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PROSECUTORS, PREJUDICES AND JUSTICE: OBSERVATIONS ON PRESUMING INNOCENCE IN POPULAR CULTURE AND LAW

Christine Alice Corcos

THE rhetoric surrounding the proposed trials of suspected al-Qaeda members for the September 11, 2001 atrocities, as well as the barely suppressed anger of congressional representatives over former Enron executive Kenneth Lay's refusal to testify before them, should not surprise anyone who has read Scott Turow's *Presumed Innocent*, or any of the other books and films that question the presumption of innocence. Indeed, as Turow points out, the presumption of innocence could be considered one of the American legal system's dirtiest little secrets: try as we might, we really have a great deal of trouble accepting that those who are accused might not be guilty, and that the burden of proof lies not with the defendant to exonerate himself but with the prosecution to convict him. That we continue to try is to our credit, as well as absolutely necessary to our legal system, but given the rhetoric of the past eighteen months, it has become difficult. When the Attorney General of the United States is quoted as suggesting that using secret military tribunals to try suspected al-Qaeda members for terrorism is justified because "common knowledge" labels them terrorists, when persons who look as though they are of Arab descent are judged purely on that basis, and when elected representatives and civic leaders of all political persuasions tell us that everyone should stand behind President Bush's attempts to curtail civil liberties because otherwise we are not patriotic citizens, we must remind ourselves that these are not unusual reactions. Indeed they are the reactions expected of a society under

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The American people have had their sense of security shattered. They want it back and the administration is determined to give it to them. "We are standing firm in our commitment to protect American lives," the attorney general said determinedly on Tuesday.

Who wouldn't applaud?

But would the applause still be there if people were told the price of this commitment was the 6th Amendment, with its provisions for such things as the defendant's right to "a speedy and public trial, by an impartial jury" and "to be confronted with the witnesses against him"?

(Ah, but those rights apply only to American citizens, some tribunal supporters argue. Not so, say the experts. The wording of the Bill of Rights speaks of "the people," "the accused" and "any person," without reference to citizenship. And, says Susan Gzesh, director of the human-rights program at the University of Chicago and a lecturer in its law school, the Supreme Court has consistently held that those rights are enjoyed by everyone in the country,

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physical and psychological attack. They represent a natural human reaction: we do not find the presumption of innocence easy or natural to adopt, particularly in times of crisis. It runs counter to our intuition and makes us uncomfortable. If the individual on trial might be innocent, then the guilty person is still "out there" and leads to the conclusion that the legal system is not infallible. Therefore, an innocent person could be accused and convicted. If the innocent can be convicted and the guilty go free, where is justice? And of what use is the legal system? Since, as Alexis de Tocqueville pointed out nearly two hundred years ago, Americans worship law so questioning the legal system would require questioning our most fundamental beliefs. Therefore, we have the uncomfortable feeling that the persons on trial are probably guilty.

Examples of this attitude abound in the media and popular culture. Former Enron CEO Kenneth Lay decided (wisely) to invoke his Fifth Amendment right not to testify before a congressional subcommittee regarding the company's spectacular collapse, although just a few weeks ago he was still indicating that he planned to appear without a grant of immunity. Why the change of heart? He has decided that the event would have taken on a prosecutorial tone. Any lawyer could have told him that—his lawyer probably did.

Served with a subpoena, Lay did appear before the Senate, but only to read a prepared statement invoking his rights and to listen to various Senators acknowledge his right to do so but berate him for doing it. Consequently, he looks even more guilty, though of what we still do not know. Our instinctive reaction to the taking of the Fifth is that the individual who is exercising his rights under that Amendment must have something to hide.

It should not surprise us that so many people in responsible positions seem to overlook the presumption of innocence, or that so many attorneys responsible for the defense of those accused feel compelled to mention it. Fifteen years ago Scott Turow wove an entire novel around the notion that the presumption of innocence is a real "legal fiction." Today's high profile accusations and frantic media discussion of legal principles warrant a return visit to Turow's novel and other popular culture representations of the workings of the presumption of innocence. The presumption of innocence as a legal fiction may seem shocking, but artists of all kinds have

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2. See generally Scott Turow, Presumed Innocent (1987).
always understood it, and have explained it to us repeatedly.\(^6\) They also force us to admit that maintaining the presumption of innocence is a duty that we shirk too often—precisely because it is so difficult. It is also a duty that once shirked has consequences, but those consequences do not follow immediately. They come years or decades later, and they are difficult to trace back to an initial lack of moral courage, assuming one exists. In the last thirty years, the presumption of innocence, as demonstrated by novelists and scriptwriters in literature, film, and television, has given way to a presumption of guilt once an accusation is made.\(^7\) Society finds it easy, even comforting, to abandon that presumption of innocence and to trust those who bring the accusations, rather than ourselves to question their motives or their ability to locate not the most convenient defendant, but the defendant who is most guilty.\(^8\) Writers remind us that those who administer the legal system can twist meaning to suit the fashions of the day and deliver any of us into the tender mercies of our peers, who may be more eager to presume guilt, to achieve resolution of social crisis, than to presume innocence and continue the investigation.\(^9\)

Naturally, fact-finders, whether they be judge or jury, may not uniformly ignore their duty to presume innocence and to listen to all the evidence before making up their minds. Further, innocent people are not routinely convicted, along with the guilty. Nor should the presumption of innocence require the acquittal of the guilty. But the presumption of innocence is both the most fundamental and the most difficult presumption to adopt.\(^10\) When our nation’s leaders, engaged in protecting us from imminent danger by deliberate or inadvertent use of rhetoric that triggered certain assumptions, we tended to pay attention. After all, these are our nation’s leaders. And more to the point, a lot of them look like us, and in a time of national crisis our natural tendency is to look to them for reassurance, for support, and for guidance, especially when those accused of attacking us seem so alien to many of us.

Along with the presumption of innocence, we tend to subscribe to other legal fictions, such as the one that claims that courts uncover truth while they are dispensing justice. Again, artists of all kinds, but particularly writers and filmmakers, know very well that courts do not uncover truth; they settle disputes, at least temporarily. Or rather, they put forth a kind of truth, that allows us to close

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7. Consider the speech in REVERSAL OF FORTUNE (Warner Brothers 1990), in which Alan Dershowitz (Ron Silver) assures a reluctant student that the only friend an accused has is his lawyer. “Even the mailman looks at you funny.”
8. In Saul Levitt’s THE ANDERSONVILLE TRIAL (SAUL LEVITT, THE ANDERSONVILLE TRIAL: A PLAY IN TWO ACTS (1960)), in Abby Mann’s Judgment at Nuremberg (ABBY MANN, JUDGMENT AT NUREMBERG (1961)), in the dramatization of Alan Dershowitz’s account of the Claus von Bulow trial REVERSAL OF FORTUNE (ALAN DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE (1986); REVERSAL OF FORTUNE (Warner Brothers 1990)), and most directly in Scott Turow’s Presumed Innocent, we are forced to consider that the accused may in fact be innocent, or at least not more guilty than others who are not on trial, and may have been convicted as much because (s)he was accused as much because there was any credible evidence against him or her.
9. Id.
a particular judicial chapter and move on. But for the real truth of events, we must turn to other interpreters: writers, poets, painters, historians, anthropologists, who have their own biases, but who habitually examine the human heart more extensively than do the functionaries of the legal system.

