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# THE PRESUMPTION OF INNOCENCE IN THE SOVIET UNION

George P. Fletcher\*

## I. INTRODUCTION

The presumption of innocence is a curious item in the baggage of Western legal rhetoric. Revered today here and abroad,<sup>1</sup> it has become a standard clause in international testimonials to the rights of man.<sup>2</sup> Yet, at first blush, it seems conceptually anomalous and irrelevant in practice. It is hardly a presumption of fact—a distillation of common experience; statistics betray the suggestion that men indicted on criminal charges are likely to be innocent. Nor is it a legal rule masquerading as an irrebuttable presumption; it is rebuttable by proof beyond a reasonable doubt of the defendant's guilt. Further, it is hard to see what the presumption of innocence adds to the rules already applied by Western courts. Both common law and civilian courts apply rules requiring the trier-of-fact to acquit in cases of doubt on the material facts. And these rules on the prosecutor's burden of persuasion are neither logically nor historically derivative of a presumption of innocence.<sup>3</sup>

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<sup>1</sup> The common law presumption of innocence crystallized in early 19th century cases on the burden of persuasion in private disputes; the courts held that men be presumed to have performed their legal obligations and thus that the plaintiff must prove that the defendant failed so to act. This presumption, which in time came to be called the presumption of innocence, was invoked to circumvent the general rule that one need not prove a negative proposition. *See, e.g., Williams v. East India Co.*, 102 Eng. Rep. 571 (K.B. 1802). The French *présomption d'innocence* derives from section 9 of the 1789 Declaration of the Rights of Man. By virtue of German adherence to the Convention for the Protection of Human Rights and Fundamental Freedoms, the *Unschuldsvermutung* (innocence-presumption) is now firmly rooted in West German legal rhetoric. For further discussion and documentation of the presumption's status in West Germany and France, *see Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *YALE L.J.* 880-81 nn.1-5 (1968). Concerning the presumption in the German Democratic Republic, *see Herrmann, Die Präsomtion der Unschuld—ein die Gesellschaftswirksamkeit des sozialistischen Strafverfahrens verstärkendes Prinzip*, in (1962) *STAAT UND RECHT* 1965.

<sup>2</sup> *See* Universal Declaration of Human Rights, art. 11(2), U.N. Doc. A/811 (1948), *reprinted in* 43 *AM. J. INT'L L.* 127 (Supp. 1949); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(2), 213 *U.N.T.S.* 222, 228.

<sup>3</sup> The common law rule that the prosecutor must prove guilt beyond a reasonable doubt emerged in the early 19th century. One of the earliest references to the rule is *L. MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 398 (1811). It wasn't until the 1850's that judges began to equate the presumption of innocence

Despite the apparent redundancy of the presumption of innocence, Soviet jurists have clashed for the last two decades on its role in the Soviet legal system. Their concern has not been anything so practical as the risk of non-persuasion in criminal cases. With few exceptions, Soviet courts have repeatedly applied the civilian maxim *in dubio pro reo* requiring acquittal in cases of doubt.<sup>4</sup> Andrej Vyshinskij was virtually alone in his dissent from that rule.<sup>5</sup> With consensus on the burden of persuasion, Soviet scholars have directed their analytic acumen to the more sublime question: Does the presumption of innocence exist in Soviet law and if so, what does it mean?

The Soviet debate on the presumption of innocence began with fury in the first few years after the Second World War.<sup>6</sup> One of the first endorsements of the presumption as a doctrine of Soviet law came from Professor Strogovich, a leading theoretician of

with the rule on the prosecutor's burden of persuasion. See, e.g., *Patterson v. State*, 21 Ala. 571 (1852). Similarly, German scholars initially rejected the phrase "presumption of innocence" as a misuse of legal terminology. See K. MOSER, *IN DUBIO PRO REO* 77 (1933). But they have long subscribed to the maxim *in dubio pro reo*, which requires triers-of-fact to acquit in cases of doubt. For further discussion and documentation of these points, see Fletcher, *supra* note 1, at 880-81 nn.2-5.

<sup>4</sup> M. STROGOVICH, *KURS SOVETSKOGO UGOLOVNOGO PROTSESSA* [A COURSE IN SOVIET CRIMINAL PROCEDURE] 189-92 (1958). Soviet appellate courts aggressively review trial convictions and readily reverse convictions where it appears that the evidence was insufficient to support a finding of guilt. See, e.g., *In re Krasavin*, 2 Sud. Prak. Verkh. Suda S.S.S.R. 23 (Sup. Ct. U.S.S.R. 1955) (conviction of theft reversed where the defendant had introduced eight witnesses at trial to support his claim of alibi); *In re Kalinin*, 10 Sub. Prak. Verkh. Suda S.S.S.R. 17 (Sup. Ct. U.S.S.R. 1946) (conviction of embezzlement of state funds reversed; defendant had claimed that the money had been stolen from him on a streetcar). The latter case is significant because the court referred expressly to the presumption of innocence in its opinion supporting reversal. For a discussion of contrary rules in the 1930's, see H. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 80-81* (1966).

<sup>5</sup> Adopting principles of the English common law, Vyshinskij held that the accused must prove all defensive claims. A. VYSHINSKIJ, *TEORIJA SUDEBNYKH DOKAZATEL'STV SOVETSKOM PRAVE* [THEORY OF JUDICIAL EVIDENCE IN SOVIET LAW] 240-46 (3d ed. 1950). See also Tadevosjan, *K voprosu ob ustanovlenii material'noj istiny v sovetskom protsesse* [On the Question of Ascertaining Material Truth in Soviet Procedure], 1948 *SOVETSKOE GOSUDARSTVO I PRAVO* [SOVIET STATE AND LAW] 65, 71 (No. 6) (agreeing with Vyshinskij). Vyshinskij's reading of the common law is basically accurate. See 4 W. BLACKSTONE, *COMMENTARIES* \*201. See generally Fletcher, *supra* note 1, at 902. For a biting contemporary critique of Vyshinskij's position on the burden of persuasion, see V. ARSEN'EV, *VOPROSY OBSHCHEJ TEORII SUDEBNYKH DOKAZATEL'STV* [PROBLEMS IN THE GENERAL THEORY OF JUDICIAL EVIDENCE] 76-77 (1964).

<sup>6</sup> For an example of the early literature, see V. KAMINSKAJA, *UCHENIE O PRAVONYKH PREZUMPTSIIJAKH V UGOLOVNOJ PROTSESE* [THE DOCTRINE OF LEGAL PRESUMPTIONS IN CRIMINAL PROCEDURE] (1948). Tsarist materials also contain references to the presumption of innocence. See S. POZNYNSHEV, *ELEMENTARNYJ UCHEBNIK RUSKAGO UGOLOVNOGO PROTSESSA* [ELEMENTARY TEXTBOOK ON RUSSIAN CRIMINAL PROCEDURE] 51 (1913); V. SLUCHEVSKIJ, *UCHEBNIK* "RUSKAGO UGOLOVNOGO PROTSESSA" [TEXTBOOK ON RUSSIAN CRIMINAL PROCEDURE] 63-64 (1892).

