *De persoon des daders in het strafrecht* (inaugural lecture, Utrecht University) (1928).

79 Beccaria was a utilitarian thinker; see Beccaria [1764] 1971, supra note 32, Chapter 1. Jeremy Bentham derived many of his utilitarian ideas from Beccaria; see J.S. Mill, *Utilitarianism. On Liberty. Essay on Bentham* (ed. M. Warnock) (1962), p. 7.

80 Cf. G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (ed. H. Reichelt), [1821] (1972) p. 96: punishment is a 'right' of the delinquent.

81 See on this 'Italian School': J. Gaakeer, '"The Art to Find the Mind's Construction in the Face", Lombroso's Criminal Anthropology and Literature: The Example of Zola, Dostoevsky, and Tolstoy', (2005) 26 *Cardozo Law Review*, no. 6, pp. 2345-2377.

82 See A.A.G. Peters, 'Main Currents in Criminal Law Theory', in J. van Dijk et al. (eds.), *Criminal Law in Action. An Overview of Current Issues in Western Societies* (1986), pp. 19-36.

punishment and hence for the existence of criminal law as such. *Within* the limits indicated by proportional retribution, however, it is possible to pursue certain (utilitarian or consequentionalist) aims, such as general and special prevention, rehabilitation, socialization et cetera.[83] This side of the narrative – concerning sanctioning and its justification – was able to do the trick *in abstracto* for a long time, without one being forced to elaborate on what was *concretely* meant by this so-called proportional retribution and, above all, how the proportionality was measured. The judge's sensitivity or *Fingerspitzengefühl* sufficed, or at least this was predominantly trusted.

In the second place, the traditional narrative regarding the foundations of the criminal law concerns the structures of *criminal procedure*. This side of the narrative is less old. In the predominantly inquisitorial criminal justice systems of continental Europe it was developed mainly in the 1960s and 1970s.[84] In what has come to be known as 'procedural justice' discourses, it is commonly argued that between the 'input' of the public prosecutor and the 'output' delivered by the judge in his verdict, a process takes place in which something *happens* that is of independent importance for the function of the criminal law: already in the course of the strongly ritualized criminal procedure – and hence not only on the occasion of the pronouncement, let alone the execution of the judgment – the negative effects of a criminal offence can be addressed in such a way that public indignation ebbs away.[85]

The independent function of the trial and of proceedings as a whole consists in the 'sublimation' of public emotions or feelings of discomfort: in a criminal process emotional reactions are lifted to a higher level and being rationalized, that is cleansed from their potentially destructive overtones. If the criminal process is to fulfil this function, it needs to meet certain conditions. For example, the criminal process ought to constitute a relatively autonomous sphere, at a befitting distance from moral preoccupations and public emotions, and that is governed by an ethics of procedural rationality within which sufficient room is secured for an *effective participation* of the involved parties.[86] The procedural model emphasizes that the legitimacy of the exercise of authority is dependent upon the way subordinates are being treated by the authorities. The idea is essentially that the quality of the procedures followed and of the treatment of subjects within these procedures is of decisive importance for the acceptance of the outcomes of the procedures.[87]

This 'pull towards the procedural side' of the criminal law undoubtedly found a notable seed-bed in several societal developments of the 1970s that can be summarized with catchwords such as democratization, individualization, scepticism towards authority, and the accompanying increase of the number of liberated and articulate citizens.[88] Perhaps it is even not too daring a proposition that the partial absorption of suchlike social developments in the criminal *process* has functioned as a lightning rod that (for as long as it lasted, and by the grace of the solid confidence that, despite the social processes, was commonly invested in the person of the judge and in other criminal law officials) has diverted fundamental criticism being levelled at the relatively wide discretion of the judge or court, for example with respect to the establishment of the punishment.

4.2. Threats to the presumption of innocence

But of course things have changed since the 1970s. Several disorientating developments have put the traditionally solid confidence in the judge's *Fingerspitzengefühl* under a lot of pressure. The threats related to terrorism, the increased individualization, and the increased social and normative fragmentation in society, among other things, have engendered a commonly felt loss of a shared *identity*. The 'traditional' narrative

83 Cf. Duff 2001, supra note 77, pp. 11-14, on 'side-constrained consequentionalism'.

84 With regard to the Anglo-American tradition, see: R.A. Duff et al., 'The trial under attack', in R.A. Duff et al. *The Trial on Trial. Volume Three: Towards a Normative Theory of the Criminal Trial* (2007), p. 2.