Among the most prominent examples of the questionability of the presumption of innocence and of the role of the courts in finding truth as well as dispensing justice is Scott Turow’s novel, Presumed Innocent, which was turned into a major film starring Harrison Ford. Turow was a prosecutor for several years before going into private practice, so his picture of the workings of the legal system is that much more disturbing.

The ironic title of the film Presumed Innocent reminds us that most people do not in fact presume that a defendant, in this case the assistant district attorney of a fictional county, is innocent until proven guilty. Presumed Innocent’s protagonist, prosecutor Rusty Sabich, discovers this irony only after he is accused—a discovery that brings his beliefs about his life’s work and his own values into question. Many lawyers in the novel, most of them prosecutors, force Rusty into this questioning. By using so many members of Rusty’s own profession to play fundamental roles, author Scott Turow forces us to confront our own beliefs about the presumption of innocence, both in fiction and in real life. In addition, he makes us aware of the other presumptions on which lawyers and non-lawyers alike base and sometimes prejudge guilt and innocence.

In Scott Turow’s world, prosecutors are the individuals least likely to presume anyone innocent as a matter of law or as a matter of fact—even though they are required by the canons of legal ethics not to prosecute anyone they believe might not in fact be guilty. Indeed, Turow’s novel sketches for us the archetypal prosecutors who represent the best and worst of both real and fictional district attorneys (DAs), all of whom struggle with the question to some degree. In each archetype there is enough truth to cause some real concern about whether justice can be done, and seen to be done. In addition, Presumed Innocent presents us with a world in which many prosecutors intentionally or unintentionally, backed by the force of the state, destroy lives. They are not the heroes they should be; the heroes that Rusty thought he recognized when he first became a prosecutor. Only by leaving the world of the prosecutor does he fully discover this, although at the beginning of the novel he has his suspicions.

If we compare Turow’s characters to prosecutors we hear and see in daily life, then the concern whether justice can be done deepens. Thus, Presumed Innocent continues to be relevant in any examination of both real and media justice. The film, of course, compresses many of Turow’s complicated written images into more easily digestible visual chunks, but I would argue that it does not lessen the novel’s impact. Fifteen years after its publication, Presumed Innocent remains an

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13. This rule is codified in different places in various state codes, but is equivalent to the Model Rules of Prof’l Conduct R. 3.8 (2001). See, e.g., Ind. Code Ann. § 3.8 (West 2001); La. St. Bar, art. XVI, R. 3.8 (2001).
indictment of the legal system and suggests that one of our most honored principles—the presumption of innocence—is honored more in the breach than in the observance.

Using prosecutors in most of the important roles in the story allows Turow to explore all the contradictions inherent in that particular profession. Turow’s prosecutors are all card-carrying members of the Popular Culture Prosecutors’ Bar Association (PCPBA). In Presumed Innocent, we see familiar images in the PCPBA, members which include the cynical and crooked district attorney, often in cahoots with the presiding judge, prepared to railroad an innocent defendant for the sake of his career. Another image is the underpaid and overworked prosecutor who is out to protect society from serial killers and uncaring corporate polluters.

Consider two of the first prosecutors we meet in the novel, who happen to be Rusty’s early heroes: John White and Ned Halsey. Speaking of these two characters, Rusty said:

John White brought me up to watch the first jury trial I’d ever seen. Ned Halsey was making the opening statement for the state, and as he gestured across the courtroom, John, in his generous, avuncular way ... whispered my initial lesson.... If you don’t have the courage to point, ... you can’t expect them to have the courage to convict.14

In Turow’s world, the prosecutor may be portrayed (and understood) as overly ambitious, uninterested in the protection of individual rights,15 or interested only in protecting the status quo. Since the novel is written in the first person, we are meant to assume (or presume) that the opinions are Rusty’s, but that is what is important. He is a thirteen-year veteran of the DA’s office who has acquired some cynicism along the way—cynicism that sometimes gets in the way of our objective evaluation of his statements. But we can see his disillusionment with the system he has served.

Here is the description of Rusty’s nemesis Nico Della Guardia, who eventually prosecutes him for the murder of Carolyn Pohlhemous:

I met Nico a dozen years ago, on my first day as a deputy P.A., when we were assigned to share an office. Eleven years later I was the chief deputy and he was head of the Homicide Section and I fired him. By then he had begun overtly attempting to run Raymond out of office. There was a black physician, an abortionist, whom Nico wanted to prosecute for murder. His position made no sense as a matter of law, but it excited the passions of various interest groups whose support he sought. Nico planted news stories about his disagreements with Raymond; he made jury arguments—for which abundant press coverage always was arranged—that were little more than campaign speeches.

...Nico’s most arresting aspect has always been the brassy and indiscriminate sincerity he is displaying here, reciting the elements of his platform while conversing, in the midst of a funeral, with his opponent’s chief assistant.16

14. Turow, supra note 2, at 3.
15. Id.
16. Id. at 13.
Rusty's description of Della Guardia's chief henchman Tommy Molto is equally unflattering, especially when you consider that Molto is a former seminarian.

A driven personality. The kind to stay up all night working on a brief, to go three months without taking off a weekend. A capable attorney, but he is burdened by a zealot's poverty of judgment. As a prosecutor, he always seemed to me to be trying to make facts rather than to understand them. He burns at too high a temperature to worthwhile much before a jury....

Molto is the DA in charge of creating the case against Rusty. He is the kind of prosecutor who frightens us, the kind some people accused Ken Starr of being, the kind Starr was portrayed as by some of the media—single-minded, on a crusade, ignoring all exculpatory evidence and blind to the fact that accusations, once made, are lasting.

When Rusty discusses Della Guardia's presence at Carolyn's funeral, as well as the upcoming election, with his boss Raymond Horgan, we see the kind of political pressure that remains undiscussed, but plays a part in prosecutions and sometimes results in scapegoating.

I inquire about the meeting with the mayor, and Horgan rolls his eyes. "He wanted to give me some advice, just in confidence, me and him, because he doesn't want to appear to be taking sides. He thinks it would help my chances a lot if we arrested Carolyn's murderer before Election Day."

The political payoff associated with quick resolution of high profile crimes meshes with police concerns about "doing one's job" and leads inevitably, and sometimes intentionally, to the trial and conviction of innocent people. We know our legal system is not perfect, and we assume this is part of any system created by human beings. As part of the profession, lawyers learn to accept its faults, but they also may become complacent, or willfully blind to the excesses of the moral pigmies among them.