Soviet criminal law.<sup>7</sup> Since the initial flurry of activity, at least a score of articles have focused on the subject. With the literature almost unanimously supportive of the presumption, expectations were high that the draftsmen of the 1958 Fundamental Principles of Criminal Procedure would codify the presumption as a fundamental doctrine of Soviet law. Yet, hints of rejection appeared in a 1958 article,<sup>8</sup> and in December 1958, B. S. Shirkov, Deputy to the Supreme Soviet, denounced the presumption as "a worm-eaten dogma of bourgeois doctrine."<sup>9</sup> Official bypassing of the presumption in 1958 prompted some proceduralists to delete discussions of it in the new editions of their texts on criminal procedure.<sup>10</sup> It appeared that the presumption of innocence might pass from the rhetoric of Soviet law. Then, in a number of articles published in 1964, Russian jurists rekindled the dying debate.<sup>11</sup> The presumption had regained sufficient vitality by 1965 to gain recognition in a new encyclopedia of Soviet legal concepts.<sup>12</sup> Despite its omission from the 1958 Fundamental Principles, the noble presumption persists as an important doctrine in Soviet legal rhetoric.<sup>13</sup>

<sup>7</sup> See M. STROGOVICH, *UCHENIE O MATERIAL'NOJ ISTINE V UGOLOVNOJ PROTSESE* [THE DOCTRINE OF MATERIAL TRUTH IN CRIMINAL PROCEDURE] (1947).

<sup>8</sup> Baranov, *Ob Osnovakh ugolovnogo sudoproizvodstva SSSR* [On the Fundamental Principles of Criminal Proceedings in the Soviet Union], 1958 *SOTSIALISTICHESKAJA ZAKONNOST'* [SOCIALIST LEGALITY] 8, 10 (No. 3).

<sup>9</sup> Pravda, December 27, 1958, at 5.

<sup>10</sup> See M. CHEL'TSOV, *SOVETSKIJ UGOLOVNYJ PROTSESS* [SOVIET CRIMINAL PROCEDURE] 127-28 (4th ed. 1962); I. CHUTKIN, L. MARIUPOL'SKIJ, & I. SHEREMET'EV, *SOVETSKIJ UGOLOVNYJ PROTSESS* [SOVIET CRIMINAL PROCEDURE] 76 (1960).

<sup>11</sup> Filiminov, *O funktsijakh suda i sledstviya* [On the Functions of the Court and of the Investigation], *Literaturnaja Gazeta*, Aug. 18, 1964, at 2; Gorkin, *O sotsialisticheskomo pravosudii* [Socialist Justice] *Izvestie*, Dec. 2, 1964, at 3; Strogovich, *Otvet prokuroru* [Answer to the Prosecutor], *Literaturnaja Gazeta*, Aug. 18, 1964, at 2; Strogovich, *Sudebnaja oshibka* [Judicial Error], *Literaturnaja Gazeta*, May 23, 1964, at 5.

<sup>12</sup> *ENTSIKLOPEDICHESKIJ SLOVAR' PRAVOVYKH ZNANIJ* [ENCYCLOPEDIA OF LEGAL CONCEPTS] 359-69 (S. Bratus' & N. Zhegin eds. 1965).

<sup>13</sup> The nature of the Soviet debate has been widely misunderstood in the Western press. See, e.g., Binkley, *The Rule of Law: The New Soviet Criminal Procedure*, 46 *A.B.A.J.* 637 (1960), in which the author intimates that a standard of proof less stringent than proof of guilt beyond a reasonable doubt prevails in Soviet criminal courts. This is plainly false. See note 4 *supra*. For an example of the political uses of comparative legal criticism, see Gillingham, *Russia Stages a New "Show" Trial*, *New York Times*, August 14, 1960, VI, at 13, in which the author claims that the 1958 legislative rejection of the presumption of innocence led to a presumption of guilt in Soviet law. *Id.* at 84. For more responsible accounts of the Soviet debate on the presumption of innocence, see the writings of Harold Berman cited in note 14 *infra*; Bilinsky, *Die Präsuntion der Unschuld in der sowjetischen Rechtslehre*, 1962 *RECHT IN OST UND WEST* 55; Kiralfy, *The Campaign for Legality in the U.S.S.R.*, 6 *INT'L & COMP. L.Q.* 625, 638 (1957). For a perceptive analysis of many of the issues in the Soviet law of evidence that underlie the debate on the presumption of innocence, see Ginsburgs, *Objective Truth and the Judicial Process in Post-Stalinist Soviet Jurisprudence*, 10 *AM. J. COMP. L.* 53 (1961).

With good cause, one wonders why Soviet jurists are so intrigued by the presumption of innocence. If it is merely a prestigious redundancy, why shouldn't they embrace the term and be done with it? On the other hand, if it is more than a rule on the risk of non-persuasion, why do they seem singularly incapable of pinpointing that additional factor and assessing it straightforwardly? Also, one wonders why of all the major European legal systems it is the Russians alone who balk at the presumption of innocence.

As I shall argue in this paper, the Soviet debate on the presumption of innocence highlights two important features of law and legality in the Soviet Union: (1) it illustrates an exhortative function of legal rubrics—a function frequently ignored by those who think of law as rules of decision; and (2) it provides the medium for a significant institutional struggle in the Soviet system. Before turning to a discussion of these claims, we pause to consider an alternative account of the Soviet preoccupation with the presumption of innocence.

## II. A CRITIQUE OF BERMAN'S THESIS

Professor Harold Berman has repeatedly assessed the position of the presumption of innocence in Soviet law. His position is that "all that American jurists generally mean by that phrase is spelled out in Soviet law."<sup>14</sup> If this is true, then Berman is left with only one quandary: if the Russians endorse the presumption in substance, then why do they reject the label? In his recent book, *Soviet Criminal Law and Procedure: The RSFSR Codes*, Berman attempts to resolve this quandary with a twofold thesis. He argues first, that as presumptions generally are alien to Soviet criminal procedure, it is not surprising that Soviet officials should be unreceptive to the rubric "presumption of innocence;" and secondly, owing to the awkwardness and the inaccuracy of Russian versions of the phrase, "the accused is presumed innocent until proven guilty," Russian lawyers are unable to grasp the "technical meaning" of the presumption of innocence.<sup>15</sup> These arguments raise a number of methodological problems in comparative legal analysis which warrant detailed attention.

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<sup>14</sup> H. BERMAN, *JUSTICE IN THE U.S.S.R.* 71 (2d ed. 1963). See also *TRIAL OF AMERICAN U-2 SPY PILOT xxi* (Soviet Booklet No. 16 1960) ("Soviet Law has rejected the phrase 'presumption of innocence' but has retained the substance of the doctrine."); H. BERMAN, *supra* note 4, at 82 ("It would appear that all that is generally meant by 'presumption of innocence' . . . is spelled out in the 1960 Code without the use of the phrase itself.")

<sup>15</sup> H. BERMAN, *supra* note 4, at 79-87.

Berman's first explanation of the Soviet ambivalence towards presumptions in criminal cases builds on the singularity of Continental concepts of proof and persuasion. Assessing this explanation requires some historical clarification. Until the French Revolution, the system of evidence that prevailed in French and other Continental courts was legalistic, formal and rule-bound. The forms of evidence were ranked according to their weight, the testimony of two competent eyewitnesses was binding on the court, and presumptions of every hue were a prominent means of proof.<sup>16</sup> In reaction to what they felt to be a tyranny of evidentiary rules, the French reformers of 1789 vested complete authority in the jury to formulate its own judgment (*intime conviction*) of the facts in dispute.<sup>17</sup> The system of formal rules thus yielded to the supremacy of subjective judgment in individual cases.