85 In the Netherlands, it was chiefly Peters who forcefully emphasized the 'independent function' of criminal proceedings; see A.A.G. Peters, *Opzet en schuld in het strafrecht* (doctoral dissertation, Leiden University) (1966), pp. 281-294.

86 See for example V. Lazić, 'Procedural Justice for "Weaker Parties" in Cross-border Litigation under the EU Regulatory Scheme', (2014) 10 *Utrecht Law Review*, no. 4, http://doi.org/10.18352/ulr.293, pp. 110-117; F. de Jong, 'A Reciprocal Turn in Criminal Justice? Shifting Conceptions of Legitimate Authority', (2013) 9 *Utrecht Law Review,* no. 1, http://doi.org/10.18352/ulr.209, pp. 1-23.

87 T.R. Tyler, *Why People Obey the Law* (2006), p. 163; T.R. Tyler, 'Legitimacy and Criminal Justice: The Benefits of Self-regulation', (2009) *Ohio State Journal of Criminal Law*, pp. 307-346.

88 See for example P. Spierenburg, *Please, please me's number one* (valedictory lecture, Erasmus University Rotterdam) (2013).

of criminal justice no longer suffices; for many, it is too abstract and insensitive to contemporary moral preoccupations and needs. In addition, the notion of procedural justice with its emphasis on protective safeguards for defendants can as such no longer avert the increasing criticisms levelled at the criminal justice system.

The background narrative that we discussed in the previous subsection has consequently been put under considerable pressure by a number of relatively recent developments, five of which we mention here in brief. First and foremost, there is the remarkably increased and still increasing attention currently being paid to victims of crimes and the concept of victimhood in general. While some criminal law systems – not in the least the Dutch criminal law system – have tended to neglect the victim in the past, his/her possibilities to participate in criminal proceedings have gradually been expanded, and are still increasing in many jurisdictions.[89] Secondly and relatedly, the attention to restorative justice mechanisms as supplements to the traditional criminal justice procedures has increased notably.[90] Then, thirdly, there is the strong public demand for more 'punitiveness' in criminal justice; be it actual or assumed, the public opinion concerning sentencing (sentences not being harsh enough, judges being too soft) remains a constant and influential factor of interest, debate and research.[91] Fourthly, there is the influence of the notion of 'responsiveness': the idea that the criminal justice system should be more attentive to the public's needs and expectations of criminal justice now provides a justification of its own for shift emanating from societal developments.[92] Fifthly and lastly, the contemporary focus on security and risk avoidance has engendered a shift towards a more proactive and predictive type of criminal proceedings.[93]

These five developments point in the direction of a shift in what is considered (implicitly or explicitly) as the main function of criminal justice, and more particularly the function of criminal proceedings. These shifts seem related to the generally felt discomfort in our contemporary, late-modern Western 'risk societies' – a discomfort engendered by an increasingly experienced lack of a communally shared identity or of a shared self-image of society at large.[94] The aforementioned developments within the administration of criminal justice attest to an underlying need for (re)constructing a shared background narrative concerning the identity and origin of the political community in question.

Within the traditional criminal justice settings there exists a firmly established background narrative underlying the criminal law, pertaining to the identity of the political community in question (see Subsection 3.1), that is to say: a narrative is in place that addresses, among other things, the deeply political question of which individuals are said to belong to the political community, so as to be subjected on an equal footing to the juridical order under the authority of which the community has collectively placed itself.[95] This background narrative is not normally the object of fierce controversies. On the contrary: such a narrative is typically the tacit and undisputed background against which all concrete instances of legal adjudication take place.[96]

However much the 'traditional' forms of administration of criminal justice may diverge in important respects, they typically have very little to do with any pursuit of fabricating 'origination myths' that give expression to the identity of the political community of which they form a part. Typically, rather the contrary is the case: in criminal procedures, acts are scrutinized that constitute violations of norms, with respect to