As Rusty tells us after an encounter with the medical examiner who has leaked information to Tommy Molto: "I sit in my office and brood. Oh, how fucking clever. Everything we asked for. And nothing more. Give the results—but not the opinion. Call when the forensic chemist reports, but don't mention what it says. Let us run as long as possible in the wrong direction. And in the meantime, leak every goddamn thing you know to Molto.... God, I think politics is dirty. And the police department is dirtier. The Medici did not live in a world fuller of intrigue.... Every one ... needs a break. And you give it. In a big-city police department ... there is no such thing as playing by the book. The book got trashed many years ago." Apparently many of Rusty's ideals were also trashed. But as Turow reminds us, we are willing to accept the faults of the system as long as we are not its victims. We

17. Id. at 136-37.
18. Id. at 16.
19. Id. at 97.
may make presumptions about the number of innocent people likely to be convicted if particular kinds of evidence are admitted, or excluded. We may allow jurors to continue to believe, and may believe ourselves, for example, that eyewitness testimony is more credible than other kinds, simply because it is given by a human being.\textsuperscript{20} We are not Rusty Sabich, who could so easily have been convicted, and we are not Juan Melendez, the Florida man who spent seventeen years on death row for a murder to which another man had already confessed repeatedly.\textsuperscript{21}

Though Rusty has lost a good deal of his professional ambition, Horgan has not, although he is also cynical and tired. Rusty describes Horgan:

I look at the worn face of Raymond Horgan, my old idol, my leader.... Twelve years after he got started talking about revolutionizing the idea of law enforcement, and a year too late for the best interests of us both, Raymond Horgan has finally pulled the plug. It is now all someone else's problem. And to the little incubus that argues that principles and issues are involved, there is, after twelve years, an exhausted man's reply. Ideas and principles are not foremost here. Not when you do not have the jails to hold the crooks you catch, or enough courtrooms to try them; not when the judge who hears the case is too often some hack who went to night law school because his brother already had filled the one slot available in their father's insurance agency, and who achieved his appointment by virtue of thirty years' loyal precinct work. In the administration of Nico Della Guardia there will be the same imperatives, no matter what he's saying on his TV spots: too many crimes ... too few lawyers, too many calls for political favors, too much misery, and too much evil that will keep happening no matter what the ideals and principles of the prosecuting attorney. He can have his turn. Raymond's ease at the abyss becomes my own.

"What the fuck," I say.

"Right," says Raymond after he gets done laughing.\textsuperscript{22}

In the novel, Raymond Horgan is a man who had ideals, like Rusty, but who has gotten tired of the bureaucracy and the no-win situations. In the film he is much more of a one dimensional character, interested in his re-election, and therefore in catching someone—anyone—for Carolyn’s murder, and eventually distancing himself from the crime. Horgan will not stand with Rusty once the accusations begin. In the film Rusty has a good deal of trouble understanding Horgan's betrayal; indeed, he seems just a little too stupid or naive to have been such a success as an assistant district attorney (ADA).

Whatever their role in the drama, prosecuting attorneys are often unsavory characters, who intentionally subvert the system, or obtain the "correct" (i.e. just) result only through accident or the intervention of some outside agency. Another example of the politically ambitious attorney is Robert Vaughn's character in the

\textsuperscript{20} On the unreliability of eyewitness testimony, see generally Elizabeth F. Loftus & Hunter G. Hoffman, Misinformation and Memories: The Creation of New Memory, 118 J. EXPERIMENTAL PSYCHOL. GEN. 100 (1989); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996).


\textsuperscript{22} Turow, supra note 2, at 100-01.
film *Bullitt*, who threatens the title character if he does not produce the DA’s star witness immediately, regardless of the physical threats that have been made against the man’s safety. Or consider Tom Krasny, the prosecutor in *Jagged Edge*, who deliberately manufactures evidence to convict an innocent man, and gets away with it until defense attorney Teddi Barnes reveals the truth in open court. A 1986 *National Law Journal* poll indicates that most Americans believe that “citizens’ groups” contribute more than lawyers or judges to the protections of individual rights (42% to 11% and 11%). However, in reply to the question “which most closely represents your view of the most positive aspect of lawyers?” 20% responded “They protect the rights of citizens” and 6% said “They are active in bringing about social change.” It may also be that most Americans responding to the poll did not realize, or did not remember, that “citizens’ groups” include such organizations as the American Civil Liberties Union and the Sierra Club, in whose activities many lawyers participate extensively. Clearly, the American public also has presumptions about lawyers in general. Americans’ presumptions about prosecutors, as well as other lawyers, tend to parallel Rusty’s views. A 1997 Gallup Poll revealed that respondents believe only car salesmen have fewer ethics than lawyers. The vitriol launched at lawyers is thousands of years old of course, but only in the last few years have we attempted to do anything about it, which has led to the formation of a new association—the American Lawyers Public Image Association. That the public also assumes many police are corrupt is becoming more and more evident, and the taint now extends to the Federal Bureau of Investigations (FBI), which was long considered a bastion of fairness, at least by outsiders. For example, a 2000 Gallup Poll revealed that 40% of Americans believed the FBI deliberately withheld evidence from Timothy McVeigh’s defense team.

Equally disturbing is the image that prosecutors and police have in “made for television” dramas that are based on real crimes and trials. In many cases their behavior clearly reinforces the “presumed guilty” attitude, even though it is often disguised, perhaps as a result of an imperfectly understood agenda that some critics identify. The docudrama *Cruel Doubt*, based on a murder and attempted murder

27. See generally American Lawyers Public Image Association, at http://www.alpia.org/home.htm (last visited Nov. 12, 2002).
30. See, e.g., *MYTHOLOGIES OF VIOLENCE IN POSTMODERN MEDIA* (Christopher Sharrett ed., 1999).
in a small North Carolina town, has several scenes in which the surviving victim and mother, played by Blythe Danner, angrily accuses the police of trying to frame her son for the murder of her second husband. Referring to their incompetence, she charges, "the police could accuse an innocent person, couldn't they?" The chief investigator responds in another scene by refusing to let her know the process of the investigation, since she has (wisely) hired an attorney for her son, Christopher, the chief suspect. "We can't work out a deal with Chris," says the police officer, "once the lawyers are involved." Since we eventually learn that Chris is guilty of conspiracy in the murder, we of course are meant to sympathize with the overworked, unjustly accused police and prosecutor. But in the less well known real life Michelle Bosko murder case, eight men were accused, and several convicted, even though one man who confessed alleged he was the only perpetrator, and he alone provided accurate details of the crime in his confession.\(^{32}\) The others are serving life sentences without the possibility of parole based only on their confessions, which they, their lawyers, and a recent documentary allege were coerced after hours of police interrogation.

*Presumed Innocent* also illustrates women prosecutor members of the PCPBA as DAs and as victims. In both cases they exhibit the kind of negative image women lawyers often have in popular culture.\(^{33}\) "[W]omen lawyers do not find the truth, they obfuscate it; they do not restore order, they destroy it... Hollywood’s female lawyers are not in court when justice is restored, and they do not act as lawyers."\(^{34}\) Female attorneys are presumed incompetent a great deal of the time.\(^{35}\) The number of female ADAs and public defenders in movies and on television is amazing, although it is one of the few accurate reflections of the legal system.\(^{36}\)

Lydia MacDougall, called "Mac," who is confined to a wheelchair after a car accident that killed her first husband, represents the best that Rusty has seen in the prosecutors' bar association. He is not cynical about her, but he is cynical about her probable success in politics.