The French doctrine of subjective evidentiary judgment fared better abroad than did Napoleon's armies; the doctrine of *intime conviction* triumphed in the major court systems on the Continent. Prussia fell to French influence after the upheaval of 1848,<sup>18</sup> as did Russia with the court reforms of 1864.<sup>19</sup> The conquest of French doctrine left in its wake a thoroughgoing disdain for presumptions as surrogates for the proof of guilt. German lawyers no longer rely on presumptions in proving guilt,<sup>20</sup> and French and Russian jurists rarely do.<sup>21</sup> Thus Berman can argue, quite persuasively, that the

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<sup>16</sup> See H. BRUNNER, *FORSCHUNGEN ZUR GESCHICHTE DES DEUTSCHEN UND FRANZÖSISCHEN RECHTES*, ch. II (1894); A. DU BOYS, *2 HISTOIRE DU DROIT CRIMINEL DES PEUPLES MODERNES* 269-326, 358-83 (1858); A. ESMEIN, *HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* 256-71, 288-322, App. B (Simpson transl. 1913).

<sup>17</sup> The Law of September 16, 1791 required the following oath to be administered to the jurors: "Vous jurez et promettez . . . de vous décider d'après les charges et moyens de défense, et suivant votre conscience et votre intime conviction . . ." ("You swear and promise . . . to decide according to the charges and the pleas in defense, and following your conscience and your inner conviction . . ."). Law of September 16, 1791, Pt. II, Tit. VI, Art. 24. These words are retained intact in the oath presently administered to criminal juries in France. See C. PRO. PÉN. § 304. For a full text and discussion of the Law of September 16, 1791, see A. ESMEIN, *supra* note 16, at 416.

<sup>18</sup> See the Law of Jan. 3, 1849, § 97; H. MEYER, *THAT-UND RECHTSFRAGE IN GESCHWORENENGERICHT* 121-22 (1860). See generally C. MITTERMAIER, *DIE GESETZGEBUNG UND RECHTSÜBUNG ÜBER STRAFVERFAHREN* 427-29, 468-72, 475-94 (1856).

<sup>19</sup> See 1864 UGOL. PRO. KOD. [CODE CRIM. PRO.] § 666.

<sup>20</sup> In the nineteenth century, German lawyers still spoke of the presumption of sanity in criminal cases. See LIEROW, *PROBLEME DER SCHULDVERMUTUNG IM ZUGE DER GESCHICHTLICHEN ENTWICKLUNG DES DEUTSCHEN STRAFVERFAHRENS* (1957); A. VON FEUERBACH, *LEHRBUCH DES FEINLICHEN RECHTS* 66 (11th ed. 1832).

<sup>21</sup> With regard to French usage compare 2 G. STEFANI & G. LEVASSEUR, *DROIT PÉNAL GÉNÉRAL ET PROCÉDURE PÉNALE* (2d ed. 1964) (no reference to presumptions in criminal cases other than the presumption of innocence) with 2 P. BOUZAT & J. PINATEL, *TRAITÉ DE DROIT PÉNAL ET CRIMINOLOGIE* § 1230 (discussing presumptions both of law and of fact). One of the rare cases in which a Soviet lawyer refers to

civilian concept of proof has prompted Soviet officials to view the presumption of innocence as they would any inculpatory presumption—with disfavor.

To buttress his claim, Berman relates the rejection of the phrase "presumption of innocence" to a parallel 1958 decision to avoid legislative references to the prosecutor's burden of persuasion. Berman suggests that both of these decisions derive from two dominant characteristics of Soviet criminal procedure: the inquisitorial role of the trial judge and the doctrine of *intime conviction*. These characteristics are earmarks of the French and German as well as the Soviet system of criminal procedure, and they may well explain why Russian officials, like their German counterparts, are chary of references to the prosecution's burden to prove or to persuade the court of the accused's guilt.<sup>22</sup> Even though Russian judges apply the European maxim *in dubio pro reo*—requiring acquittal in cases of doubt—they, and not the embattled lawyers, bear final responsibility for the scope of the factual inquiry at trial. This fact, together with the emphasis on subjective persuasion, may make it awkward to speak of the prosecutor's duty to introduce evidence or to persuade the court of the accused's guilt. So far as it is limited to the question of the prosecutor's burden of persuasion, Berman's account is appealing.<sup>23</sup> It is difficult, however, to see how this procedural analysis assists his account of the rejection of the presumption of innocence. There is no general correlation between

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presumptions in criminal cases other than the presumption of innocence. is M. STROGOVICH, *supra* note 7, at 204-26 (discussing the presumptions that every man knows the law and that judicial decisions represent accurate factual determinations).

<sup>22</sup> German writers distinguish between *formelle Beweislast* (burden of introducing evidence) and *materielle Beweislast* (burden of persuasion). The German prosecutor does not bear the former burden alone; the trial judge is bound by StPO § 244(2) to investigate the case on his own initiative. While some nineteenth century writers were willing to say the prosecutor bore the *materielle Beweislast*, see, e.g., A. VON KRIES, *LEHRBUCH DES DEUTSCHEN STRAFPROZESSRECHTS* 341 (1892), contemporary writers regard this burden as inconsistent with the prosecutor's impartial posture in the trial. Apparently these writers wish to avoid the suggestion that the prosecutor "loses" if the defendant is acquitted. See 1 E. SCHMIDT, *LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG* 205 (2d ed. 1964); cf. 1 LÖWE-ROSENBERG, *DIE STRAFPROZESSORDNUNG* 123 (21st ed. 1963). It is significant that this argument does not appear in the Russian literature. Unlike their German neighbors, French writers freely speak of the prosecutor's *charge de la preuve*. See, e.g., G. STEFANI & G. LEVASSEUR, *supra* note 21, at 21.

<sup>23</sup> It is important to note, however, that Soviet writers display little hesitancy in speaking of the prosecutor's burden of persuasion (*bremja or objazannost' dokazyvanija*). See, e.g., SOVETSKIJ UGOLOVNYJ PROTSESS [SOVIET CRIMINAL PROCEDURE] 79 (D. Karev ed. 1956); M. STROGOVICH, *supra* note 4, at 186; Shifman, *Diskussionnyye voprosy ugolovnogo sudoproizvodstva* [Debatable Questions of Criminal Proceedings], 1957 SOTSIALISTICHESKAJA ZAKONNOST' [SOCIALIST LEGALITY] 14, 16 (No. 7). But cf. M. CHEL'TSOV, *supra* note 10, at 145 (questioning the usefulness of the concept in criminal cases).

inquisitorial judicial roles and the doctrine of *intime conviction*, on the one hand, and rejection of the phrase "presumption of innocence" on the other. Though the French and German courts are committed to both procedural points, they display little hesitancy in speaking of a presumption of innocence. Indeed, in both countries, the presumption is of increasing prestige, and there is not a shred of the kind of debate that marks the Soviet effort to come to grips with the doctrine.<sup>24</sup>

Berman might be right in suggesting that Soviet jurists have confused the presumption of innocence with presumptions like those of sanity and intention, or with common law concepts of proof and persuasion. Yet there is hardly any evidence of this confusion in the writings of Soviet scholars and politicians. Accordingly, Berman's first contention remains an argument in search of support.

