Capital Defense Journal

Volume 14 | Issue 2 Article 4

Spring 3-1-2002

Better to Let Ten Guilty Men Live: The Presumption of Life-A Principle to Govern Capital Sentencing

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I. Prologue

In the December 1984 edition of the Yale Law Journal, Beth S. Brinkmann, a student commentator, advocated the implementation of a presumption of life in capital sentencing.[1] Eight years after the Supreme Court determined in *Gregg v. Georgia*[2] that the death penalty did not constitute cruel and unusual punishment, Brinkmann argued that the analysis of capital sentencing should begin not with the Eighth Amendment, but rather with the Due Process Clause of the Fourteenth Amendment.[3] From that starting point, she reached the conclusion that procedural due process required that capital sentencing begin with a presumption that the defendant was entitled to life imprisonment unless the prosecution could prove beyond a reasonable doubt that the death penalty was the only appropriate penalty for the defendant.[4] In the eighteen years since that note was published, it is readily apparent that the time has come for the practical application of the presumption of life.

Although Brinkmann based her argument on an analysis of the Due Process Clause, one can find support for the presumption of life in legal commentary, statutes, and empirical studies. Since Brinkmann's work, several states have expanded and refined their capital statutes. Moreover, the United States Supreme

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*. J.D. Candidate, May 2003, Washington & Lee University School of Law; B.A., College of William and Mary. This article is dedicated to lawyers committed to protecting due process of the laws for all people. One of these people is Professor Roger Groot, who has been a mentor and a role model to me. Special thanks to my dad, whose unflagging opposition to capital punishment inspired me to explore death penalty law, and to my mom, whose commitment to her convictions emboldens me to stay true to my own. Thanks also to the members of the Virginia Capital Case Clearinghouse for their friendship and support.

1. Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 352 (1984).

2. 428 U.S. 153 (1976).

3. Brinkmann, *supra* note 1, at 352; Gregg v. Georgia, 428 U.S. 153, 187 (1976) (reasoning that "in the absence of more conclusive evidence, . . . the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe").

4. Brinkmann, *supra* note 1, at 352-53.

Court has changed the Due Process analysis of criminal cases with decisions such as *Apprendi v New Jersey*.[5] As courts and legislatures refine the process of capital sentencing, and as empirical research reveals more problems inherent in various levels of the capital system, the justification for a governing principle to effect reform becomes more evident.

II. Overview

To presume life in a capital sentencing proceeding is simply to presume that life imprisonment is the appropriate penalty for the defendant unless the prosecution establishes, by evidence beyond a reasonable doubt, that the death penalty is the appropriate sanction.[6] The presumption of life is directly analogous to the presumption of innocence that operates in the verdict phase of all criminal proceedings. Courts have traditionally supported a mandatory presumption of innocence through an examination of policy, precedent and positive law.[7] Although courts have yet to require a presumption of life, the necessity of the presumption of life becomes clear through a perusal of the same sources of law.

In order to support its claim that a court must charge a capital jury that it will presume life imprisonment unless the prosecution meets its burden of establishing that the death penalty is necessary, this article examines jurisprudential concerns, constitutional law, precedent, and statutory law. In Part III, the article explains that philosophical consistency and practical necessity mandate the application of the presumption of life. In Part IV, the article demonstrates textual support for the presumption in the Constitution and United States Supreme Court jurisprudence. In Part V, the article illustrates that the Virginia capital sentencing scheme incorporates and in fact requires the jury to presume life.[8]

III. Justifications for the Presumption of Life

A. The Philosophical Reasoning Underlying the "Justice Principles"

> If . . . the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty

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5. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (explaining that "any fact [other than that of a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt").

6. This argument proceeds from the assumption that there are instances in which a death sentence would be appropriate–certainly an open question. This article does not express a view on the issue of whether the death penalty is ever inappropriate, but merely recommends a new procedural approach to the existing system.

7. *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (reaffirming the requirement of the presumption of innocence through an examination of prior cases and scholarly works).

8. *See* VA. CODE ANN. § 19.2-264.4 (Michie 2000) (providing, inter alia, that "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt [the statutory factors required for imposing a death sentence]).

> persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.[9]

Our most basic understanding of the criminal law is derived from such notions as "a person is innocent until proven guilty," or that the prosecution must prove that the defendant is "guilty beyond a reasonable doubt before a jury of his peers."[10] These bedrock concepts– "justice principles"– are grounded in the philosophical concepts underlying the law. An examination of basic conceptions of justice demonstrates that the presumption of life tracks the philosophical genesis of these justice principles.

The justice principles are based upon the notion that the protection of liberty is so crucial that an individual's liberty interest outweighs the government's interest in punishing criminals.[11] This postulate was immortally phrased by Blackstone, who wrote that "it is better that ten guilty persons escape than that one innocent suffer."[12] Two priorities support the protective ideal: accuracy and lenity, the notion that in the absence of clear evidence that a criminal tribunal ought to err on the side of the defendant. Criminal justice then seeks first to ensure that trials reach the correct result, and secondly, that, should a trial fail to reach truth, that it err in such a way that is most protective of the defendant's liberty interest.

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9. *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

10. *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 513, 523 (1979) (reversing defendant's conviction because of the jury instruction that "the law presumes a person intends the ordinary consequences of his voluntary acts," impermissibly conflicted with the presumption of innocence); *Taylor*, 436 U.S. at 485 (explaining that "one accused of a crime is entitled to have guilt or innocence determined solely on the basis of the evidence introduced at trial . . . and it long has been recognized that . . . the presumption [of innocence] is one way of impressing upon the jury the importance of that right"); *Winship*, 397 U.S. at 361 ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a nation."); Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); McKenzie v. Risley, 842 F.2d 1525, 1545 (9th Cir. 1988) (en banc) (Fletcher, Pregerson, Canby and Morris, JJ., dissenting) (explaining that the Due Process Clause requires that a defendant be found guilty only by proof beyond a reasonable doubt and that failure to instruct the jury on the State's burden of proof can never be harmless error). Inasmuch as these are principles clearly articulated by law, they have also been fully absorbed by popular culture.

11. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) (explaining that the reasonable doubt rule provides an imbalance in favor of the accused which "is a societal judgment that an individual's liberty interest transcends the state's interest in obtaining a criminal conviction").

12. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

The priorities of accuracy and lenity are both enforced through the imposition of the reasonable doubt rule in criminal trials. The requirement that the prosecution prove every element of its case beyond a reasonable doubt is virtually axiomatic.[13] The reasonable doubt rule ensures lenity by requiring that a defendant receive the benefit of any reasonable doubt. The rule ensures accuracy through requiring that the prosecution meet a heavy evidentiary burden before the state is permitted to impose punishment on the defendant.

Typically, the law requires parties seeking its intervention to meet an evidentiary burden.[14] Because the government seeks judicial intervention to deprive a criminal defendant of his life, liberty or property, the government must establish beyond a reasonable doubt that the defendant's conduct merits punishment.[15] The burden of proof essentially requires that courts presume that legal intervention is unnecessary unless the party seeking that intervention shows otherwise.[16] If the prosecution seeks to punish the defendant, then it must take affirmative steps to establish the defendant's bad conduct with its own evidence. The specified instances in which a criminal defendant must meet a burden of proof are typically affirmative defenses, in which the defendant admits that his conduct was factually unlawful, but asks the law to recognize that there is either a justification or an excuse for the conduct.[17] Generally speaking, in these contexts, the defendant's burden remains modest, usually a preponderance standard, while the prosecution maintains a continuous burden of proving all elements beyond a reasonable doubt.[18]

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13. *Winship*, 397 U.S. at 361 (noting "virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions"). *Winship* gave the reasonable doubt rule constitutional significance. *Id.* at 364.

14. RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE 23 (1992) ("Traditional legal commentary has been comfortable placing burdens on the party seeking the law's intervention: on the plaintiff in civil cases and on the prosecution in criminal trials.").

15. *See* Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting) ("Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt.").

16. *See* GASKINS, *supra* note 14, at 23.

17. *See* Commonwealth v. Sands, 553 S.E.2d 733, 736 (Va. 2001) (explaining that self-defense constitutes an implicit admission of responsibility and an assumption of the burden of establishing that evidence of justification should raise reasonable doubt as to criminal liability).

18. *See* Patterson v. New York, 432 U.S. 197, 214-15 (1977) (upholding requirement that defendant prove "extreme emotional disturbance" by a preponderance of evidence in order to be found guilty of manslaughter rather than murder); United States v. Davis, 260 F.3d 965, 969-70 (8th Cir. 2001) (holding that it does not violate the due process clause to require a defendant sentenced under mandatory life sentence statute to prove that his prior convictions were nonqualifying felonies); Harrell v. State, 65 S.W.3d 768, 770-71 (Tex. Crim. App. 2001) (holding that it does not violate due process to require defendant charged with aggravated kidnapping to prove by a preponderance of evidence that he voluntarily released the victim in a safe place because release is not an element of the crime); Hodge v. Commonwealth, 228 S.E.2d 692, 694 (Va. 1976) (approving

The notion that the party seeking legal intervention must prove the elements of its case makes intuitive sense. The only risk to that party is the risk of non-persuasion, which results in a judgment for the other party. Consider the result if the law were to transfer the risk of non-persuasion to the defendant. The result of the defendant's failure of proof is the loss of life, liberty or property, while the party prosecuting the action bears no risk at all. Once the prosecutor has met her burden of coming forward, she can sit back and require the defendant to show cause why the law should not act against him. Such a result would be fundamentally inconsistent with due process.

Yet another procedural requirement seeks to preserve the priority of accuracy–the requirement that juries be composed of individuals who are "indifferent in the cause."[19] While the Sixth Amendment requires that criminal defendants be tried by an impartial jury, state statutes and case law have often required an even greater level of detachment.[20] It is not enough for a juror to be impartial in fact; the law requires that courts ensure that the jurors are detached from the cause and can form no opinion on the case based on anything other than the evidence presented at trial.[21] The Supreme Court of Virginia recently addressed the issue of juror impartiality in *Green v Commonwealth*,[22] in which the

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requirement that once Commonwealth has proven the elements of second degree murder defendant bears "burden of showing circumstances of justification, excuse or allevation"); Dejarnette v. Commonwealth, 75 Va. 867, 881 (1881) (holding that "[i]f [the defendant] relies on the defence [sic] of insanity, he must prove it to the satisfaction of the jury"). In civil cases, however, the defendant may bear a more substantial burden, as in the doctrine of res ipsa loquitur and the theory of strict liability. GASKINS, *supra* note 14, at 27.

19. VA. CODE ANN. § 8.01-358 (Michie 2000) (providing that "if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that cause").

20. U.S. CONST. amend. VI; VA. CODE ANN § 8.01-358; *see, e.g.*, Morgan v. Illinois, 504 U.S. 719, 727 (1992) ("[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors."); United States v. Polichemi, 201 F.3d 858, 859 (7th Cir. 2000) (holding that the trial court erred in not excusing for cause a juror who had been an employee of the United States Attorney prosecuting the case); Green v. Commonwealth, 546 S.E.2d 446, 452 (Va. 2001) (holding that juror expressing intent to impose death penalty on a mere finding of guilt, and juror who expressed belief in guilt of defendant were not qualified to serve); Medici v. Commonwealth, 532 S.E.2d 28, 32 (Va. 2000) (holding that juror whose husband had been murdered by an individual represented by the same attorney as the defendant was not qualified to serve, although she expressed unequivocal ability to be objective); Cantrell v. Crews, 523 S.E.2d 502, 504 (Va. 2000) (holding that juror represented by the same firm as that of plaintiff's attorney is not qualified); *see also* MASS. GEN. LAWS ANN. ch. 234, § 28 (West 2000) (providing that "[i]f the court finds that the juror does not stand indifferent in the case, another shall be called in his stead"); R.I. GEN. LAWS § 9-10-14 (1997) (providing for the exclusion of any juror not standing "indifferent in the cause" and that counsel for either party may not be precluded from examining veniremen); S.C. CODE ANN. § 14-7-1020 (Law. Co-op. Supp. 2001) ("If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.").