In the general run of things, I would say Mac is probably the finest lawyer in this office, organized, shrewd, gifted in court. Over the years she has learned to use the chair to advantage before a jury.... As the jurors get a couple of days to think about what it would be like to have their legs flapping around, loose as flags, as they listen to this woman, handsome, forceful, good-humored, absorb the wedding ring, the casual


\(^{33}\) I am not discussing here whether Turow is really misogynistic, as he has been accused of being. I am simply interested in whether his images track popular culture images.


mention of her baby, observe the fact that she is — impossibly — normal, they are full of admiration and, as we all should be, hope. Next September, Mac will become a judge. She already has party slating and will run in the primary unopposed. The general election will be an automatic. There are not, apparently, a lot of people who feel they can beat a lawyer with support from women’s groups, the handicapped, law-and-order types, and the city’s three major bar associations. 37

Notice that he is attributing her probable success not to her abilities, but to non-objective factors: her sex, her physical disability, and her job. Rusty is not sanguine about the likely quality of most judges. He seems to believe that if they are good, it is accidental. Of course these judges are elected; we don’t know what he might think of an appointed state bench.

Carolyn Pohlhemous was, in the words of her boss, Raymond Horgan, “a smart, sexy gal. A helluva lawyer.” 38 Horgan links both her abilities as a prosecutor and her victim status to her sexual appeal. Indeed, her sexual activities are what get her killed, just as they are what give her the opportunities to pursue a career she loves. Just like Mac, she uses sex to get attention for her work, although not quite in the same way. Mac’s use of her gender is clearly more acceptable than is Carolyn’s. Note that Carolyn is also a mother in the novel; the film drops all mention of her teenaged son. With neither of these images does Turow reassure us that prosecutors are as pure as needed to uphold the ideals of the legal system, even if women DAs have understandable motivations to use whatever “edge” they might have in order to advance their careers.

As Rusty notes, the stereotyping that Mac and Carolyn have used to advance their careers also exists with regard to assumptions about defendants. These assumptions victimize him; they are one of the reasons he becomes the accused in the Pohlhemous case rather than the prosecutor. Why does the new prosecutor, Tommy Molto, point the finger at Rusty originally? For the same reasons that Rusty’s good friend, Detective Lipranzer suspects him. Molto knows the profile of individuals likely to commit an intimate murder, as is the case in the Pohlhemous crime. Rusty had a sexual relationship with the victim. The National Institute of Justice Crime Survey’s statistics for 1987-1991 indicate that 91% of women attacked or killed during that period were assaulted by someone they knew. Rusty admits as much when talking with Carolyn’s ex-husband, although it’s because he’s considering the latter as a potential suspect.

Murders aren’t usually mysterious. In this city these days, half of them are gang-related. In almost all the other cases, the victim and the killer knew each other well. About half of them are broken love affairs; marriage on the rocks, unhappy lovers, that kind of thing. Usually there’s been some kind of breakup in the last six months. Generally, the motivation is pretty obvious. 39

In this particular case, the murderer doesn’t quite fit the profile.

37. Turow, supra note 2, at 52.
38. Id. at 8.
39. Id. at 69.
Lipranzer's reasons for suspecting Sabich are more complicated. He is, of course, familiar with the profile. But he also has trouble reconciling the notion of Rusty as a defendant, with a perfect right to exercise his right to silence because of his prior experience of having Rusty as a colleague and friend who confided not only information, but prosecutorial strategy, to him. With Lipranzer's reaction, Turow brings into the focus another aspect of the difficulty of accepting the presumption of innocence: the right of the accused to refuse to be a witness against himself.

The behavior of those accused exercising their right to silence makes them "look guilty." Further, Rusty's activities, both before and after the dismissal of charges against him, lead Lipranzer to suspect that Rusty might in fact be guilty. Rusty is aware of Lipranzer's attitude. Here is his evaluation of Lipranzer's detective abilities:

I first ran across Lip seven or eight years ago.... We have done a dozen cases since, but there are still ways in which I regard him as a mystery, even a danger.... On paper, his job is to act as police liaison, coordinating homicide investigations of special interest to our office. In practice, he is as solitary as a shooting star.... Lipranzer is a scholar of the underlife.40

Lipranzer bases his suspicion on Rusty's actions: that he had a long term relationship with the victim, which ended badly; that he seems to have wanted Lipranzer to delay or forget about crucial evidence; and, that when Lipranzer gives him the evidence at the end of the film, Rusty destroys it. Readers and viewers know that Rusty is not guilty, but only because they are privy to other scenes involving Rusty when Lipranzer is not present. In legal terms, this information is equivalent to hearsay, and is either inadmissible, or if Rusty were to report it, not persuasive. Rusty is not inclined to divulge the content of those scenes to Lipranzer. Thus, Lipranzer's suspicions seem justified where they are based, quite reasonably, on his observations of Rusty's behavior. Should such suspicions, unrebutted for lack of admissible or persuasive evidence, be enough to convict Rusty of murder? Lipranzer is an intelligent and trained investigator with lengthy experience in evaluating suspects' activities. Though he is wrong about Rusty, a jury of Lipranzers privy to Rusty's activities might well have convicted him.

Further, Rusty is a loner and alone. He is apparently the only one of the attorneys in the prosecutors' office who still supports Raymond Horgan whole-heartedly and does not seem to understand the depth of Horgan's ambition and impending betrayal. He is the only major character who has no place in the new administration: Molto will replace him; Mac will be a judge; Horgan will move on in politics; and, Carolyn, of course, is dead. By focusing on this isolation, Turow reinforces the notion that the defendant stands solitary and almost powerless against the machinery of government. Rusty's only remaining friend is a rogue cop. His attorney, Sandy Stern, represents wealthy clients accused of unspeakable crimes whom no other attorney will defend.41

40. Id. at 21.
41. Stern plays a much bigger role in the book than in the film in terms of his law practice, since he and Sabich tangle over a criminal case at one point, and he represents the woman in the child abuse...
Turow’s view that the defendant is indeed alone, fighting the organized and sometimes evil system, is the focus of other plays and films. The notion that the defendant is alone against the powerful machinery that a government controlled process can bring against him is clearly articulated in the film *Reversal of Fortune*, based on the book by Alan Dershowitz, the lead attorney in the appellate proceeding.\(^{42}\) *Reversal of Fortune*, which is perhaps the only major film to deal with the appellate process rather than with a trial, sounds the theme that a skewed adversarial system, biased against the accused, leaves that individual with no one courageous enough to speak out in his support or defense. As Ron Silver, who plays Dershowitz, tells a student in one scene, “Imagine that you are a mother accused of child abuse. There’s no one you can trust, no one on your side. Even the mailman looks at you funny. No one is your friend, except your lawyer.”\(^{43}\)