With his second argument, Berman shifts his focus from the civilian theory of proof to the nature of Russian as a language for legal discourse. He attempts to account for the 1958 rejection of the presumption of innocence by appealing to the awkwardness of Russian verbs corresponding to the English verb "presume." Because translations are imperfect, the argument runs, Russian versions of the maxim, "the accused is presumed innocent until proven guilty," invariably miss the mark; and thus Soviet scholars and officials have been unable to grasp the technical meaning of the presumption of innocence.<sup>25</sup>

The argument is reminiscent of the more general view, advanced notably by Benjamin Lee Whorf, that each language reflects a unique conceptual system and that therefore speakers of different languages see the world differently.<sup>26</sup> As the Navajo does not distinguish between blue and green, so the speaker of Russian, per Berman, does not distinguish between the acts of presuming and the closely related acts of regarding, considering and supposing. According to Berman, the Russian language fails to make these distinctions and thus the Russian lawyer becomes confused as he

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<sup>24</sup> See, e.g., Judgment of Oct. 3, 1958, in 1959 NEUE JURISTISCHE WOCHENSCHRIFT 193, which declared inapplicable StGB § 245a requiring persons convicted of certain offenses to prove that burglary tools found in their possession were not being held for criminal purposes; the court cites the presumption of innocence as a ground for not presuming that the possessor of burglary tools had a criminal purpose. See also Patarin, *Le particularisme de la théorie des preuves en droit pénal*, in QUELQUES ASPECTS DE L'AUTONOMIE DU DROIT PÉNAL 5-20 (G. Stefani ed. 1956).

<sup>25</sup> H. BERMAN, *supra* note 4, at 86-87.

<sup>26</sup> See generally LANGUAGE, THOUGHT AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (Carroll ed. 1956). For a succinct summary and critique of Whorf's views, see Black, *Linguistic Relativity: The Views of Benjamin Lee Whorf*, 68 PHIL. REV. 228 (1959).



attempts to fathom the "technical meaning" of the presumption of innocence. The similarities between Berman's claim and the Whorf hypothesis are striking.

Yet Berman goes one step further. Whorf's concern is limited to the impact of vocabulary and syntax on the way men perceive and "dissect" reality. As though proposing a corollary to this thesis, Berman suggests that the existing stock of words in a language limits the speaker's capacity to grasp the meaning of foreign words and concepts. As he puts it, the technical meaning of the presumption of innocence has not fully "penetrated the consciousness" of Russian-speaking lawyers. That means, I take it, that the conceptual framework of Russian inhibits understanding of the special way common lawyers use the presumption of innocence.

There are difficulties with Whorf's position;<sup>27</sup> and even more with Berman's. It would be a sad, relativistic world indeed if the Navajo could not grasp what his English-speaking neighbor meant by "green," or if the Communist Chinese lawyer, even after abundant explanation, could not fathom what the Westerner meant by justice. (I am told that the Chinese had no word for justice before they attempted to translate the Western concept). Yet if, as Berman suggests, the existing stock of words in a language limits the speaker's conceptual framework, we are led to this pessimistic picture of trans-language communication. Before bemoaning these insuperable barriers between legal systems, we should take a closer look at Berman's evidence.

Of the three Russian verbs corresponding to the English verb "presume"—*predpologat'*, *prezumirot'*, and *schitat'*— Berman discusses only the latter two.<sup>28</sup> Neither of these, he suggests, can generate an adequate translation of the phrase "the accused is pre-

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<sup>27</sup> See Black, *supra* note 26.

<sup>28</sup> Of the three forms, *predpologat'* is the most suitable verb for capturing the concept of the presumption. It is the only verb of the commonly used Russian equivalents for "presume" that yields a noun form parallel to "presumption" (i.e., *predpolozhenie*). Accordingly, it is the form used by Russian jurists to refer to presumptions in private disputes. See A. KLEJNMAN, *SOVETSKIJ GRAZHDANSKIJ PROTSESS* [SOVIET CIVIL PROCEDURE] 145-47 (1964). And it is used unhesitatingly by Russian writers to translate the presumption of innocence. See N. POLJANSKIJ, *VOPROSY TEORII SOVETSKOGO UGOLOVNOGO PROTSESSA* [PROBLEMS OF THE THEORY OF SOVIET CRIMINAL PROCEDURE] 182 (1956); S. POZNYSEV, *supra* note 6, at 51. Another verb used to translate the phrase "the accused is presumed innocent" is *priznat'sja*, though this verb conveys a sense of official adjudication. Apparently, this was the verb used in the draft proposal for inclusion in the 1958 Fundamental Principles. See Baranov, *supra* note 8, at 8. But cf. Golunskij, *Novye Osnovy ugovnogo sudoproizvodstva Sojuza SSR i sojuznykh respublik* [The New Fundamental Principles of Criminal Procedure of the U.S.S.R. and the Union Republics], 1959 *SOVETSKOE GOSUDARSTVO I PRAVO* [SOVIET STATE AND LAW] 48, 54 (No. 2).

sumed innocent until proven guilty." Both verbs, Berman submits, convey a stronger meaning than does the English verb "presume." As he suggests, the appropriate English rendition of *schitat'* (the more frequently used of the two verbs he discusses) is not "presume," but "consider." Even if Berman is right in this proposed translation, one wonders why the added force of the verb should make the Russians unreceptive to the presumption of innocence. Berman has an argument why it should; indeed it is the only argument on behalf of his claim that the "technical meaning" of the presumption of innocence has not penetrated the Russian consciousness. In his words:

[T]o say that the accused "is considered" innocent is clearly inaccurate, for the prosecutor, at least, "considers" him guilty, and so does the preliminary session of the court that confirms the indictment, while the trial court has—as yet—no opinion at all in the matter.<sup>29</sup>

This argument, unfortunately, proves too much. If it is sound, it represents a serious conceptual challenge to the presumption of innocence.<sup>30</sup> The difference between "presume" and "consider" is, in this context, an irrelevant matter of degree. Admittedly, "consider" is a stronger verb than is "presume," but both convey the subject's belief in the truth of that which is presumed or considered to be true. A prosecutor who believes his quarry to be guilty might say, "I consider him guilty;" or if he is less sure, he might say, "I presume that he is guilty." It is only the candor of the prosecutor's qualified belief in guilt that makes the latter statement the slightest bit odd. If, as Berman argues, the prosecutor's considering the accused guilty precludes saying that the accused is considered innocent, then surely the prosecutor's presuming the accused guilty precludes saying that the accused is presumed innocent. Obviously, Berman doesn't wish to prove that the presumption of innocence is conceptually untenable. Thus one is unavoidably puzzled by his reliance on an argument that is applicable to the verb "presume" as well as to the verb "consider."

Berman's reliance on the distinction between "presuming" and "considering" derives from an incorrect perception of the problem of translating legal doctrine. One translates a phrase from one sys-

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<sup>29</sup> H. BERMAN, *supra* note 4, at 87.

<sup>30</sup> Soviet authors have relied on the same argument to demonstrate the internal inconsistency of the presumption of innocence. See; V. LUKASHEVICH, GARANTII PRAV OBVINJAEMOGO V SOVETSKOM UGOLOVNOM PROTSESSSE [GUARANTEES OF THE RIGHTS OF THE ACCUSED IN SOVIET CRIMINAL PROCEDURE] 48 (1959); SOVETSKIJ UGOLOVNYJ PROTSESS [SOVIET CRIMINAL PROCEDURE] 79 (D. Karev ed. 1956); Poljanskij, *K voprosu o prezumpcii nevinovnosti v sovetskom ugovolnom protsesse* [The Question of the Presumption of Innocence in Soviet Criminal Procedure] 1949 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 57, 59, 62 (No. 9).

tem of legal jargon to another not by finding counterparts for the constitutive words of the phrase, but by recreating the function of the phrase as a whole. Berman's error consists in the search for a word that corresponds to the word "presume." Instead one should ask: Is there a phrase in Russian that fulfills or could fulfill the role played by the English phrase, "the accused is presumed innocent until proven guilty?" And to answer that question one must first be clear about the function of the presumption of innocence in common law and West European courts.