21. VA. CODE ANN. § 8.01-358 (Michie 2000).

22. 546 S.E.2d 446 (Va. 2001).

court reversed the capital murder conviction of Kevin Green on the grounds that the circuit court abused its discretion by refusing to excuse two prospective jurors who expressed bias against the defendant.[23] The court held that a defendant has a right to a jury that is "indifferent in the cause" and that any reasonable doubt as to the impartiality of a juror must be resolved in favor of the defendant.[24] In determining that one of the jurors was not qualified because he was not indifferent in the cause due to his predisposition to impose death, the court explained that the juror's strong inclination toward death reflected a "fixed opinion about the punishment that the defendant should receive."[25] In its discussion of the second juror, the court explained that, despite the juror's understanding that the defendant was presumed innocent and that the Commonwealth bore the burden of proving guilt beyond a reasonable doubt, the fact that she persisted in her belief of the defendant's probable guilt was a manifestation of "firm opinions which would have impaired her ability to be impartial and stand indifferent in the cause."[26] *Green* demonstrates that a manifestation of impartiality is not sufficient to qualify a juror to sit; it is essential that the juror hold no opinions, as to either guilt or sentence, which would impair the juror's ability to be impartial, or would create the appearance of partiality.[27]

Although the ideal juror would be totally detached from the cause, in reality even the totally impartial juror has his own preconceptions and predilections which are in no way based on the competent evidence presented at trial, but could yet factor into the decision. Thus, in order to make jurors as detached as possible, the law limits that which jurors "know" by creating presumptions. An evidentiary presumption limits the jury by its absence; before the party bearing the burden of establishing the basic fact meets its burden, the jury is not permitted to infer the ultimate fact.[28] The presumption of innocence has a more direct knowledge limiting effect. The jury is explicitly instructed that it may consider only that the defendant is innocent until the prosecution has met its burden of persuasion.[29]

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23. Green v. Commonwealth, 546 S.E.2d 446, 447 (Va. 2001).

24. *Id.* at 452.

25. *Id.*

26. *Id.*

27. *See* Medici v. Commonwealth, 532 S.E.2d 28, 31 (Va. 2000) (explaining that permitting a juror whose husband had been murdered by a former client of defense counsel would "weaken public confidence in the integrity of criminal trials").

28. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 65 (2d ed. 1995) (describing a permissive presumption as an instance in which "the factfinder may... find the existence of the presumed fact, upon proof of the basic fact").

29. Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978) (explaining that "the purging effect of an instruction on the presumption of innocence simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial").

B. Philosophical Consistency Justifies the Presumption of Life

The process of capital sentencing implicates a defendant's most fundamental right–life. If the justice principles are founded on the notion that an individual's liberty interest must receive greater protection than the government's interest in criminal convictions, then it follows that an individual's interest in his life ought to receive greater protection than the government's interest in obtaining death sentences. For the same reasons that the presumption of innocence has axiomatic weight in the trial of fact, the presumption of life is a necessity in a capital sentencing proceeding.

Although the sentencing authority will surely know that the defendant has been convicted of murder, it is nevertheless necessary to eliminate irrelevant information that could prejudice the sentencing authority. In many states, including Virginia, where the trial jury has the responsibility of deciding whether to impose death, the sentencing authority has been exposed to the evidence necessary to convict the defendant prior to making its decision as to sentence. Although the jury must have some knowledge of the circumstances of the crime and the defendant in order to impose a sentence at all, there should be a procedural device in place to prevent the jury from pre-deciding sentence on the basis of evidence to which it was exposed in the guilt phase.[30] Because there is no individualized voir dire between the guilt phase and the sentencing phase, a juror would be free to decide, after conviction, that the defendant committed the crime, that the crime was vile and inhuman, and that death is the only appropriate penalty. When a juror makes such a decision, the defendant is automatically denied the process to which he is entitled in the sentencing phase. Virginia law requires that jurors be impartial as to sentence, but there remains no such mechanism to preclude jurors from making early decisions.[31] The presumption of life would serve this purpose in the same manner in which the presumption of innocence functions in the guilt phase–by informing the jury that it is to presume life to be the appropriate penalty. The presumption would theoretically counterbalance the assumptions the jury may have formed as it returned its guilty verdict. Just as the presumption of innocence requires the jurors to lay aside consideration of arrest and indictment, the presumption of life would require the jurors to lay aside consideration of conviction that leads to the conclusion that death is the only, or even the probably, appropriate penalty.[32]

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30. *See* William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1488 (1998) [hereinafter *Foreclosed Impartiality*]. Bowers, et al., found that 48.3% of jurors in their survey indicated that they had made up their minds as to sentence at the end of the guilt phase of the trial. *Id.* Among Virginia jurors surveyed, 47.7 % indicated that they had decided sentence at the end of the guilt phase, and of these, 18.2% indicated that they had settled on the death penalty. *Id.*

31. VA. CODE ANN. § 8.01-358 (Michie 2000); *see also* Green v. Commonwealth, 546 S.E.2d 446, 452 (Va. 2001).

32. Taylor v. Kentucky, 436 U.S. 478, 485 (1970) (citing 9 JOHN WIGMORE, EVIDENCE 407

Furthermore, the presumption would function to preserve the proper allocation of the burden of proof. Because of the problem of jurors formulating opinions as to sentence at the end of the guilt phase, it follows then that in the minds of such jurors the defendant would face the burden of proving himself ineligible for death. Such a result would be inconsistent with a capital sentencing scheme that requires the prosecution to establish the aggravating factors necessary to support a death sentence beyond a reasonable doubt.[33] Moreover, the natural consequence of requiring the defendant to prove himself ineligible for death pragmatically would relieve the prosecution of meeting its burden of proof and allocate the risk of non-persuasion to the defendant. The defendant would be compelled to introduce competent mitigating evidence to persuade the jury that his crime does not rise to the level that ought to be punished by death. Although the defendant possesses de jure rights to remain silent and not to present evidence, in fact his failure to show why he should not be put to death could cost him his life.[34] The presumption of life, however, would preserve the defendant's rights to remain silent and affirmatively state the prosecution's burden of rebutting the presumption of life.

The jury's task in the penalty phase of a capital trial is to determine whether the defendant is a member of that subset of defendants convicted of capital murder who are deserving of the death penalty.[35] This determination is a subsequent determination of guilt or innocence. After determining whether the defendant is a member of the larger class of those convicted of capital murder, the jury's task is to determine whether statutory aggravating factors exist that separate the defendant into the smaller class of those guilty of the most serious commissions of murder.[36] Because the penalty phase has this narrowing purpose, the correct phrasing of the axiom in this context is that it is better to imprison for life ten people "guilty" of death than put to death one person "innocent" of death. The effect of an incorrect result is that a person guilty of murder, but undeserving of death, could be subjected to death.