Similarly, in today’s political climate, those concerned about the erosion of civil liberties in general, or the fair treatment of Camp X-Ray prisoners, or John Walker Lindh in particular, run the risk of being labeled as unpatriotic, un-American, or at best people who “just don’t get it” and at worst “terrorist sympathizers.” Attorney General Ashcroft said:

> To those who pit Americans against immigrants, citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: “Your tactics only aid terrorists for they erode our national unity and diminish our resolve... They give ammunition to America’s enemies and pause to America’s friends.”\(^{44}\)

Is he suggesting that those who criticize the government commit treason? He does not say so. But such comments make it difficult for lawyers and judges to remind potential jurors that there is a presumption of innocence. Further complicating the issue is the recent statement from the Pentagon that even if acquitted, detainees at Camp X-Ray might not be freed or automatically deported. William J. Haynes II, the Pentagon’s top lawyer, called the prisoners “dangerous people” and said “If we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge but may not necessarily automatically be released.”\(^{45}\)

The themes Turow explores in *Presumed Innocent* appear in earlier, equally well-known works, demonstrate that concerns about the presumption of innocence have cut through many fictional representations of the law. They have influenced and continue to influence popular culture notions of the possibility of justice as well. In

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42. ALAN DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE (1986); REVERSAL OF FORTUNE (Warner Brothers 1990).

43. REVERSAL OF FORTUNE (Warner Brothers 1990).


the Saul Levitt play *The Andersonville Trial*, the defendant Captain Wirz is on trial for war crimes committed against Union prisoners of war (POWs) at the Confederate prison camp he supervised during the war between the states. Levitt makes it clear that Wirz is being used as a scapegoat for all the Confederate officers who outrank him whom the Johnson government does not want to try, and Wirz will not be acquitted. Indeed, the real Captain Wirz was the only Confederate officer tried, convicted, and executed for war crimes after 1865. The Levitt play emphasizes the “gamesmanship” going on during the trial, particularly with respect to the evidentiary rules and the defendant’s right to a civilian attorney. As Wirz says to his lawyer during one scene, long before the final decision of the tribunal, “You are all playing games with the law, and I am to die.” It is clear to him, as it is clear to us, that someone must pay for the deaths at Andersonville, and that it does not much matter whom it is, as long as it is not someone who might still have influence in a post-Civil War South. The Union must punish some culprits, but avoid making martyrs. Wirz was not, and is not, important enough to be a martyr. And his unimportance stems, at least partly, from his “alien nature”: he was not a native-born American, and therefore he was already an “outsider.”

Scapegoating, the alien nature of the proceeding, and martyrdom are all themes of equal weight in *Judgment at Nuremberg*. Note the scene in which the young defense attorney, Hans Rolfe, attempts to convince his client, Ernst Janning, to fight the charges against him. “Don’t take the accusations lying down,” says Rolfe. “Don’t honor these judges or this tribunal; don’t take their assurances of a fair trial at face value. There will be no fair trial for you in any case, so take this opportunity to deliver your message. Think about the innocent dead at Hiroshima and Nagasaki. Is that their morality?” But his pleas do not move Janning, who is determined to pay for the crime of failing to deliver justice, of acquiescing to the miscarriages of justice which the Third Reich represents. After the tribunal reaches its decision, and condemns all the defendants to prison, Rolfe visits the chief judge, played by Spencer Tracy (that casting sends messages of its own). He proposes a small wager with the American judge: Within several years, he says, every one of the defendants will be out of jail. Tracy does not accept, because he knows it is a sucker bet. Rolfe is right. Neither the Allies nor the Germans have any appetite for the continued martyrdom of these judges. It is too easy to imagine oneself in their place. Consider also, says one commentator, that there were members among the Third Reich judiciary who were never tried, and many became judges under the new regime. Why? Because the new German regime, under a new legal system, had need of trained judges.

Indeed, in the aftermath of the Afghanistan war, John Walker Lindh was a prominent scapegoat—scapegoating is a phenomenon that always seems to amaze

46. LEVITT, supra note 8.
49. Id.
us after the fact, but that writers have been pointing out for years.  

Accusations of his treason diminished eventually, primarily because treason is so difficult to prove, but that does not mean we are not expected to understand that Lindh was associated with treasonous activities. Further, Attorney General Ashcroft’s comments have already occasioned criticism from Lindh’s attorney, James Brosnahan, who has requested that he refrain from prejudicial statements: “I’d think the American people probably want the attorney general to focus on those people who really did the harm to this nation … and not take it out on John Lindh, … because in my view … they have brought up the cannon to shoot the mouse.”53 The mouse image is particularly good in this context: a mouse is a tiny, helpless creature—calling Lindh a rodent would not have been nearly as effective.

All lawyers and lawmakers know that rhetoric is one of the most powerful weapons in their arsenal, and they use language freely to persuade posterity that their view of a particular debate is the right one. Scapegoating extends to daily life as well; we are now urged to be aware, to watch the activities of persons who might be dangers to the nation and to report them to the authorities immediately. Indeed, commentators urge us to be vigilant, which seems regularly to turn into violence as illustrated in the following example.

A 19-year-old Indian student at the University of Illinois at Urbana-Champaign was physically attacked early Friday by a fellow student who called him a “terrorist.” The incident—which escalated into a fight involving between 30 and 40 people—is another in a series of racially motivated assaults on Middle Eastern and Asian college students following the terrorist attacks on the World Trade Center and the Pentagon.54

Anyone familiar with the novel Gentleman’s Agreement, or John Griffin’s memoir Black Like Me knows that ugly assumptions about racial and ethnic groups are nothing new, and emerge and flourish quickly in the appropriate political environment.55 Does another witch-hunt now loom, along the lines of the McCarthy investigations, or as Arthur Miller presents in The Crucible?56 Consider the number of non-citizens already detained, without a hearing or access to attorneys, since 9/11.


52. U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.").


55. LAURA Z. HOBSON, GENTLEMAN’S AGREEMENT (1946); JOHN GRIFFIN, BLACK LIKE ME (1960).

As we now know, Lindh has pled guilty, and Moussaoui is on trial.57 The likelihood that they will be convicted of something is fairly high.58 Absent prosecutorial misconduct or ineptness, acquittals on all charges were always unlikely, and the rhetoric that surrounded discussion of their cases reflects that fact. And, if they were to be acquitted, they would never be considered innocent by the rest of the world. Certainly the facts reported suggested that they should have been tried.59 But the public never knew the extent of the evidence against Lindh, and sadly, it doesn’t seem to matter. The debate is already so fierce that finding untainted juries will be difficult, even if potential jurors assure the judge and attorneys that they are not already biased against the defendants. Individuals who want to serve on juries in high-profile crimes are not stupid. They know what to say to be acceptable to the prosecution and the defense; they have learned that from television and movies. They know that to the question, “Can you listen to all the evidence presented and render a just, fair and impartial verdict?” the correct answer is “yes,” regardless of the truth. Indeed, they may convince themselves that they truly can be impartial. People who answer truthfully, “No” do not get empaneled on juries. Does this mean a potential juror’s bias cannot be rooted out? No, but it does mean that both the prosecution and the defense must be persistent in chasing after it.