It is widely agreed today that the function of the presumption of innocence differs from the procedural role of other rebuttable presumptions. As Packer and Wigmore have stressed, the presumption of innocence serves primarily to offset the jury's inclination to regard a man arrested and indicted as guilty.<sup>31</sup> To bolster the image of the accused's innocence and thus to encourage an unbiased evaluation of the evidence, the law plays a trick; it pretends that there is a factual likelihood of innocence—a presumption of innocence—when there is none in fact. With this indulgence in self-deception, the rhetoric of the Western legal tradition seeks to minimize the likelihood that innocent men will be convicted on the prestige of the prosecutor's decision to indict. Fairness to the individual is the end, and pretense and fiction are the means. Yet, if we are going to indulge in fiction for the sake of fairness, we might fasten our law-  
yerly ingenuity for fiction to any number of phrases. We could simulate the functional impact of the presumption of innocence by saying that "the accused is considered innocent" or that "the accused is regarded as innocent." If the English language lacked the word "presume," we would unhesitatingly use one of these alternative forms. The issue—in both Russian and English—is not whether one has the linguistic apparatus to create a pretense of the accused's innocence; the issue is whether one wants to do it.

The underlying weakness of Berman's analysis is his ambivalence toward the function of the presumption of innocence in the Western legal tradition. He regards the presumption as a rule of procedure allocating the burden of persuasion at trial.<sup>32</sup> He thinks of it also as a concept with a "technical meaning," though he never

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<sup>31</sup> Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 12 (1964); 9 J. WIGMORE, EVIDENCE 406-09 (3d ed. 1940).

<sup>32</sup> In his latest work Berman lists a total of five rules for which the presumption stands: "(a) The accused has no obligation to present evidence. (b) No inference of guilt may be drawn from the mere fact of indictment. (c) Evidence supporting the indictment must be presented at trial, and the judgment of the court must be based on that evidence alone. (d) The court may not assume that the accused is guilty. (e) If proof of guilt is not established he may not be convicted." H. BERMAN, *supra* note 4, at 82. For Soviet efforts to compile lists of the specific rules encom-

tells us what that meaning might be.<sup>33</sup> Yet he ignores the role of the presumption as a device for counteracting the influence of the prosecutor's pre-trial evaluation of the evidence. It is this latter function that provides the map to the tortuous Soviet debate on the nature and scope of the presumption of innocence. To grasp this function in context, one must consider the array of legal précepts that are used similarly as devices of persuasion and exhortation.

### III. THE PRESUMPTION AS EXHORTATION

The presumption of innocence is but one of the variety of important legal doctrines that serve not as rules of decision, but as rhetorical gambits in legal discourse. The characteristic of these doctrines is that, although they may have the form of legal rules, they never emerge as major premises in judicial opinions. Nonetheless, one speaks of these unenforceable rules as legal rules; they represent a significant part of the system of rhetoric with which lawyers argue legal issues. In this respect the function of the presumption of innocence parallels the use of constitutional rules in jurisdictions in which the courts do not review the constitutionality of legislation; these constitutional rules do not generate decisions, but they do have rhetorical force in legal debates.<sup>34</sup>

Unenforceable legal rules appear frequently as ascriptions of official duties in the judicial process. A notable example is the maxim *in dubio pro reo* as it functions in the German criminal courts. The demand of the rule is clear: in a case of doubt, the trial judge must acquit. Yet a condition for invoking the rule to reverse a conviction upon appeal is that the trial judge must have openly

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passed by the presumption of innocence, see M. CHEL'TSOV, *supra* note 10, at 146-47; ENTSIKLOPEDICHESKIY SLOVAR' PRAVOVYKH ZNANIY [ENCYCLOPEDIA DICTIONARY OF LEGAL CONCEPTS] 359-60 (S. Bratus' & N. Zhegin eds. 1965); M. STROGOVITCH, *supra* note 4, at 184.

<sup>33</sup> The term "technical meaning" appears for the first time in H. BERMAN, *supra* note 4, at 86-87. In one passage, it is the verb "presume" that has a "technical meaning." *Id.* at 86. In another, it is the presumption of innocence that has a "technical meaning attached to it in English and American law." *Id.* at 87.

<sup>34</sup> The preamble to the 1958 French constitution incorporates the 1789 Declaration of the Rights of Man and thus the *présomption d'innocence* in section 9 of the Declaration has the status of *droit constitutionnel*. Though the preamble is not applied as a rule of decision in specific cases, the *présomption d'innocence* obviously has vast rhetorical significance. See Patarin, *supra* note 24, at 15-20. Also, the U.S.S.R. CONST. § 111 (1936) guarantees the "right to a defense" in criminal trials. This provision has emerged in the works of several Soviet authors as rhetorical underpinning of the presumption of innocence. See V. LUKASHEVICH, *supra* note 30, at 56; SOVETSKIY UGOLOVNIY PROTSESS [SOVIET CRIMINAL PROCEDURE] 75 (D. Karev ed. 1956); M. STROGOVITCH, *supra* note 4, at 154.

conceded his doubts in his written opinion.<sup>35</sup> Though enforceable only at this fringe, the rule does serve to exhort judges to proceed carefully before concluding that the accused is guilty.<sup>36</sup>

The presumption of innocence typically fulfills a parallel exhortative function in common law and civilian trials. The pretense of a factual inference of the accused's innocence admonishes the trier-of-fact to proceed impartially—without deference to the probability that the prosecutor's decision to prosecute is well-founded. In common law trials, the judge invokes the presumption to admonish the jury not to be swayed by the beguiling facts of arrest and prosecution. In civilian bench trials, the admonition is more subtle: the judge is exhorted by the rhetoric of his system to proceed cautiously and impartially in determining the facts of the case.

This exhortative role gives the words, "presumption of innocence," a significance transcending rules for the burden of persuasion and the proof of guilt at trial. The 1960 RSFSR Code of Criminal Procedure provides that the defendant's guilt must be established at trial, and that the court may consider only evidence heard at trial.<sup>37</sup> The civilian rule *in dubio pro reo*—a precept requiring acquittal in cases of doubt—is firmly entrenched in Soviet practice.<sup>38</sup> Yet knowing what evidence to consider is not to be free of the impact of the prosecutor's determination of guilt in weighing competing items of proof. And a willingness to acquit the accused in case of doubt is not to be above prosecutorial influence in determining whether a doubt exists. Even if the court limits itself to the evidence submitted at trial and even if it demands proof beyond a reasonable doubt, there is still the danger that it might be swayed by the prosecutor's opinion of guilt. Guarding against that danger is the job of the presumption of innocence.

If the rhetorical impact of the presumption of innocence is simply to counteract prosecutorial prestige, one wonders why Soviet scholars have debated the doctrine so vigorously. The answer

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<sup>35</sup> W. SARSTEDT, *DIE REVISION IN STRAFSACHEN* 249-51 (4th ed. 1962); Seibert, *In dubio pro reo und Revision*, 1955 *NEUE JURISTISCHE WOCHENSCHRIFT* 172.

<sup>36</sup> Compare the rule of the German Code of Criminal Procedure, StPO § 160(2), that the prosecutor must be impartial in his investigation prior to trial. The rule prescribes a procedural role; apparently it too is enforceable only at its fringe. There is no discussion in the commentaries of specific instances of enforcement. See generally 2 LÖWE-ROSENBERG, *DIE STRAFPROZESSORDNUNG* 761-64 (21st ed. 1963); 2 E. SCHMIDT, *LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG* 446-48 (1957). But StPO § 202, providing for supplementary preliminary judicial investigation, serves to check the impact of biased prosecutorial investigations.