The application of the reasonable doubt standard to capital sentencing reflects the legislative intent to determine correctly which defendants are worthy

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(3d ed. 1940)).

33. *See* VA. CODE ANN. § 19.2-264.4 (C) (Michie 2000) (providing that "the penalty of death *shall not be imposed* unless the Commonwealth shall prove *beyond a reasonable doubt*" either the future dangerousness of the defendant or the vileness of the offense (emphasis added)).

34. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself."); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (incorporating the Fifth Amendment self-incrimination clause against the states); Griffin v. California, 380 U.S. 609, 613 (1965) (holding that prosecutor's comment on the defendant's failure to testify violates the defendant's right against incriminating himself).

35. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 23 (1997) (arguing that capital juries should evaluate each defendant individually as to the sentencing decision).

36. *Id.* at 30.

of death and which are worthy of life imprisonment.[37] The gravity of the defendant's crime makes it difficult, however, for judges and juries to isolate those issues relevant to the determination of guilt from those relevant to the determination of penalty.[38] Because the obvious objective of the sentencing phase is to determine whether the defendant fits in the subset of capital murderers worthy of death, the logical approach is to structure the sentencing phase as a freestanding inquiry in which the predicate offense, and the circumstances thereof, are but a portion of the evidence subject to the jury's consideration. In this new inquiry, it is clear that the defendant is guilty of murder, but the jury must find, beyond a reasonable doubt, whether the defendant's crime makes him eligible for death. In this new inquiry, subject to the reasonable doubt standard, the jury ought to presume that the defendant does not fit within this smaller subset of defendants until the prosecution has met its burden of proving that he does.[39]

C. *The Practical Necessity of the Presumption of Life*

The jury is a human institution. It is incapable of making detached, logical conclusions and it is incapable of divining absolute truth. Rather, it is subject to

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37. The United States Congress, the General Assembly of Virginia and a number of legislatures in other states have elected to impose a reasonable doubt standard for the government's proof of the statutorily-required factors for the death sentence. *See* 18 U.S.C. § 3593(c)(2000) ("The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such factor is established beyond a reasonable doubt."); VA. CODE ANN. § 19.2-264.4(C) (requiring proof beyond a reasonable doubt of the vileness or future dangerousness factors to impose death penalty); COLO. REV. STAT. ANN. § 16-11-103(2)(a)(I) (West 1996) (requiring sentencing panel unanimously to find proof of at least one aggravating factor beyond a reasonable doubt before imposition of death sentence); GA. CODE ANN. § 17-10-30(c) (1997) (providing generally that the death penalty may not be imposed unless the jury finds one or more statutory aggravators beyond a reasonable doubt); N.Y. CRIM. PROC. LAW § 400.27(11)(a) (McKinney 2001) (providing that "[t]he jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating . . . factors substantially outweigh the mitigating . . . factors established . . . and unanimously determines that the penalty of death should be imposed"); OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997) (providing that "[t]he prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances . . . are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death"); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. 2001) (providing that "[u]nless at least one of the statutory aggravating circumstances . . . is found [beyond a reasonable doubt], the death penalty must not be imposed"); TENN. CODE ANN. § 39-13-204(f)(1) (2001) (providing for life imprisonment if the jury finds that the state failed to prove any statutory aggravator beyond a reasonable doubt).

38. *See* Crocker, *supra* note 35, at 79 (illustrating that "courts too often treat the punishment inquiry as a restatement of the guilty verdict").

39. *Cf.* Taylor v. Kentucky, 436 U.S. 478, 486 n.13 (explaining the value of the presumption of innocence as a protection of a defendant's entitlement to conviction only by proof beyond a reasonable doubt).

emotional, visceral responses to the evidence and the manner in which it is presented. Society has accepted this as a consequence of the system of justice it has chosen to adopt. Nevertheless, the structure of the legal system is designed to keep this emotional response within limits. It is one thing for a jury to be persuaded by an effective advocate and quite another for the jury to respond to its passions. The need for such limitations in general demonstrates a very practical basic need for a presumption of life in capital sentencing proceedings.

> In order to understand the risk of failing to properly guide jury discretion in a capital case, it is useful to examine the traditional role of the jury in American law .... Juries consist of ordinary citizens called on any given day, in any state, and in federal or county courthouses to resolve disputes of all kinds between people or entities. Their responsibilities range from deciding whether a human being should be destroyed for criminal conduct to deciding petty squabbles between neighbors. Without warning a carpenter, fisherman, or salesman could be sitting in judgment for a multi-national corporation or a homeless vagrant.[40]

Perhaps the overriding reason for implementing the presumption of life is the need to control the discretion of capital juries. The fact that jurors are human beings who bring their own concerns, anxieties and uncertainties to the process frustrates the law's attempts to empanel totally impartial jurors.[41] Moreover, juror opinions on the imposition of the death penalty tend to vary based on arbitrary factors such as race, socioeconomic status and religion.[42] Because selection for jury service is, at least initially, a random process, and because these arbitrary factors tend to affect jurors' preconceived notions of the death penalty, it stands to reason that there are a variety of different results that could occur at sentencing based on factors other than the evidence produced in the proceeding.

The consequent variety of possible reasons behind a jury's decision to impose death makes being sentenced to death nearly as predictable as being "struck by lightning."[43] While the appearance of due process may be present, the truth remains that some residual effects of the arbitrary conditions of the jurors will have an effect on the verdict. A defendant stands a greater probability of being sentenced to death in a jurisdiction primarily composed of low-income whites than in a jurisdiction primarily composed of higher-income blacks.[44] This

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40. José Filipé Anderson, *When the Wall has Fallen: Decades of Failure in the Supervision of Capital Juries*, 26 OHIO N.U. L. REV. 741, 749-50 (2000).

41. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L.J. 1043, 1071 (1995) (explaining that "ambiguity, uncertainty and anxiety may be an invitation to whim and arbitrariness, regardless of statutory guidelines").