The prosecutor’s role is tremendously important; he or she must be above suspicion when he or she brings charges, especially if the prosecutor is the U.S. Attorney General. Some commentators believe that prosecutors are compelled to ferret out truth, at least as far as they are able, before bringing charges.60 Prosecutors can create the taint so easily, but the taint can never be washed away, because they transfer their notions of the case to us, the jury.

As mentioned above, Rusty Sabich, like Henry Wirz and the German judges, is a loner, and becomes an outsider during the trial. He is also, to some extent, a scapegoat for the police department: pressured to make an arrest for Horgan; unwilling to face charges that he might be assisting a murderer to escape justice; and, for Molto, who wants personal revenge.

In that Rusty fits the profile of the perpetrator of a particular type of crime also marginalizes him, as does his having been labeled an accused murderer. Thus, the use of profiling allows those who do not fit the profile to distance themselves from the proceedings and to feel comfortable in their role as dispensers of justice. Potential jurors, and we are all potential jurors, find it even harder to put the presumption of innocence into practice when they are continually assaulted by labels used by those in authority. Why is it legitimate to try al-Qaeda members suspected of terrorism before secret military tribunals? According to Attorney General Ashcroft, only POWs are entitled to be tried before regular US military tribunals.

58. Id.
Al-Qaeda members are not POWs, but rather terrorists and thus, as lawyers say, *res ipsa loquitur*: the thing speaks for itself.\(^6\)

Labels are one of the most powerful weapons available to sway the public. Consider the message of those works that examine war crimes and war crimes tribunals. Were the fictional judges in the film *Judgment at Nuremberg* any more guilty of crimes against humanity than others who were never tried? Certainly the American prosecutor tries to make the case that they were, primarily because they were influential enough to stand up against the government. Yet how many individuals, in much freer societies, stood up to caution against unnecessary limitations on civil liberties put in place so quickly by governments after 9/11? Even Alan Dershowitz, the champion of the wrongly accused, has said that torturing prisoners may be acceptable in extreme cases, such as those posed by the prisoners at Guantanamo Bay.\(^62\) Speaking truth to power is difficult enough in peacetime. In war, it cannot only be difficult but dangerous.

Whether justice is the business of the tribunals apparently destined to try the prisoners at Camp X-Ray, or indeed whether justice is possible in such a highly charged atmosphere is a question that writers have also considered. The almost universal negative media reaction to the Bush Administration’s military tribunals, as originally proposed, is exemplified in this commentary from a British journalist.

Despite disquiet in congress, in the media and within the legal profession, there is little doubt the US public supports the measures. But setting aside cherished constitutional guarantees faces strong opposition. In the case of military tribunals, says Kuby, you end up with a situation in which someone’s guilt is largely preordained, based on the accusation. “That’s anathema to our system of justice. It’s a show trial without the show.”\(^63\)

Many British commentators, however, seem to overlook radical changes in the United Kingdom’s approach toward the rights of suspects. Since 1994 no “right to silence” that is comparable to the Fifth Amendment exists under British law.\(^64\)

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\(^6\) Note that the military is in favor of treating the detainees as POWs, if only to protect the rights of American soldiers who might fall into opposition hands. The handling of such detainees, and the question of whether they are POWs or alleged common criminals, is an old one and is somewhat overlooked. Tim Padgett, *Are They POWs or Terrorists?* (Jan. 28, 2002), TIME (Online ed.), at http://www.time.com/time/nation/article/0,8599,197785,00.html (on file with University of Toledo Law Review).

\(^62\) 60 Minutes: Legal Torture? (CBS television broadcast, Sept. 20, 2002), available at http://www.cbsnews.com/stories/2002/01/17/60minutes/main324751.shtml (last visited Nov. 12, 2002) (“After the events of September 11, with many al Qaeda members in custody, Dershowitz says he wants to bring the debate to the forefront. He gave the ‘ticking bomb’ scenario—a person refusing to tell when and where a bomb will go off—as an example of the type of case warranting torture.”).

\(^63\) Edward Helmore, *It’s a Show Trial Without the Show*, THE GUARDIAN, Nov. 28, 2001, available at http://www.guardian.co.uk/Print/0,3858,4308810,00.html (last visited Nov. 12, 2002).

\(^64\) The Criminal Justice and Public Order Act, 1994, c. 33 (Eng.). But see Clare Dyer, *Law Lords Dash Hopes of Human Rights Appeals*, THE GUARDIAN, July 6, 2001, available at http://society.guardian.co.uk/crimeandpunishment/story/0,8150,517690,00.html (last visited Nov. 12, 2002) (discussing a new decision by the Law Lords ruling that a statute putting the burden of proof on the defendant to prove he was unaware of the materials he was carrying).
Further, commentators do not seem to understand the purpose of the presumption: that no one should be required to bear witness against himself.

John Walker Lindh, the "American Talib" accused of conspiracy to take up arms against U.S. forces, is another example of the conflicts so vividly portrayed in Judgment at Nuremberg and The Andersonville Trial, but he is not the only one. Australian David Hicks, accused of similar crimes, and currently being held at Guantanamo Bay, seems to have the same problem.

Alleged Australian al-Qaeda fighter David Hicks would get a fair trial in his home country, Defence Minister Robert Hill said today. Senator Hill rejected claims he or the government had demonised Hicks, who is being held in a military prison in Cuba by the United States. Hicks's family and his lawyers have accused the government of demonising him, making it impossible for him to ever receive a fair trial in Australia. But Senator Hill said while Hicks was entitled to a presumption of innocence, he would not endorse any terrorist act or a person who engaged in terrorist training. "You will see that I've stressed that these are allegations relating to Hicks, and I'm confident that within Australia he would receive a fair trial," he told ABC radio. "He's entitled to a presumption of innocence ... but I'm also very conscious of the way in which terrorist organisations work, and his training with al-Qaeda. Terrorism is horrific, those who engage in it, those who practice in it, those who train in it are not going to receive any positive endorsement from me."65

Such statements as those of Ashcroft and Hill give rise to a concern that the public, believing that elected or respected appointed officials know the law, will assume that these officials are also capable of giving guidance as to the "correct" outcome of any trial.

Further, who dares oppose the increased security, the investigations, the detentions of Muslims and Arabs, the limitations on our civil liberties in time of war? In time of war we see alien enemies where only aliens walked before. Some limitations are of course reasonable. But what is reasonable? Our natural inclination is to fear first, ask questions later, and eventually, perhaps, when the threat seems to have passed, relax our guard and restore the liberties taken, as we did with the Japanese Americans interned during the Second World War. But can we make them whole?