89 See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime; R.S.B. Kool & G. Verhage, 'The (Political) Pursuit of Victim Voice: (Comparative) Observations on the Dutch Draft on the *Adviesrecht*', (2014) 10 *Utrecht Law Review*, no. 4, DOI: http://doi.org/10.18352/ulr.292, pp. 86-99; Duff et al. 2007, supra note 84, p. 2; R.A. Duff et al., 'Normative Conceptions of the Trial in Historical Perspective', in R.A. Duff et al., *The Trial on Trial. Volume Three: Towards a Normative Theory of the Criminal Trial* (2007), p. 53; A. Ashworth & L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions', (2008) 2 *Criminal Law and Philosophy*, pp. 21-51, at p. 42.

90 See for example E. Girling et al., 'The Trial and its Alternatives as Speech Situations', in R.A. Duff et al., *The Trial on Trial. Volume Two: Judgment and Calling to Account* (2006), pp. 65-81; E. Claes et al., *Punishment, Restorative Justice and the Morality of Law* (2005).

91 Cf. Ashworth & Zedner 2008, supra note 89, pp. 42-44.

92 The *locus classicus* of this conception is P.H. Nonet & P.H. Selznick, *Law and Society in Transition* (2001). On the dangers involved in responsivity in criminal law, see Y. Buruma, 'Een al te responsief strafrecht', (2008) *Delikt en Delinkwent*, no. 2, pp. 105-120.

93 Galetta 2013, supra note 2; Ashworth & Zedner (2008, supra note 89, pp. 42-44.

94 Cf. Z. Bauman, *Liquid Modernity* (2000); U. Beck, *Risk Society. Towards a New Modernity* (1992).

95 In fact, in shaping a new communal narrative on the identity and origin of the polity, the source of sovereignty or political power is being framed narratively and thereby defined anew. See, on a more general note, the fascinating study of Kahn 2011, supra note 52.

96 This is not to say that such narratives are never brought up or explicitly referred to (for example in the United States, 'We, the people').

which we have *already agreed* – statutorily or otherwise, and whether on good or less solid grounds – that they are of such importance that these norms deserve the protection of the criminal law. In other words: the narrative on the identity of our political community is 'there' already, and every single criminal act forms an exception that only proves the validity of the pre-established rule.

Within the administration of criminal justice in a 'traditional' sense, deviations from the rule (crimes) are thus usually classified rather easily in terms of the existing norms. In spite of the self-evident fact that criminal offences may concern serious and starkly reprehensible acts, these norm deviations are nevertheless amenable to a 'neutralization' in the sense that their occurrence does not in fact threaten the normative system as such, which is to say: the administration of justice seeks to ensure that their occurrence does not gravely undermine the general public's *confidence* in the validity of the norms from which the criminal acts departed.

However, due to the normative and social fragmentation, morality in our late-modern societies has become rather 'liquid' (Bauman) and has started to drain away from underneath its legal solidification. The intangibility is frightening; the 'conflicts' that we call criminal offences – or that result in criminal offences – are increasingly being experienced, not as exceptions that prove the rule or as deviations from the regular pattern of normative expectations that can easily be 'coded' in terms of the legal armamentarium, but rather as point-blank threats to the societal order and the identity of the political community as such.

In this light it is not surprising that suspects and convicts are regularly portrayed as enemies or monsters ('they') against whom society ('we') has to protect itself with all means available.[97] The delinquent then easily figures as a scapegoat: he is not an individual whose legally established wrongdoing in fact confirms the validity of the infringed norm, but rather someone who, by way of his wrongdoing, has proved to be unworthy of belonging to 'our' community. Neither is it surprising that the attention for victims and victimhood has expanded, both in society as a whole and in the criminal law. This increased attention can be viewed as a manifestation of the broad concern for one of the perhaps very few remaining issues on which there still exists a rather widespread consensus in our contemporary, fragmented Western societies: the collective repudiation of suffering and all forms of victimhood.[98]