<sup>37</sup> R.S.F.S.R. 1960 UGOL. PRO. KOD. [CODE CRIM. PRO.] §§ 301, 309 (1960). For an English translation of these provisions, see H. BERMAN, *supra* note 4, at 372, 375.

<sup>38</sup> See note 4 *supra*.

lies, at least in part, in an additional exhortative function of the Soviet version of the presumption of innocence. That function is to buttress the command that the pre-trial investigator thoroughly and impartially explore every facet of the case against the accused. This is an exhortative function of the presumption peculiar to the Soviet and Eastern European legal systems that has proven to be at odds with the role of the presumption as a check on prosecutorial prestige. It is this incompatibility of roles that has sparked the unending controversy on the status of the presumption in Soviet law.

To clarify the inconsistency of the presumption's roles, we turn to some facts of Soviet criminal procedure. For our purposes, the critical facts are these: (1) the pre-trial investigator and the court prosecutor are both officers of the procuracy, the administrative agency that oversees all questions of legality in the Soviet courts and bureaucracy;<sup>39</sup> (2) the standard for issuing an indictment is the investigator's conclusion that the suspect is guilty, and not merely a finding of probable cause;<sup>40</sup> and (3) the pre-trial investigation is thought to be an impartial inquiry.<sup>41</sup> These procedural factors bestow an unusual trial posture on the court prosecutor: he is at once an advocate seeking to demonstrate the guilt of the accused and a representative of a state agency that has impartially found the accused to be guilty.

Prosecutors in France, West Germany and common law jurisdictions are on a different footing. Their findings on the evidence

<sup>39</sup> See generally H. BERMAN, *supra* note 14, at 238-47.

<sup>40</sup> This is an uncontroverted tenet of Soviet writers. See M. STROGOVICH, *supra* note 4, at 182; Baranov, *supra* note 8, at 9; Poljanskij, *supra* note 30, at 62. The rule is supported by R.S.F.S.R. 1960 UGOL. PRO. KOD. [CODE CRIM. PRO.] § 71, which provides that the investigator and the procurator must evaluate the evidence according to their *intime conviction*; presumably, the investigator could not reach an *intime conviction* on an issue of lesser significance than the guilt or innocence of the accused. This provision represents a change relative to § 128 of the 1923 R.S.F.S.R. Code of Criminal Procedure, which specified that the court must reach an *intime conviction* in its evaluation of the evidence, but omits reference to an *intime conviction* on the parts of the investigator or the procurator. The current rule that the investigator must definitely decide the guilt or innocence of the accused in a divergence from Tsarist and current Western European practice. See S. POZNYSEV, *supra* note 6, at 265, where the standard for issuing an indictment is described as the procurator's determination that the evidence is *dostatochno polnym i dajushchim osnovanija dlja obvinenija* (adequately complete and furnishing a basis for an accusation). One reason for the rule according to Soviet writers is that the procuracy is charged with determining whether the suspect should be subjected to pre-trial detention, and that decision, the writers claim, presupposes a finding of the suspect's guilt. See V. LUKASHEVICH, *supra* note 30, at 51-52 SOVETSKIJ UGOLOVNYJ PROTSESS [SOVIET CRIMINAL PROCEDURE] (D. Karev ed. 1956); Viktorov, *O kritike nekotorykh polozhenij v teorii sovetskogo ugolovnogo protessa* [On the Criticisms of Several Positions in the Theory of Soviet Criminal Procedure], 1958 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 88, 91 (No. 3).

<sup>41</sup> R.S.F.S.R. 1960 UGOL. PRO. KOD. [CODE CRIM. PRO.] §§ 20, 71.

do not purport to be official impartial determinations of fact. Nor can they invite assistance from a pre-trial investigator who has made an impartial definitive finding of guilt prior to trial. The German *Untersuchungsrichter* and the French *juge d'instruction* conduct impartial investigations before issuing an indictment, but their conclusion is merely a finding of probable cause for commencing the prosecution.<sup>42</sup> Though only a matter of degree, the difference between a finding of probable cause and a conclusion of guilt is significant. If the pre-trial investigator must make a definitive finding of guilt, he bears that much greater responsibility for sifting the innocent from the guilty in the conviction process. And if the fairness of the system turns substantially on the impartiality and judgment of the pre-trial investigator, one quite reasonably might exhort the investigator to do his best to avoid indicting an innocent man. By making the presumption expressly applicable to the pre-trial investigation, Soviet scholars seek this exhortative effect. Stressing the likelihood of the accused's innocence counteracts the investigator's possible preconceptions of the suspect's guilt.

By adding this exhortative function to the presumption of innocence, Soviet scholars have generated a doctrine with competing rhetorical tasks. If the presumption exhorts the pre-trial investigator to make an impartial finding of guilt, how can the trier-of-fact ignore the persuasive effect of this impartial determination in his evaluation of the evidence at trial? Yet as it functions at trial, the presumption exhorts the trier to ignore the procuracy's evaluation of the evidence—however impartial and exhaustive that evaluation may be. Thus the Soviet presumption of innocence slides between conflicting roles. Sometimes it functions to affirm the responsibility of the procuracy in the guilt-determination process; sometimes it admonishes the trial judge to disregard the procuracy's opinion of the defendant's guilt. With these two faces of the presumption in constant tension, it is not surprising that Russian scholars have searched for two decades for the dominant face of the presumption in Soviet law.

#### IV. THE PROCURACY AND THE COURTS

The doctrinal parries of Soviet scholars on the presumption of innocence shield a significant institutional struggle in Soviet

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<sup>42</sup> In German law the standard for commencement of the trial is that there be *hinreichender Tatverdacht* (sufficient suspicion). See StPO § 203. The parallel French provision is C. PRO. PÉN. § 176, providing that the *juge d'instruction* must determine whether there are *charges constitutives d'infraction* against the law. See Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 LA. L. REV. 1, 23 (1962).

law. The struggle is for influence over the outcome of cases, and the contenders are the two dominant branches of the Soviet legal system: the procuracy and the courts. The struggle is a limited one. No one has urged that the courts should be deprived of their exclusive power formally to declare men guilty and to prescribe punishment. Yet even within a system of indictment and judicial trial, there is room for promoting the influence of the pre-trial investigative agency. The evidence must be evaluated at trial. The problem is whether the procuracy's pre-trial conclusion should influence the judge's evaluation at trial. The system is more efficient if the judge can rely on the judgment of the procuracy as he might rely on the judgment of an expert witness. Yet to the extent that the judiciary defers to the procuracy, the trial is that much less a safeguard against convicting the innocent. To use Professor Packer's apt constructs, the Soviet institutional struggle reflects one of the points of tension between the Crime Control and the Due Process Models of the criminal process.<sup>43</sup> Confidence in the judgment of pre-trial investigative authorities is characteristic of the Crime Control Model; insistence on the unique role of courts in the criminal process is the mark of the Due Process Model. The conflict is between efficiency in convicting the guilty and concern for avoiding the conviction of the innocent. These polar values collide in various ways. In the Soviet Union, they collide at the level of an academic debate on the nature and scope of the presumption of innocence.