I am not suggesting that the U.S. government should not investigate thoroughly real threats to our nation's safety, nor that temporary reasonable limitations are not justified. But it seems to me that what constitutes a temporary and reasonable limitation depends to a great extent on presumptions about the continuing nature of the threat. The Supreme Court has yet to review the constitutionality of FISA court activities.66 Meanwhile, that court is likely to become increasingly important in the

66. In ACLU v. United States (No. 2M69, ACLU et al v. the United States), the ACLU asked the Court for review of FISA issued warrants. Since only the U.S. government can request such a review, the Court ruled against the ACLU. See Michael Kirkland, Court Rejects FISA Intervenors, UPI, Mar. 24, 2003, LEXIS, Nexis Library, UPI File.
issuance of permission to U.S. intelligence agencies to monitor suspected terrorists, since the government need only make a minimum showing to obtain permission to surveil its targets. We only infrequently saw this kind of courage during the Second World War, when then President Franklin Delano Roosevelt gave the order to intern thousands of American citizens of Japanese descent, whose only crime was their ethnic ancestry. These innocents lost their homes, businesses, and four years of their lives. According to the commanding officer of the Western Defense Command:

The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become “Americanized,” the racial strains are undiluted... The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

Among the few voices raised in defense of the Nisei was that of then Governor Ralph L. Carr of Colorado, an act which consequently cost his political career. The U.S. government took decades to acknowledge that these citizens were unfairly treated.

Profiling is also the name of the game as we know from other areas of law enforcement, and it can easily result in the scapegoating discussed above. “Driving while black” is too common an infraction to need much documentation here. It has emerged in an ugly new guise: “flying while Semitic-looking.” It is thus not surprising to see agitation in the media and in government circles directed at examining why, for instance, Richard Reid was allowed to board an American Airlines, December 24th Paris to Miami flight while a Secret Service agent was banned from an American Airlines flight four days later. Of course the excess of caution on December 28th was the result of the permission Reid received to board a flight on December 24th, but deep thought is not characteristic of the “hot news” media coverage emerging since 9/11.

68. Id.
71. See Takami, supra note 67.
73. Colbert King, American Airlines: Two Bloopers, WASH. POST, Dec. 29, 2001, at A23. Indeed we are also hearing a lot of ridiculous discussion about how Reid’s shoes were checked before he boarded an El-Al plane for Israel prior to his Miami flight.
Prosecutors suggest that part of what the federal government will need to demonstrate to obtain a conviction in the Zacarias Moussaoui case is that Moussaoui's actions before his detention before 9/11 on immigration violations tracks those of the known hijackers so closely that to presume he was also a part of the conspiracy is demonstrated beyond a reasonable doubt. Whether true or not, it certainly sounds reasonable to a jury to say that if a defendant does certain things in a certain way, this constitutes enough evidence to overcome the presumption of innocence. For most people in daily life, this is in fact the way to evaluate evidence. As Thoreau noted, a trout in the milk is a powerful persuader, and one need not see paw prints near the bowl to be further convinced. Cats fit the profile of those who like both trout and milk. Likewise, if Moussaoui acted the same way as the other terrorists prior to 9/11, then potential jurors may not need to see the “paw prints” to also see him fitting the profile of a terrorist. 74

What is the message of The Andersonville Trial and Judgment at Nuremberg? I would submit that at least one of its messages is that justice is the stated business of such tribunals, but it is impossible to deliver in full. What the public wants is for someone to pay. Only then can life go on as normally as possible. Only then can those of us not directly affected get on with our lives. But when a tribunal takes another approach, where the conviction of those accused does not seem inevitable (that is, if acquittal seems to be a genuine possibility), some members of the public continue to feel victimized. They succumb, understandably, to the desire to assign guilt rather than to assume innocence.

The only recent example we have of tribunals whose function is to cleanse and heal, rather than punish, is that of the South African truth commissions. 75 These commissions were set up because the new government believed, and continues to believe, that an admission of guilt on the part of the defendants, followed by forgiveness on the part of the nation, delivers more healing power than would a criminal proceeding. Is the South African government correct? Consider Ariel Dorfman’s play Death and the Maiden, in which the victim of torture in an unnamed South American country takes the man she believes to be her torturer prisoner, when the evil regime that allowed for the torture is toppled and a new one takes its place. 76

What she wants from this man is an admission of guilt; then she says she will let him go. But he protests he is innocent. He does not know what crime it is he is supposed to have committed. The woman’s husband, a civil rights lawyer horrified by his wife’s actions, tries to assist him by suggesting an appropriate confession. After a long dark night of the soul, she lets her suspect go. Was he guilty? We don’t know, but we suspect so. Has she gotten what she needed from the episode, that is, some kind of emotional satisfaction? We think so. Should she have done what she did? She explains that she does not trust the government, including her husband, who is part of the administration, to do justice for her and her fellow

74. Mariner, supra note 57.
76. DEATH AND THE MAIDEN (Capitol Films 1994).
victims. She prefers to put her faith into her own personal truth commission. But can she trust that what comes out of her prisoner’s mouth is truth? Perhaps all she really needed was to exert some kind of control over her own life and over her prisoner’s. The power of life and death is, after all, the ultimate power—the power we give to our judicial system. Can the South African government trust that what those brought before it confess is true? The truth commissions had safeguards; they had ways to test the veracity of those brought before them. But could their safeguards have failed? Possibly. Does it matter?

Rusty’s rapid marginalization and transformation to a “defendant”—a label which conjures up all sorts of negative associations—surprises us precisely because he is a prosecutor, and therefore part of the “legal system.” We expect that the defendant who understands the system has a tremendous advantage. Indeed, we suspect that we cannot “presume the system innocent” of bias toward those who are an integral part of it. But Turow’s vision is a dark one: the defendant who is an outsider, as Rusty becomes, as Wirz becomes (because the South loses the war), and as the German judges become (because Germany loses the war) is in grave danger, because the formal legal process is not equivalent to justice. Once Rusty is a defendant, his former colleagues all fall into their defined roles as prosecutors. Naming a defendant restores order to the universe, even if the defendant is one of their own, and someone who previously had a role as a friend. Turow points out to us that these roles are in complete conflict. Why? Because as friends we tend to presume our friends innocence. Prosecutors, Turow says, presume guilt and he presents Rusty, one of their own, as a prime example.

In addition to their roles as prosecutors or friends, the characters in Presumed Innocent have other roles that emphasize judging and presuming activities that all members of society routinely carry out. Rusty himself acts as judge and jury of Judge Lyttle’s actions when he discusses the evidence of bribery against Lyttle and Carolyn’s role in bringing that evidence to light. He and Raymond Horgan actually work out a plan to keep Lyttle on the bench because the judge understands the spirit of the law—the spirit behind the phrase “presumed innocent.” Larron Lyttle was never a prosecutor. As Rusty tells us, Larron is “a ruthless autocrat in his courtroom,” and notwithstanding his friendship with Raymond, the sworn enemy of the deputy prosecuting attorneys. The saying is that there are two defense lawyers in the courtroom, and the one who’s hard to beat is wearing a robe.77 The luck of the draw has provided Rusty with a champion on the bench to match the one he hires, a member of that opposition that he once believed did not share his beliefs in justice.