The five aforementioned developments also affect the way in which the administration of criminal justice is given shape. The attention for the victim and for restorative justice attests to a shift towards regarding the criminal act more as a personal and private, 'local' if you will, 'conflict', whereas in the 'traditional' narrative a criminal act was conceived of as primarily an interference with public legal order.[99] This is to say: crime is being perceived not only as a threat – from a wide and abstract perspective – to the fragile self-image of our society, but also – from an individual and more concrete perspective – as a miniaturized version of a social disruption. Both the increased attention for the victim and for restorative justice instruments and the strong public demand for more 'punitiveness' in criminal justice seem related to the idea that the criminal law has the task of resolving disruptions that are viewed as threats to the normative fabric of society.[100]

All in all, criminal justice is moving away from some fundamental characteristics of the traditional criminal procedure: its distant and abstract, public and objective nature, founded in legal safeguards. This rather top-down image of the criminal law operating on behalf of, and at a certain distance from, the involved parties and the general public, is increasingly repressed by a totality of far more *particularistic*

97 See also Ashworth & Zedner 2008, supra note 89, p. 39; Galetta 2013, supra note 2.

98 See, with reference to the work of Richard Rorty, H. Boutellier, *Solidariteit en slachtofferschap* (doctoral dissertation, University of Amsterdam) (1993).

99 See C.H. Brants, 'The 'Victim Paradigm' in (International) Criminal Justice', in F. de Jong (ed.), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School* (2015), pp. 203-229.

100 As a side note: in this connection we may note that the discussed developments bring to mind certain aspects related to the so-called 'transitional justice' discourse. The term transitional justice, in other words, denotes a collection of different initiatives aimed at restoring a peaceful societal order after brief or long-lasting, but at any rate serious political, religious and/or social conflicts in the course of which often many individuals were injured or killed and severe traumas were created. See C.H. Brants, 'Introduction', in C.H. Brants et al. (eds.), *Transitional Justice* (2013), pp. 1-2. Transitional justice can be said to have 'revolutionary' pretences: transitional justice initiatives are supposed to finish with the chaotic past and to substitute this for a new, communal order. In their effort to achieve this, the involved parties strive to develop a shared narrative on all which is rejected (the horrors and human rights contraventions of the past) and on all that has to come (a new, peaceful society in which fundamental rights are secured); In this connection, associations with the concept of a 'paradigm shift' are brought to mind. See Th. Kuhn, *The Structure of Scientific Revolution* (1970), p. 5.

narratives of the directly involved parties, including the victim. All five developments suggest a demand for a less detached, abstract and formal type of criminal proceedings: the proceedings have to provide a more concrete absorbing of feelings of revenge or indignation, in a more individualized manner that acknowledges the anger or resentment of the victim and his/her need for compensation and redress.[101] Therefore, there has come more space for the production of 'particularistic' narratives in order to ensure that those who are directly involved have a way of having their feelings taken into account and their sufferings appeased. By creating and enhancing this space, the legislator and the criminal justice administration are responding, not only to the needs of specified categories of individuals, but also to the publicly felt need for a more recognizable, more responsive criminal justice system.

This shift towards a more 'particularistic' bedding of criminal justice proceedings has particular repercussions for the meaning and function of the presumption of innocence. Indeed, the presumption of innocence fits perfectly into the 'traditional' criminal procedure.[102] It is a notion that is highly characteristic of the rationally arranged, abstract, and somewhat reserved type of criminal proceedings of which safeguards for the suspect are a prominent part. The previously mentioned shifts in the criminal justice systems of many Western societies suggest that protective safeguards for suspects and defendants are increasingly perceived as obstructions to effective protective measures for victims of crime. Unsurprisingly, then, the notion of the presumption of innocence easily becomes disregarded. This is even less surprising if we consider the very abstract nature of the principle: as a 'counterweight' it does not in and of itself postulate very hard and clear norms that can easily be enforced.

