

Innocent Until Proven Ratings

Robert Shapiro cross-examines the media on their mishandling of criminal cases.

It used to be that in the United States of America you were innocent until proven guilty. Now, in the court of cable TV law, you are innocent until you prove you can draw an audience.

Watch any of the news shows that dissect the latest hot crime case and it's painfully clear that any presumption of innocence has long gone out the window, replaced by an automatic assumption of guilt.

Arrest a public figure—Illinois Governor Rod R. Blagojevich for example—and the person is thought guilty before even taking a seat inside a courtroom. The context of any of his taped conversations are moot because the cable TV talking heads have decided that whatever he said or meant, he must have been up to no good.

Likewise, the latest lurid murder turns into a guessing game of how the first person to surface as a potential suspect must have done it. Forget about trying Colonel Mustard because we've already decided he's guilty. Let's just figure out whether he used the lead pipe or the candlestick, and if it took place in the conservatory or the billiard room.

The trouble is, this trend is turning our most basic tenet of criminal justice upside down. The presumption of innocence is not legal fiction, but a concept that is fundamental to our Constitution. It's designed to protect all of us and guarantee fair play in the criminal courts. But the media presents an arrest, or even the naming of a suspect or "person of interest," as a conviction. Then the frenzy begins.

The consequences can be grave. Suspects are subjected to public humiliation. They become the butt of late-night TV jokes. Brad Dickson, a former monologue writer for *The Tonight Show with Jay Leno*, once recounted in sympathetic hindsight the show's skewering of Richard Jewell, the security guard who was initially linked to the 1996 bombing at the Atlanta Summer Olympics. "We had a field day with it, doing dozens of jokes all assuming Jewell was guilty," Dickson wrote. "Which is the way that show worked. You're accused, you musta done it." Except Jewell didn't do it, and before his death he was publicly exonerated.

Families and reputations can suffer irreparable harm. People lose their jobs and careers. Who wanted to work with Steven Hatfill after he was all but convicted of being the mad scientist behind the nation's anthrax attacks, even though he was never charged? Even when the truth emerges, as it did for both Jewell and Hatfill, who won a large settlement from the Justice Department, the reputation remains stained. The words of former Labor Secretary Ray Donovan, who was falsely charged with fraud and larceny, still echo: Moments after being found not guilty, he famously asked, "Which office do I go to to get my reputation back?"

These days, before a person is even booked on a charge, a headline story based on a press release is already circulating on television, radio, in print, and on the Web. By this point the person is all but finished, yet the case hasn't even begun. Forget about the law taking its course.

But it should. Our law presumes innocence for a reason: Proving someone's guilt can and should be difficult. In all but the easiest cases, it's often a highly methodical, tedious undertaking. Witnesses and investigators make honest mistakes, or sometimes have other agendas that get in the way of seeking the truth. We need probable cause to make an arrest, but that arrest was never meant to be equated with guilt. It's a starting point on the road to seeking justice, and can even be based on the input of a single person or the observations of a single cop.

Nowhere is it harder to reclaim your reputation than in federal cases. Charges brought by a US Attorney entitle the accused to a preliminary hearing. There, the accused and his attorney can confront and cross-examine the witnesses before the case proceeds further. Unfortunately, in reality this rarely occurs because before the hearing is held, prosecutors go to a grand jury and seek an indictment. To most people, hearing someone has been indicted is the end of the road—guilt is certain. Yet, an indictment is the first state of a proceeding, and just one way of charging a criminal act.

Though it carries with it the presumption of guilt, an indictment is easily won. There's an old saying, "You can indict a ham sandwich." At a grand jury proceeding, the accused is not allowed to be present nor is his lawyer. It's supposed to be secret, so unlike a preliminary hearing, there's no opportunity to defend oneself.

Like a TV pilot, some criminal cases get "picked up" by the networks and make their way into prime time for dissection by Larry, Greta, Sean, Bill, and Nancy. Once there, no one misses a chance to pile on, partly because talking heads know they get invited back only when they are provocative. Good TV means painting cases in black and white. The pro forma tag line, "Of course, he is presumed innocent," is followed by a blistering half hour on why there's no way he can be innocent. The hammering is nationwide, which means that moving a case to another city for a fair trial isn't an option. How easy would it be for a Casey Anthony to find a jury insulated from her pretrial media conviction in San Diego or Omaha, let alone in her home state of Florida, when voodoo dolls in her likeness are sold on e-Bay?

No one can dispute that the First Amendment clearly allows the media to opine and that guests on shows can say they believe a person is guilty. The problem is that while the talking heads and police can say what they want, attorneys are barred by the courts from saying anything that may affect the outcome of the case. Thus, many attorneys can only utter the garden variety "no comment" or "the charges have no merit," either of which the talking heads pounce on as yet another sign the client is guilty. Granted, there is no restriction on the accused. But what clear-thinking attorney would allow his client to speak to the press?

Our system of justice is based on the British common law. England, however, now prohibits the press from reporting prejudicial information about defendants in an ongoing criminal trial. Canada does the same. Perhaps our system would benefit if we followed their lead. What's the harm of waiting for a jury verdict? The free flow of information still exists, albeit slower. It would still allow for the public spotlight to shine on the institution of the courts, and defendants would have some hope of getting a fair trial.

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