42. Theodore Eisenberg, et al., *The Deadly Paradox of Capital Juries*, 74 S. CAL. L. REV. 371, 380-87 (2001).

43. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

44. Eisenberg, *supra* note 42, at 385-86.

unacceptable consequence could be remedied substantially by a guiding principle which diminishes the effects of these arbitrary factors.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[45]

One such preconceived notion that the presumption of life would ameliorate is the notion that death is the only acceptable penalty for certain crimes.[46] A substantial number of jurors come to the process with the notion that there are certain crimes for which death is the only acceptable penalty.[47] Jurors holding such a belief are not fully capable of weighing aggravating factors against mitigating factors to reach a conclusion other than that death is the appropriate penalty. Such jurors, in fact, are more likely to impose death in every instance in which a defendant was found to be guilty.[48]

The fact that individual jurors harbor preconceived views on the application of the death penalty is magnified because of those jurors' ability to influence the tenor of deliberations and the positions of their colleagues as to sentence.[49] Jury deliberations permit those jurors with strongly held preconceived notions to intimidate those jurors who remain undecided into approving those views.[50] In

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45. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

46. Bowers, *Foreclosed Impartiality*, *supra* note 30, at 1504.

47. *Id.* The investigators found that among capital jurors surveyed, 70.4% believed death to be the only acceptable penalty for a murder committed by someone previously convicted of murder, 57.0% believed death to be the only acceptable penalty for a premeditated murder, and 52.0% believed death to be the only acceptable penalty for multiple murders. *Id.* at 1505. The investigators further found a correlation between the number different crimes for which a juror would deem death to be the only appropriate penalty and the tendency to favor death at the end of the guilt phase of trial. *Id.* at 1507.

48. *Id.* at 1511-12.

49. *Id.* at 1525. The investigators found that some jurors had used the deliberations of the guilt phase as an opportunity to "neutralize the misgivings of others about imposing the death penalty." *Id.* A Texas juror reported that "[a] few of them didn't know if they could sentence a person to death and that's when we were using persuasive tactics[, saying that] the judge is the one who will pronounce the sentence." *Id.* Life jurors, on the other hand, saw the guilt phase deliberations as an opportunity to bargain for a life sentence. *Id.* at 1527. An Alabama juror stated that "[t]o sell the two [holdouts], we won't go for death [sic] penalty. They said we made an agreement." *Id.*

50. *Id.* at 1523. The investigators interviewed a number of jurors in capital cases to investigate the influences of pro-death jurors as to sentence during the guilt phase deliberations. *Id.* The investigators found that pro-death jurors typically advocated the death penalty when considering whether the defendant was guilty of the offense. *Id.* The juror responses included the following:

CA juror: Even though they weren't supposed to, there was some angry people in

such cases, the ability of a juror to function independently as a rational decision maker is foreclosed in the absence of a strong guiding principle.

An additional rationale for controlling the discretion of capital juries is the concept of residual, or lingering, doubt. Residual doubt occurs when jurors have a sufficient level of doubt as to the accuracy of the guilt proceeding that they are hesitant to impose a death sentence.[51] Jurors frequently cite residual doubt as the primary factor in voting for life rather than death.[52] If jurors harbor some doubt as to the actual guilt of the defendant, or the defendant's death eligibility, it would be inconsistent with a capital sentencing scheme that requires proof of aggravating factors beyond a reasonable doubt not to instruct the jurors as to how they ought to consider that doubt. Courts have not, however, generally recognized residual doubt as an appropriate issue on which to instruct the jury.[53] The presumption of life would help jurors in managing residual doubt by affirming the prosecution's burden of proving the death-eligibility of the defendant beyond a reasonable doubt.

The reality of the jury system is that jurors are "amateur judges," who cannot be released to perform their weighty tasks without specific guidance.[54] The presumption of innocence has long served as a maxim accessible to the layman which helps a juror understand how to decide cases at the guilt phase. Once the defendant is adjudged guilty, this presumption obviously is no longer a factor in the minds of the jurors. It is nevertheless logical to provide a similarly

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there, there was some people screaming, "Hang him!" "We'll shoot the bastard!" You know?

SC juror: They wanted to go and hang him immediately, most of them.

TX juror: The son of a bitch ought to be hung.

FL juror: At first they all wanted death, they wanted to fry those black boys .... They felt like these two black boys took a white man's life, we're going to burn them; that's the impression I got from a lot of the jurors ... I really believed they wanted to burn both of those guys because they were black and because the white defendant had a plea bargain and we didn't even hear his testimony.

Id.

51. Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307, 308 (2001).

52. *See id.* at 314 (citing William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1987-88)).

53. *Id.* at 312-13. *But see* United States v. Davis, 132 F. Supp. 2d 455, 468 (E.D. La. 2001) (granting defendants' motions to argue residual doubt to the jury, noting that "[t]he belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice"); State v. Hartman, 42 S.W.3d 44, 57 (Tenn. 2001) (holding that in cases in which "the proffered residual doubt proof is impeachment of testimony of the only witness who offered direct ... proof of the defendant's involvement in the crime, such proof is clearly relevant and admissible to establish residual doubt as a mitigating circumstance"); State v. Teague, 897 S.W.2d 248, 256 (Tenn. 1995) (holding that state law required trial court to permit defendant to present evidence going to residual doubt at a re-sentencing hearing).

54. Anderson, *supra* note 40, at 751, 776 (explaining Supreme Court jurisprudence in capital cases as a recognition that "jurors cannot be trusted with all the information or be left without guidance about information which has been determined relevant to its decision").

strong guiding principle to control the jury's discretion during the capital sentencing process.

IV. The Constitutional Significance of the Presumption of Life

A. Supreme Court Jurisprudence on the Presumption of Innocence and the Reasonable Doubt Rule

The positive law justification for the presumption of life comes from the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court has held that the presumption of innocence has constitutional significance because the Due Process Clause "must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.'"[55] The familiar language of the Fourteenth Amendment precludes a state from "depriv[ing] any person of life, liberty or property, without due process of law."[56] It follows that as the presumption of innocence stands as a shield to prevent the deprivation of a defendant's liberty without due process, so too should the presumption of life protect the defendant from the deprivation of his life without due process of law.[57]

The fact that due process protects the interests of the individual defendant against those of the government unless the evidence against the defendant is overwhelming is a hallmark of the American system of justice. Inasmuch as the requirement that the prosecution meet its burden of proof ensures accuracy and consistency, it also ensures fairness as defendants under the American system of law have come to rely on the notion that they may require the government to establish guilt before being subjected to punishment.