5. Concluding observations: the importance of a counterfactual reading of the presumption of innocence

We want to conclude by arguing that the different shifts and developments that were briefly mentioned in the previous section lend all the more urgency to the idea that the presumption of innocence constitutes an indispensable principle. If we understand the presumption of innocence, as we do, as an essentially counterfactual and multi-layered concept, then we can see that the concept is designed, first and foremost, to shield criminal proceedings from exactly those instrumentalist developments that have already proven to pose a threat to the effectiveness of the presumption of innocence. For that reason, this principle is deserving of a much more widely acclaimed *intrinsic* and inalienable value than is attached to it presently.[103] The value of a counterfactual reading of the presumption of innocence lies in the fact that it not only liberates the presumption of innocence from being normatively defined and fixated according to its practical significance, it also provides the flexibility to operationalize its value in a changing procedural environment.

We draw two main conclusions from the foregoing. First, the presumption of innocence is firmly connected with the authority of the court or the adjudicating judge. The principle is supposed to contribute to the maintenance of this authority in that it postulates the inherently *provisional* nature of all dealings that take place *before* the court's final and authoritative judgment on the defendant's criminal liability. Second, the presumption of innocence is essentially a *counterfactual* notion. It does not equal a factual presumption. Neither can its meaning be exhaustively captured by any constellation of actually existing regulations or norms that stipulate the conditions under which the principle's aims would be (completely) realized.[104]

In the counterfactual reading that we submit the mediating function of the presumption of innocence comes to expression: the presumption of innocence effects a highly necessary *deceleration* in the processes of investigation and adjudication. Again, what we see is a connection between the (factual) possibility that a suspicion may prove to be false or undeserved, on the one hand, and the normatively procured

101 See J. van Dijk, 'De komende emancipatie van het slachtoffer. Naar een verbeterde rechtspositie voor gedupeerden van misdrijven', (2009) *Tijdschrift voor Herstelrecht*, no. 1, pp. 24-25.

102 See J. Hruschka, 'Die Unschuldsvermutung in der Rechtsphilosophie der Aufklärung', (2000) 112 *Zeitschrift für die gesamte Strafrechtswissenschaft*, no. 2, pp. 285-300.

103 See, in a similar vein: P. Roberts, 'Loss of Innocence in Common Law Presumptions', (2014) 8 *Criminal Law and Philosophy*, pp. 317-336, especially pp. 322-326.

104 Which implies that the principle's core meaning cannot be expected to be exhaustively reflected in the different provisions of the proposed EU Directive (see Section 1, supra) – the different components of which we have referred to throughout this article.

temporariness and suspension of judgments on guilt. The space for differing interpretations of the facts and of the legal norms and concepts is partly secured by the open-ended doctrinal concept of the presumption of innocence, by shielding the defendant vis-à-vis the judicial authorities and by offering a procedural platform to the defendant to air his views. In this connection, the trial's function as a forum for adversarial argument is of paramount importance. The presumption of innocence requires that the defendant be given an adequate and proper opportunity to participate and be heard in this forum.

The presumption of innocence is more than a normative source of inspiration for the individual criminal law officials. Considering the presumption's protective rationale – protecting both the defendant and the authority of the court – that encompasses the entire criminal proceedings from beginning to end, the presumption of innocence deserves to be firmly embedded in the structure of the criminal process and in the system of criminal justice. The proposed EU Directive on strengthening certain aspects of the presumption of innocence does not advocate that. The three aspects of the principle that have been imported in the proposed EU Directive – namely: concerning statements made by public officials, concerning the allocation of the burden of proof, and concerning the connection with the privilege against self-incrimination – are very significant in the sense that each of them aims to protect the suspect from situations which hamper his procedural position and effective use of procedural rights, but their mutual relation remains unclear – as does the overall normative concept of the presumption of innocence that is behind them. As such, this proposal does not constitute a framework that reflects the counterfactual core of the presumption of innocence as argued for in this contribution.

The different, strongly ideological tendencies within contemporary criminal justice make it the case that above all the *critical potential* of the presumption of innocence has become its most important and valuable asset. As we stated above, the presumption of innocence serves to shield criminal proceedings from exactly those instrumentalist developments. Under the aegis of the presumption of innocence, the defendant is promoted to the rank of a full and autonomous agent in the proceedings against him, and is enabled to insert his own views and narrative into the criminal law system, which in turn has to hold these views and narratives *against itself*, before the judgment is finally reached.