When Tommy Molto accuses Rusty of having murdered Carolyn, does he respond with legal precision? No. He responds by saying, “Yeah, right,” an “admission” that Molto attempts to introduce as an uncoerced confession at trial (in one of the funnier scenes in the film). Confessions are powerful evidence to juries. As one commentator stated:

Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict

77. TUROW, supra note 2, at 97.
the defendant. A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case. In a criminal justice system whose formal rules are designed to minimize the frequency of unwarranted arrest, unjustified prosecution, and wrongful conviction, police-induced false confessions rank amongst the most fateful of all official errors.78

Manipulation is an essential part of the system. For Turow, it explains how the innocent are acquitted. Acquittals are a matter of luck or of clever defense strategy. Luckily for Rusty—the scapegoat chosen because his boss wants to win re-election—has two powerful allies: defense attorney Alejandro (Sandy) Stern, previously his courtroom enemy, and Judge Larron Lyttle. Stern is the archetypal defense attorney, whom so many in the media like to excoriate, but like Brendan Sullivan, the bulldog legal counsel who represented Oliver North, he is “not a potted plant.”79 His quietly aggressive solution to the problem of the “B” (bribery) file is evidence of that. As for Judge Lyttle, his pro-defense position is clear: “These charges here—These charges are the most serious crime—What else could you do to Mr. Sabich? A prosecutor his entire professional life, and you bring charges like this. We all know why Mr. Stem wants a quick trial. There’re no secrets here.”80 Later Rusty notes that “[Lyttle’s] eyes hold the light of a warmth I have never seen from him in court. I am a defendant now, in his special custody. Like a chieftain or a Mafia don, he owes me some protection while I am in his domain.”81 Note the comparison, not to a fair minded individual, but to someone who has complete control over his domain and can ignore the law with impunity if he so chooses. Further, Rusty may be suggesting that Lyttle might ignore the law in the interests of justice, just as he and Sandy Stern do eventually in order to keep Lyttle on the bench. Certainly Lyttle’s pro-defense stance and his unspoken presumptions about the natural behavior of prosecutors play a large part in Rusty’s salvation. Prosecutors are supposed to make evidence available. If they do not, Lyttle presumes that they have chosen not to, and not because they are unable to comply.

For his part, Sandy Stern assumes, rightly, that Lyttle will react in a certain way when presented with Stern’s knowledge of the “B” file. That is, Stern assumes that rather than admit that he is guilty of accepting bribes, Lyttle will rule in a way favorable to the defense.

Finally, as Turow points out, an acquittal may resolve the question of one individual’s legal guilt or innocence, but it does not satisfy the larger societal question. Even though Rusty is clearly not guilty, no one else will ever be prosecuted for Carolyn’s murder. No one else will ever undergo the presumption

80. Turow, supra note 2, at 75-78.
81. Id. at 204.
82. Id. at 205.
of guilt. "No one talks about pursuing it, surely not with me, and it’s a practical impossibility anyway to try two people for the same crime."83

Ultimately Rusty is freed not because of the presumption of innocence, but because the mistakes of the prosecution make the trial a travesty (this is similar in some ways to the suggestion that the Simpson prosecution was the DA office’s to lose, and it lost it). He understands that his life will never be the same. Rusty says of his career: “The mayor has told me a couple of times he thinks I’ll make a fine judge, but he has not put that on paper.”84 In Kindle County, judges have to be elected. Rusty will never overcome the presumption of guilt the voters have. “I will always be a kind of museum piece. Rusty Sabich. The biggest bullshit thing you’ve ever seen. Set up, no question about it, and then Della Guardia covered Molto. Really pathetic, the whole business. The guy is not quite the same.”85

Finally, even though Rusty is clearly not guilty, no one else will ever be prosecuted for Carolyn’s murder. No one else will ever undergo the presumption of guilt. As he says: “No one talks about pursuing it, surely not with me, and it’s a practical impossibility anyway to try two people for the same crime.”86 And certainly Rusty will never bring accusations against his wife, as his enigmatic comments at the end of the book make clear.

Nico had a beautiful argument if I got up there and accused her. He would have said this was the perfect crime. An unhappy marriage. A prosecutor who knows the system inside out. A guy who’s become a misogynist. He despises Carolyn. He hates his wife.... Maybe he’d say I was using Barbara as a fail-safe, the person I’d like to see nabbed in case the whole house of cards fell in on me. There are plenty of juries that might buy that.

“But it isn’t true,” says Lip.

I look at him. I can tell that I have left him out there again, floating uneasily in the nether regions of disbelief.

“No,” I tell him, “that isn’t true.”

But there is that flicker there, the brief light of an idle doubt. What is harder? Knowing the truth or finding it, telling it or being believed?87

Even though Rusty is in a way rehabilitated in the novel—he gets Horgan’s old job temporarily—that flicker of doubt will always exist, and this is what Rusty the defendant finally understands that Rusty the prosecutor never could. Once accused, an individual can never regain the presumption of innocence in the eyes of society. Every future retelling of the story will include the fact that he was suspected and tried. Rusty understands this reality because he remains in the role of defendant when talking to Lipranzer. He is not the prosecutor bound by the rules of ethics to reveal pertinent information helpful to the defense, and bound not to accuse those whose guilt is unlikely. Thus, the prosecutor’s role is tremendously important;

83. Id. at 430.
84. Id.
85. Id.
86. Id.
87. Id. at 428.
prosecutors must be above suspicion when they bring charges. They can accuse so easily, but they can never wash away the accusation, because they transfer their notions of the case so easily to us, the jury. O.J. Simpson was acquitted, but how many now sincerely believe he did not murder two people?88 In fact, perhaps the only person in recent memory who was accused (but never tried) and who has regained his pre-accusation innocent status is Richard Jewell, the security guard unfairly accused of having placed a bomb in Atlanta’s Olympic Park.89 But some commentators fear that the Patriot Act,90 the Patriot Act II,91 and the FBI’s surveillance activities in the Total Information Awareness Program92 will create “a lot of Richard Jewells,”93 people wrongly suspected who can clear their names with difficulty, if at all.

No one may be convicted for the Simpson-Goldman murders, or for the Bob Crane murder, or for any other murder in which a suspect was acquitted. Perhaps the ringleaders will never be brought to trial for the murders on 9/11. Others have paid and will pay the price for those who designed and ordered the World Trade Center and Pentagon attacks and the third failed attack on that day. We, as the thirteenth members of the jury, do not have the heart, or perhaps we do not quite believe in a second prosecution. When the police catch a suspect, our initial reaction is: “Thank [fill in the blank with one’s own belief word], that [serial killer] [arsonist] [rapist] [fill in the blank] is off the streets.” Of course she or he is guilty, otherwise we cannot feel safe. If someone else is later accused of the crime, we must confront our mistaken notions of safety and our instinctive, but apparently mistaken, faith in the authorities in such cases. And we would have to, once and for all, adopt the presumption of innocence.

89. Eunice Moscoso & George Edmonson, Data-mining Project Raises Privacy Fears: Some Lawmakers Try to Limit Pentagon’s Total Information Awareness Plan, AUSTIN AMERICAN-STATESMAN (Texas), Jan. 26, 2003, at A19.
92. Moscoso & Edmonson, supra note 89, at A19.
93. Id.