> It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.[58]

Although the Supreme Court has never held that the presumption of life has constitutional significance, it follows from the Court's jurisprudence on the reasonable doubt rule that the presumption of life is required for procedural due process. The Court first held that the reasonable doubt rule had constitutional significance in *In re Winship*.[59] In *Winship*, the Court reversed the finding of delinquency of a juvenile in which the family court judge relied on a statute which

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55. Taylor v. Kentucky, 436 U.S. 478, 486 (1978) (quoting Estelle v. Williams, 425 U.S. 501, 503 (1976)).

56. U.S. CONST. amend. XIV.

57. *Cf. Taylor*, 436 U.S. at 486 (1978) (explaining that instructing a jury on the presumption of innocence is "one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial").

58. *In re* Winship, 397 U.S. 358, 364 (1970).

59. *Id.* at 364.

provided for a finding of delinquency by a preponderance of the evidence.[60] Citing precedent dating back to 1881, Justice Brennan, writing for the majority, explained that "[t]his notion–basic in our law and rightly one of the boasts of a free society–is a requirement and a safeguard of due process of law in the historic, procedural content of due process."[61] Justice Brennan noted further that the reasonable doubt rule existed not only to ensure the accuracy of criminal convictions, but also to protect the individual defendant from the erroneous loss of liberty and the stigma associated with a criminal conviction.[62] Concurring specially, Justice Harlan further noted that:

> It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.[63]

Winship articulated the standard that the prosecution must prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [the defendant] is charged."[64]

The Court has also consistently held that the presumption of innocence, as a component of the reasonable doubt rule, may have constitutional significance because it "is a basic component of a fair trial under our system of criminal justice," and "its enforcement lies at the foundation of the administration of our criminal law."[65] In *Estelle v Williams*, the defendant, charged with assault with intent to commit murder, was required to attend his trial in prisoner's clothing, even though he asked to be permitted to wear civilian attire.[66] The Court, although unwilling to declare the State's conduct per se unconstitutional, held that requiring a defendant to appear in prison attire at trial unconstitutionally inhibits the presumption of innocence.[67] In *Taylor v Kentucky*, the Court held that the trial judge abused his discretion by refusing to instruct the jury that "the law presumes a defendant to be innocent of a crime."[68] In *Taylor*, the Court explained that in instances in which the prosecution invites the jury to make

60. *Id.* at 360, 368.

61. *Id.* at 362.

62. *Id.* at 363.

63. *Id.* at 372 (Harlan, J., concurring).

64. *Id.* at 364.

65. Coffin v. United States, 156 U.S. 432, 453 (1895); *see also* Taylor v. Kentucky, 436 U.S. 478, 486 (1978) (holding, on the facts of the case, that trial court's refusal to give presumption of innocence instruction violated the defendant's rights under the Due Process Clause); Estelle v. Williams, 425 U.S. 501, 504-05 (1976) (recognizing that the requirement that a defendant appear in prison clothing may impair the presumption of innocence).

66. *Estelle*, 425 U.S. at 502.

67. *Id.* at 505.

68. *Taylor*, 436 U.S. at 480, 490.

assumptions of the defendant's guilt on the basis of his status as a defendant, and on the basis of the arrest and indictment, the Due Process Clause requires that the trial court instruct the jury on the presumption of innocence.[69] Although the Court limited its holding to the facts of the case, Justice Brennan, concurring specially, opined that "trial judges should instruct the jury on a criminal defendant's entitlement to a presumption of innocence in all cases where such an instruction is requested."[70] The *Taylor* court also explained that the presumption of innocence is essentially a shorthand to explain the duty of the prosecution to meet its burden of proving the defendant guilty beyond a reasonable doubt.[71]

The fact that the Court has embraced and fortified the presumption of innocence in this manner is not surprising, considering the philosophical history underlying the notion. The Court, in each of the aforementioned cases, reinforced the central notion that the prosecution must prove each element of its case beyond a reasonable doubt in order to establish the government's entitlement to impose punishment.[72] The notion that the presumption of innocence is a component of the reasonable doubt rule logically supports the presumption of life as well. The Due Process Clause has consistently required that the prosecution meet this reasonable doubt burden. The burden then should not be relaxed or lifted when the government seeks to end a defendant's life. Rather, in prosecutions in which the legislature has defined facts which a jury must affirmatively find before the imposition of punishment, due process requires the prosecution, and not the defendant, to meet the burden of persuasion.[73] As discussed below, the Supreme Court has illustrated obliquely that the presumption of life bears the same constitutional significance as the *Winship* doctrine.

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69. *Id.* at 487-88.

70. *Id.* at 491 (Brennan, J., concurring); *see also* Kentucky v. Whorton, 441 U.S. 786, 791 (1979) (Stewart, J., dissenting) (explaining that "because every defendant, regardless of the totality of the circumstances, is entitled to have his guilt determined only on the basis of the evidence properly introduced against him at trial, I would hold that an instruction on the presumption of innocence is constitutionally required in every case where a timely request has been made"). *But see Whorton*, 441 U.S. at 789 (per curiam opinion) (holding that failure to instruct on the presumption of innocence is not per se unconstitutional, but that such failure "must be evaluated in light of the totality of the circumstances").

71. *Taylor*, 436 U.S. at 483 n.12.

72. *Id.* at 486 (explaining that the Due Process Clause "must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt'" (quoting *Estelle*, 425 U.S. at 503)).

73. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (explaining that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that [expose the defendant to a higher penalty] and such facts must be [proved] beyond a reasonable doubt").

B. The Bifurcated Trial

In *Gregg v. Georgia*,[74] the Supreme Court approved the bifurcation of capital murder trials into separate guilt and sentencing proceedings.[75] The majority in *Gregg* explained that jury sentencing in a unitary capital murder trial "creat[ed] special problems," in that "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."[76] The bifurcated proceeding, however, enables the jury first to hear and consider all the evidence relevant to a finding of guilt or innocence, then after determining guilt, have an opportunity independently to weigh evidence relating to appropriate punishment.[77] The bifurcated proceeding then consists of two trials, one in which the prosecution must prove the defendant's guilt, and then, in the event of conviction, one in which the prosecution subsequently must prove that the defendant should be sentenced to death.

The *Gregg* majority recognized the need to guide a jury in the sentencing proceeding.

> Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given . . . . It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.[78]

Certainly, in weighing the factors relevant to sentencing, the jury requires a central principle similar to the central principle of the guilt phase–that the prosecution must prove all the elements of its case beyond a reasonable doubt, and that the defendant may "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion."[79]

The presumption of life achieves this purpose. First, the presumption would in theory make the jury a clean slate. Although the jury would (indeed, should) be aware of the guilt of the offense, the presumption would work against prejudice toward sentence developed during the guilt phase of the trial. The jury would not be foreclosed totally from considering the circumstances of the offense, but would be reminded to consider the circumstances of the defendant as equally important evidence in sentencing. The presumption of life would, however, channel the jury's consideration of the circumstances of the offense.

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74. 428 U.S. 153 (1976).

75. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

76. *Id.* at 190.

77. *Id.* at 191.

78. *Id.* at 192.

79. *Taylor*, 436 U.S. at 484 n.12 (quoting 9 JOHN WIGMORE, EVIDENCE § 2511 (3d ed. 1940)).

By structuring the inquiry in this manner, the jury will be able independently to consider whether the prosecution has proven not only the factual guilt of the defendant, but also has proven his death-worthiness.

Secondly, the presumption would act as an ordering principle to direct the presentation of evidence in the sentencing phase. The defendant's conviction of capital murder could have the effect of re-ordering the burdens of proof in such a manner that the defendant must show that he is not death-worthy–an outcome repugnant to principles of due process. By instructing the jury on the presumption of life, the court would firmly establish the proper manner in which the jury should weigh and consider the evidence presented. Under the current system, in which a capital jury must divine an ordering principle for its deliberations, jurors determine independently the weight to assign evidence adduced in the guilt phase and evidence adduced in the sentencing phase. The instruction that the jury must presume life as the appropriate penalty requires that the jury find that the prosecution met its burden of proof during the sentencing phase and not to base its sentencing decision entirely on evidence adduced during the guilt phase. Moreover, the presumption would give the jury a much needed paradigm to follow when the evidence does not produce a clear result for either party. In such a case, it seems logical that if the jury cannot with certainty declare death to be the appropriate penalty, it would be preferable to err on the side of lenity.

The Court's approval of the bifurcated proceeding includes a corollary suggestion that the defendant be afforded the same procedural safeguards in the sentencing phase that he received in the guilt phase. In *Bullington v Missouri*,[80] the Court held that the Double Jeopardy Clause of the Fifth Amendment prevented the State from seeking the death penalty in a retrial of the defendant after the jury in the initial trial imposed a life sentence.[81] After explaining that the Court had long resisted the application of the Double Jeopardy Clause to all sentencing proceedings, the Court illustrated that the unique nature of the capital sentencing proceeding required the provision of Double Jeopardy protections.[82] The Court noted that:

> [T]he prosecution [did not] simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled, and, indeed, in all relevant respects was like the immedi-

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80. 451 U.S. 430 (1981)

81. Bullington v. Missouri, 451 U.S. 430, 446 (1981). The United States Supreme Court has granted certiorari to consider the question of whether *Bullington* applies to the resentencing of a defendant who won appellate reversal of his first conviction, in which a life sentence was entered after the jury was unable to reach a verdict as to sentence. *See* Commonwealth v. Sattazahn, 763 A.2d 359, 367 (Pa. 2001) (holding that "[a] default judgment does not trigger a double jeopardy bar to the death penalty upon retrial"), *cert. granted sub nom* Sattazahn v. Pennsylvania, ___ U.S. ___, *available at* No. 01-7574, 2002 WL 406987 (March 18, 2002).

82. *Id.* at 437-38.

> ately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.[83]

The existence of these "hallmarks of the trial on guilt or innocence," in the Court's opinion, distinguished the Missouri capital sentencing procedure from other sentencing procedures in which the Court had previously determined that the Double Jeopardy Clause did not apply.[84] Because capital juries in Missouri were presented with the choice of one of two alternative sanctions, because their determinations were made on the basis of the State's proof of additional facts, and because the State had to prove those additional facts by proof beyond a reasonable doubt, the Court determined the proceeding was intended to protect the interests of the defendant by excluding nearly all possibility of error.[85]

Because the presence of trial characteristics persuaded the *Bullington* court to extend the restrictions of the Double Jeopardy Clause to capital sentencing by jury, it follows that those characteristics also militate in favor of the presumption of life. The *Bullington* court regarded the State's burden of persuasion by proof beyond a reasonable doubt as an important feature of the sentencing proceeding which mandated the extension of guilt trial rights to the sentencing phase. In a guilt trial, the presumption of innocence is the mechanism which ensures that the State carries its burden. Because the reasonable doubt rule also applies at the sentencing proceeding, a mechanism analogous to the presumption of innocence–the presumption of life–is a necessary procedural safeguard in the sentencing proceeding.

C. *The Effect of* Apprendi v. New Jersey

The United States Supreme Court's landmark ruling in *Apprendi v New Jersey*[86] provides the most substantial authority for the proposition that the presumption of life is constitutionally required.[87] In *Apprendi*, the Court held that any fact, other than the fact of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[88] *Apprendi* essentially extends the reasoning of *Winship* to require the reasonable doubt rule to apply to sentencing in cases in which aggravating factors expand the range of available penalties. Although the *Apprendi* court explicitly distinguished a certain subset of capital cases in which the judge must find the existence of a sentencing factor, the

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83. *Id.* at 438.

84. *Id.* at 439-40.

85. *Id.* at 441.

86. 530 U.S. 466 (2000).

87. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (illustrating that a jury must find proof beyond a reasonable doubt of any facts which permit the imposition of a penalty greater than the statutory maximum).

88. *Id.*

central holding of the case suggests that when the decision belongs to the jury, the prosecution must establish the existence of the factor beyond a reasonable doubt.[89]

In his concurrence, Justice Thomas explained that facts which establish the basis for imposing or increasing punishment are elements of the crime.[90] This reasoning supports the introduction of the presumption of life to capital sentencing. Justice Thomas's reasoning in *Apprendi* suggests that for purposes of due process it is not enough to present evidence of aggravation and mitigation to the jury without an ordering principle.[91] By affirming that these facts bearing on the

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89. *Id.* at 496; *see id.* at 494; *see also id.* at 498-99 (Scalia, J., concurring) ("What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee–what it has been assumed to guarantee throughout our history–the right to have a jury determine those facts that determine the maximum sentence the law allows." (emphasis in original)); *id.* at 521 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment–for establishing or increasing the prosecution's entitlement–it is an element.").