The two faces of the presumption of innocence provide masks for the conflict of institutional loyalties. Viewing the presumption primarily as an exhortation to the officials of the procuracy expresses confidence in their ostensibly objective inquiry before trial. Stressing the role of the presumption as an exhortation to the trial judge to proceed without deference to the procurator's judgment obviously has the opposite thrust: it stresses the uniqueness of the courts in the guilt-determination process.

As the institutional struggle between the procuracy and the courts is for limited objectives, so too is the debate among the scholars. All proponents of the presumption agree that it applies during the pre-trial investigation.<sup>44</sup> The suspect is not entitled to counsel until the investigator reaches his conclusion to indict,<sup>45</sup> and thus it falls on the investigator to fulfill the role of defense counsel as well as that of accuser. The function of the presumption,

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<sup>43</sup> See generally Packer, *supra* note 31.

<sup>44</sup> N. POLJANSKIJ, *supra* note 28, at 186; *But cf.* V. LUKASHEVICH, *supra* note 30, at 49-52; M. STROGOVICH, *supra* note 7, at 236; Poljanskij, *supra* note 30, at 59, 60.

<sup>45</sup> R.S.F.S.R. 1960 UGOL. PRO. KOD. [CODE CRIM. PRÖ.] §§ 47, 48.



at this stage, is to exhort the investigator to consider the suspect's side of the case.<sup>46</sup> Indeed, Russian scholars typically contend that the roots of the presumption lie in the suspect's constitutional right to a defense; they see the exhortation of the presumption as a surrogate for representation by counsel.<sup>47</sup>

So much is common ground. The parting of positions comes in confronting the question: what is the impact on the presumption of innocence of the investigator's finding the suspect guilty and issuing an indictment? This is a determination that looks much like a judicial finding of guilt. Both the administrative and the judicial findings are putatively impartial, and both are based on the decision-maker's *intime conviction*. The investigator's decision, when ratified by the procurator, has the procedural effect of bringing the case to trial. The problem is whether it should also carry weight in the adjudication of guilt at trial. This is the core of the institutional struggle.

To abstract the issue from the fray, the scholars put it more subtly: does the pre-trial finding of guilt displace the presumption of innocence? Professor N. Poljanskij is the leading advocate of the view that the pre-trial finding of guilt does displace the presumption of innocence; Professor M. Strogovich is the tenacious champion of the view that it does not.<sup>48</sup>

It is easy to see how the dispute about the impact of pre-trial findings of guilt on the presumption of innocence is, in effect, a dispute about the influence of the procuracy at trial. If one believes that the procuracy's finding of guilt displaces the presumption of innocence, one attributes to the finding a legal effect pertaining (however ambiguously) to the defendant's legal guilt. And, if that is the case, it is hard to say that the procurator's determination of guilt should be irrelevant in the determination of the same issue at the next stage of the process. After all, if the procuracy (acting through the investigator) has already "decided" the issue of guilt and that decision is rendered impartially, then surely it is entitled to some weight in the conviction process. As Professor Poljanskij argued in 1956:

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<sup>46</sup> See, e.g., the refined analysis of this point in V. LUKASHEVICH, *supra* note 30, at 50-51.

<sup>47</sup> See V. LUKASHEVICH, *supra* note 30, at 56 SOVETSKIJ UGOLOVNYJ PROTSESS [SOVIET CRIMINAL PROCEDURE] 75 (D. Karev ed. 1956); M. STROGOVICH, *supra* note 4, at 184.

<sup>48</sup> See generally N. POLJANSKIJ, *supra* note 28, at 168; M. STROGOVICH, *supra* note 4, at 235. For an exposition of the compromise position that the investigator's findings of guilt displaces the presumption of innocence with the presumption arising anew at trial see V. LUKASHEVICH, *supra* note 30, at 55, 56.

It is therefore impermissible to think that the court alone decides the question of guilt. Both investigator and procurator in turn (and in the prescribed form with the appropriate consequences) answer the same question and both, before they can answer the question affirmatively, are bound to overcome every reasonable doubt as to the suspect's innocence.<sup>49</sup>

To demote the courts and further the procuracy, Poljanskij erects an image of the criminal process consisting of several stages—investigation, trial and appeal—with each stage of the process of equal significance. He suggests that the relationship of the procuracy to the courts is precisely the same as that of trial courts to appellate tribunals, with each agency reviewing the accuracy of factual findings made in the stage preceding.<sup>50</sup>

In an effort to contain the procuracy's influence, Professor Strogovich has argued fervently that pre-trial findings of guilt have no impact on the presumption of innocence. His position is that the presumption describes an "objective legal relationship"—a relationship that is unaffected by the "subjective" opinions of the procuracy.<sup>51</sup> He concedes that the pre-trial decisions of the investigator and the procurator have the effect of bringing the case to trial; but he parries any intimation of substantive legal effect by insisting that the presumption of innocence is displaced only by a judicial determination of guilt. Strogovich thus fashions the presumption of innocence to function as it does in common law jury instructions, namely as an exhortation to the trier-of-fact to proceed without deference to the prosecutor's opinion of the defendant's guilt.

The debate between Strogovich and his many opponents turns on a straightforward challenge to the conceptual coherence of the presumption of innocence, the same challenge that Professor Berman regards as evidence of mistranslation of the presumption of innocence. It runs like this: If the accused is presumed innocent

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<sup>49</sup> N. POLJANSKIJ, *supra* note 28, at 188; cf. V. ARSEN'EV, *supra* note 5, at 134 (agreeing that the investigator "decides" the question of guilt): *But see* M. STROGOVICH, *supra* note 7, at 235 (maintaining that the investigator "in no way pre-decides the question of guilt").

<sup>50</sup> N. POLJANSKIJ, *supra* note 28, at 188. Professor Golunskij agrees with this view of the criminal process. *See* Golunskij, *Ob otsenke dokazatel'stv v sovetskom ugovnom protsesse* [On the Evaluation of Evidence in Soviet Criminal Procedure] 1955 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 70, 73 (No. 7). Strogovich replies to Golunskij with a categorical rejection of this view of the criminal process in M. STROGOVICH, *supra* note 4, at 182 n.1.

<sup>51</sup> *See generally* M. STROGOVICH, *supra* note 4, at 185; M. STROGOVICH, MATERIAL'NAJA ISTINA I SUDEBnye DOKAZATEL'STVA V SOVETSKOM UGOVnom PROTSESSE [MATERIAL TRUTH AND JUDICIAL EVIDENCE IN SOVIET CRIMINAL PROCEDURE] 203 (1955); M. STROGOVICH, *supra* note 7, at 235-36. Agreeing with Strogovich on this point are V. KAMINSKAJA, *supra* note 6, at 148; V. LUKASHEVICH, *supra* note 30, at 56.

at the beginning of the trial, then someone must presume him innocent. And who could that someone be? Not the judge, for he has no basis in fact for presuming one way or the other. Not the procurator, for if he presumed the accused innocent, he would dismiss the indictment. Because no official of the system presumes him innocent, it is wrong to say that a man indicted is presumed to be innocent.<sup>52</sup> The challenge is a fair one. If the presumption of innocence is like every other presumption, then one should be able to say that either the trier-of-fact or the procurator presumes the defendant to be innocent. And that is not so.