In the opinion of the Court, Justice Stevens explained that *Apprendi* does not have the effect of "render[ing] invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Id.* at 496. The Court referred to sentencing schemes in states such as Florida and Arizona, in which the sentencing determination was left to the trial judge. *Id.* In *Walton v Arizona*, the court upheld these sentencing schemes on the ground that the aggravating factors were not separate elements of the offense, but rather "standards" to assist the trial judge in reaching his determination. Walton v. Arizona, 497 U.S. 639, 648 (1990).

Sentencing schemes, such as the scheme in place in Virginia, in which the jury must find the presence of the aggravating factor beyond a reasonable doubt in order to impose a death sentence are distinguishable. The *Apprendi* majority articulated:

> [I]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not–at the moment the State is put to proof of those circumstances–be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484. Under Virginia's statute, and others like it, the maximum penalty for capital murder is life imprisonment, and that penalty may be elevated to death only on proof beyond a reasonable doubt of future dangerousness or vileness. VA. CODE ANN.§19.2-264.4(C) (Michie 2000). Because of this requirement, the statutory aggravators in Virginia cannot be called guiding standards for sentencing, but separate circumstances that lead to greater punishment. Therefore, under *Apprendi*, except to the extent that future dangerousness may be established by the fact of prior convictions, the facts leading to an increase in penalty "beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

This distinction, however, may soon be moot, as the Supreme Court will reconsider *Walton* in the coming term. *See* Arizona v. Ring, 25 P.3d 1139, 1150-51 (Ariz. 2001) (questioning the validity of *Walton* in light of *Apprendi*, but upholding Arizona capital sentencing scheme), *cert. granted*, 122 S. Ct. 865 (2002) (No. 01-488).

90. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

91. *See id.*; *see also* United States v. Woodruff, 68 F. 536, 538 (D. Kan. 1895) (explaining that when statute required a factual determination of the exact sum of a fine which may be imposed, the defendant is entitled to trial by jury).

sentence are "elements," *Apprendi* essentially requires that the prosecution prove its entitlement to the penalty sought.

The presumption of life animates the *Apprendi* requirement in capital sentencing. Since the aggravating factors are in fact those things–elements–that make a capital murder punishable by death, *Apprendi* requires that these elements, when submitted to a jury, be proven beyond a reasonable doubt. The presumption of life functions to ensure that the prosecution meets this burden before the defendant may be sentenced to die.

V. The Virginia Capital Sentencing Scheme Incorporates a Presumption of Life

The provisions of the Code of Virginia that govern capital sentencing indicate a strong legislative preference for life and suggest that the implementation of a presumption of life would be consistent with the goals of the legislature. Section 19.2-264.4 reads, in pertinent part, that "[i]n case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life."[92] This provision requires that punishment be fixed at life imprisonment not only in those cases where the jury affirmatively recommends a life sentence, but also in those instances in which a jury is deadlocked as to the appropriate sentence.[93] In the absence of unanimous agreement among the jurors, the statute prefers the imposition of a life sentence.

Section 19.2-264.4, if read in its plain meaning, suggests that capital juries should presume life.[94] A plain reading of the statute shows that the legislature intended to impose the reasonable doubt rule on the Commonwealth's proof of aggravation.[95] Because the presumption of innocence is a natural corollary to the reasonable doubt rule, reading Section 19.2-264.4(C) to require the jury to err on the side of the defendant could not be wholly inconsistent with the intent of the legislature.[96] Moreover, a contrary reading would result in an absurd outcome. The legislature clearly defined a reasonable doubt burden for the Commonwealth's proof of the statutory aggravating factors; an interpretation that would require the jury to apply its discretion in any manner that did not give the benefit of reasonable doubt to the defendant would be fundamentally inconsistent.

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92. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000).

93. VA. CODE ANN. § 19.2-264.4(E) (Michie 2000).

94. VA. CODE ANN. § 19.2-264.4 (C) (Michie 2000); *see* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE INTERPRETIVE PROCESS 10 (1997) (explaining that if the statute provides a clear answer the inquiry should end because the role of courts is limited to enforcing the law as written).

95. VA. CODE ANN. § 19.2-264.4 (C).

96. *See* MIKVA, *supra* note 94, at 10 (illustrating that courts will not apply the plain meaning rule when such a reading would lead to a result clearly inconsistent with the intent of the legislature).

VI. Conclusion

For all the procedural clarity that the presumption of life would impart to capital sentencing, it is important to remember one final consideration. It is better to let any number of men truly "guilty" of vile capital murder be sentenced to life than to let one innocent man die. The criminal justice system in America is predicated on the notion that an individual's liberty interest is precious and that the government must carry a heavy burden to deprive a person of that interest. That same respect does not, however, always carry over when the individual defendant is guilty of capital murder and the government seeks to impose the death penalty.

The functional beauty of the presumption of innocence is its accessibility. Nearly every American citizen knows its meaning. The presumption is so widely known that jurors in criminal cases have it in the backs of their minds as they hear the evidence presented and as they deliberate. The technical language of Section 19.2-264.4(C), although plainly meaningful to lawyers, is not so simple that it floats off the tongue as the words "innocent until proven guilty." Because the courts expect jurors deftly to handle these legal standards, the criminal justice system ought to shape these standards into easily understood concepts. The concept that the defendant should be presumed to receive a life sentence unless the prosecution proves otherwise is an easy standard. This is not to say that juries mishandle the reasonable doubt standard in capital sentencing in epidemic proportions. Rather, the possibility of such an occurrence is sufficiently substantial to warrant a consistent practice of instructing juries to presume life.

VII. Appendix: Model Presumption of Life Jury Instruction

As you begin your deliberations, the law requires you to presume that the defendant should be sentenced to life imprisonment.[97] Although you have found the defendant guilty of capital murder, your verdict is an insufficient basis for the imposition of a death sentence.[98] The Commonwealth bears the burden at all times of establishing that the defendant constitutes a continuing serious danger to society, that his conduct was wantonly vile, or both.[99] You may not even consider the imposition of a death sentence unless and until the prosecution has met its burden. The defendant does not have a burden of producing any evidence showing that the death penalty is inappropriate, and you may impose a life sentence on the presumption of life alone.[100]

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97. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000).
98. *See id.*; *Taylor*, 436 U.S. at 485.
99. VA. CODE ANN. § 19.2-264.4(C).
100. *See id.*