Strogovich retorts to the challenge with the flair of a practitioner of the common law. It is the law, he says, that presumes the defendant to be innocent.<sup>53</sup> Therefore, the presumption of innocence does indeed survive the procurator's determination of the defendant's guilt. This personification of the law has persuaded no one. To say that the law or the legal system presumes the defendant innocent is to indulge in fiction; it is to free the presumption of innocence from the moorings of experience and to convert it into an exhortation to the independence of trial judges. Only those sharing in these purposes—as do lawyers in the common law tradition—would be willing to accept Strogovich's fictional resolution of the perennial challenge.<sup>54</sup> Soviet scholars promoting the role of the procuracy obviously see little merit in personifying the law to make sense of a presumption of innocence at trial.

For most of the forties and fifties, the maneuvering for and against the procuracy's influence remained dressed in these doctrinal gambits on the presumption of innocence. The debate accelerated as the drafting of the Fundamental Principles in 1958 grew near; and in the closing months a few authors disclosed their concern for the institutional issues at stake. For example, one author argued that rejection of the presumption of innocence would "diminish the role and significance of the Soviet court as the agency of government rendering the definitive evaluation of the accused's conduct."<sup>55</sup> Another, although generally supportive of the presumption of innocence, expressed his concern that the presumption could

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<sup>52</sup> See note 30 *supra*. Strogovich summarizes the argument in M. STROGOVICH, *supra* note 4, at 185.

<sup>53</sup> M. STROGOVICH, *supra* note 4, at 185. M. STROGOVICH, *supra* note 51, at 203.

<sup>54</sup> Those agreeing with the 1958 rejection of the phrase "presumption of innocence" have stressed the "declaratory" nature of the doctrine. See, e.g., Golunskij, *supra* note 28, at 55.

<sup>55</sup> Sukhodrev, *K projektu Osnov ugovnogo sudoproizvodstva SSR i sojuznykh respublik* [Concerning the Drafting of the Fundamental Principles of the Soviet and Union Republics], 1957 SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 89 (No. 6).

be used to undercut the procuracy's sense of responsibility in deciding which cases should be brought to trial. What would be the point, he asks, of the investigator and procurator exercising caution in deciding whether to indict if "in any event the accused would be deemed innocent by force of law?"<sup>56</sup> Thus an author who endorses the language of the presumption of innocence is unwilling to accept its potential impact on the procuracy's influence in the process leading to conviction.

The 1958 Fundamental Principles of Criminal Procedure emerged as a compromise between the contending camps.<sup>57</sup> The draftsmen rejected the presumption of innocence, but they included several provisions that partially fulfill the conflicting exhortative functions of the presumption. Article 14 admonishes all participants of the process—investigator, procurator and court—to use every legal means at their disposal to investigate both sides of every issue. Article 7 affirms the centrality of the courts in the process of adjudicating guilt. It provides: "No one may be declared guilty of a crime and undergo criminal punishment except by judgment of a court." Article 301 of the RSFSR Code of Criminal Procedure, enacted in 1960 on the basis of the Fundamental Principles, goes even further in affirming the autonomy of judicial proceedings: "The court may base its judgment solely on evidence considered at the judicial session." If liberally interpreted, this provision might be read as a stand against the influence of the procuracy in the evaluation of evidence at trial. The opinion of the procurator on the defendant's guilt is not evidence considered at trial, and thus it should have no bearing on the outcome of the case.

It might appear that Strogovich's camp won a slight victory in the 1958 legislative reform. Yet no one ever seriously contended that any institution but the courts should have the power formally to declare men guilty of crime; and those promoting the procuracy have never urged that the procuracy's opinion should actually count as evidence. The struggle is one for influence in determining guilt, not in drawing the formal contours of the concept of evidence. In the former arena, it appears that the procuracy has gained ground since 1958. According to a 1960 textbook on criminal procedure, the investigator should decide whether particular facts or defenses are relevant to the case. He has the power to rule out particular avenues of inquiry; but he must support his decision with reasons—presumably to enable the trial judge to decide whether to "reverse"

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<sup>56</sup> Baranov, *supra* note 8, at 10.

<sup>57</sup> For an English translation of the 1958 Fundamental Principles of Criminal Procedure see 3 *LAW IN EASTERN EUROPE* 113-51. (Z. Szirmai ed. 1959).

the investigator's opinion.<sup>58</sup> With respect to these rulings, the investigator's relation to the trial judge is that of a judge to his appellate superior—precisely as Poljanskij would have it.

In 1964, one of the regional procurators went so far as to claim that the function of the procuracy is to determine guilt or innocence before deciding to indict, and that the function of the court is merely to decide the degree of guilt and to prescribe punishment.<sup>59</sup> This extreme claim has evoked vigorous replies, from both Strogovich and Justice Gorkin of the Supreme Court.<sup>60</sup> Both jurists have argued anew that the courts alone decide the question of guilt; and to bolster their positions, both have invoked variants of the presumption of innocence.<sup>61</sup> The debate rages on.

### V. CONCLUSION

The institutional conflict is clear: the Soviet procuracy poses a threat to the autonomy of the Soviet courts. The threat is not one of usurping the courts' political independence, but of displacing judicial evaluation of fact in routine apolitical cases. In response to this threat, Strogovich and his supporters have deployed the presumption of innocence precisely as it is deployed in common law courts: as an exhortation to the judicial trier-of-fact to proceed independently of prosecutorial opinion. To those who think of law as rules of decision, this effort to protect judicial autonomy may seem curious. Soviet jurists foster judicial independence by relying not on rules, but on rhetoric. They support the status of the courts not by thinking of the presumption of innocence as a rule of evidence or procedure, but as a device for counteracting the impact of the pre-trial determination of guilt. By cultivating the rhetoric of the presumption of innocence, by pretending a presumption of innocence exists when experience suggests the contrary, Soviet jurists have struggled to render the Soviet judicial process independent of administrative influence. The manifestation of the struggle is an academic debate on the nature and scope of the presumption of innocence; the issue underlying the debate is the status and autonomy of the Soviet criminal court.

<sup>58</sup> I. CHUTKIN, L. MARIUPOL'SKIJ, I. SHEREMET'EV, *supra* note 10.

<sup>59</sup> See Filiminov, *supra* note 11. This article was a response to Strogovich, *Sudebnaja oshibka* [Judicial Error], Literaturnaja Gazeta, May 23, 1964, at 5.

<sup>60</sup> See Gorkin, *supra* note 11; Strogovich, *Otvet prokuroru* [Answer to the Procurator], Literaturnaja Gazeta, Aug. 18, 1964, at 2.

<sup>61</sup> The phrase used by Strogovich is: "*Nikto ne mozhet byt' priznan vinovnym . . . inache kak po prigovoru suda*" ["No one may be adjudged guilty . . . except on the basis of a judgment of a court"]. Strogovich, *Sudebnaja oshibka* [Judicial Error], Literaturnaja Gazeta, May 23, 1964, at 5. This is a weak formulation of the presumption of innocence which Strogovich himself criticized in M. STROGOVICH, *supra* note 7, at 238. Yet it was this phrase that triggered Filiminov's attack. See Filiminov, *supra* note 11.

## APPENDIX

The following is a substantially complete bibliography of the post-war Soviet literature on the presumption of innocence.

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Gorkin, *O sotsialisticheskom pravosudii* [Socialist Justice], Izvestie, Dec. 2, 1964, at 3.

Lukashevich, *Printsip prezumptsii (predpolozhenija) nevinovnosti obvinjaemogo—garantija pravosudija v sovetskom ugolovnom protsesse* [The Principle of the Presumption of the Innocence of the Accused—a Guarantee of Justice in Soviet Criminal Procedure], 1954 VESTNIK LENINGRADSKOGO UNIVERSITETA [LENINGRAD UNIVERSITY HERALD] 81 (No. 9).

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