

Presumption of Innocence, Where Have You Gone?

Alexandra Shapiro has written a compelling narrative for reform and restoration of the heralded presumption of innocence, as an operative principle of law, not just a remotely admired adage.

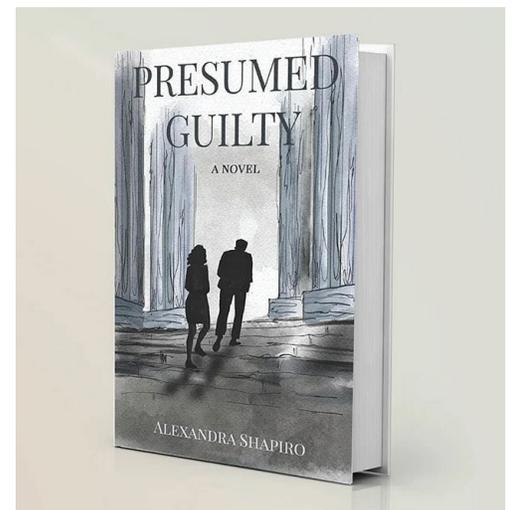
BY JOSEPH W. BELLACOSA

The title of a recent book, *Presumed Guilty*, exposes how the “the presumption of innocence” has gotten turned on its head. Even before turning the first page of the book, the reader senses that the sturdy principle has been shaken and subordinated. This tightly-written first novel is by Alexandra Shapiro, an active lawyer who practices the art and craft of criminal defense representation. She enjoys an outstanding career reputation built on building blocks as a federal prosecutor and law clerk to Justice Ruth Bader Ginsberg. Those experiences add a triangulated realistic perspective to her fictional narrative that uses a white-collar criminal prosecution to spotlight troubling imbalances in the scales of criminal justice. The theme and storyline are enhanced by a book cover illustration of a figurative defendant and lawyer hauntingly hunched over as they climb shadowed courthouse steps (Erin Petersen, Illustrator). The author makes an overarching case “beyond a reasonable doubt” for a recalibration of attitudes among those wielding the

power levers of the criminal justice system, whose operating principle pivots from a misdirected presumed guilt state of mind.

She opens with an incontrovertible resource to kick-off a reformist exhortation: “The citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth not victims, who serves the law and not factional purposes, and who approaches [the] task with humility.” (Attorney General Robert H. Jackson, the peroration from his 1940 Address to the Nation’s Federal Prosecutors “The Federal Prosecutor,” 31 *Journal of Criminal Law and Criminology*, 3-6). An insight emerges that prosecutors often expand their ambitious missions to achieve personalized agendas like rooting out greed and corruption in white-collar type cases. In their zealous quests, they often lose focus, driven by vaulting zealotry. As extrapolated above from then-Attorney General Jackson, because awesome prosecutorial power has the dangerous propensity to harm and destroy people, it ought to be exercised more humbly with a humanitarian compassion, not official hubris.

The parochial New York City setting and character development lend



‘Presumed Guilty’
By Alexandra Shapiro
New Degree Press, 2022, 278 pages, \$18.99

initial credibility to the tale, to wit, Foley Square is the principal venue—the heart of New York City’s well-known courthouses, focusing the dramatic set on the famed S.D.N.Y. The ensemble cast of characters stars the protagonist: the fast-rising star, Emma Simpson, as a highly successful executive in an alleged hedge fund insider trading/Big Pharma entanglement as an attractive bulls-eye target. The Inspector Javert types are played by a media-darling U.S. Attorney (Peter Wiseman), aided by his hardened Section Chief, “Ted” Hardin, and a conscience-stricken AUSA, Annie Waters, all of whom in

the end fail the Jackson prosecutorial profile in courage.

The plot line lays out a creatively-crafted penumbral “criminal” accusation, when substantive ones do not pan out—sadly, an all-too-common back-door maneuver. Filling the district/trial court judge role is a Robert Gregory, who comes off as a crusty recognizable inhabitant type of the comfortably “official insider” family situated at Foley Square. Woven in are a mixed bag of jurors and the imagery of the midtown Lipstick Building, of Bernie Madoff Infamy, and the Playbill is print-ready for the curtain to rise. This first book modestly describes a lot of what is wrong in the modern era when prosecutors decide to operate beyond their assigned limited portfolios, starting with an official inside-out mens rea of *presumed guilt*. If Arthur Miller had staged such a story as a morality play on the derailment from high-minded professionalism in the criminal justice enterprise, he might have entitled it “Death of Innocence” or “Loss of Innocence.”

This author’s no-drama style shows another ironic thumb on the unbalanced scale when trial courts routinely grant prosecutors motions to add *Allen* instructions to confounded juries. At the very least, such instructions neutralize—even impliedly contradict—the innocence presumption. That “kicker” instruction functionally nudges lay jurors towards guilty verdicts when their reasonably expressed doubts are subordinated to a back-ended deference for the authoritative judicial voice. Other such nudges emerge during trials when presiders subtly tip their leanings towards the already over-weighted prosecuto-

rial toolbox by rulings of an arguably uneven evidentiary and instructional nature. This standard occurrence suggests that trial judges should be weighing the benefit of doubt in such close calls in favor of the presumption of innocence, if it has to have efficacious meaning in its real applications. Perceived harmony, or worse bias, between discrete prosecutorial and judicial functions dilutes the fundamental presumption of innocence that is supposed to be lost *only after* a guilty verdict, not on the way towards a verdict. Judges, like prosecutors, should likewise hew closely to their specifically defined judicial boundaries to render even-handed justice, and not wander off as “knights errant” sending messages about more grandiose goals, as Chief Judge Cardozo metaphorically admonished in “The Nature of the Judicial Process,” 100 years ago in the Yale Storrs Lectures!

This briskly-paced book with its crisp chapters (275 pages) also takes head on public arrest scenarios—purely media-driven set-ups for inflammatory and unfair leverage. The book laments the lack accountability, with nary even a nod of self-awareness for the blatant contradiction to the basic right of a presumption of innocence. Throw in (or throw out would be better) for bad measure, the ensuing perp walks and theatrically-staged press conferences—a modern bread-and-circuses headline-grabbing media performative exercise, and the need for some reform is overwhelming proven. Prosecutors and the media self-righteously assert that these blunt-force exercises are done to serve the public’s right to know. That flimsy rationalization flies in the face of a differ-

ent kind of corruption of best and fair practice norms. They devalue the integrity of the judicial process, while transmogrifying the presumed innocent standard.

Speaking of innocence on another last level—a humanitarian feature—this book sheds a bright light on the genre of criminal justice stories by describing in detail the too-often overlooked family impact—wholly innocent bystanders. It details the kind of prosecutorial indifference to—or worse, cold manipulation of—family members. The closing line of the book’s Forward, written by John D. Cline, urges that those who are touched by the story of fictional protagonist Emma should “care, at least equally, about Emma’s flesh and blood counterparts” [husband, Pierre, and children, Sarah and Daniel]. The characters in the book are given names and lives, as those in real life prosecutions also have, who suffer as disregarded and discarded collateral damage. Alexandra Shapiro has written a compelling narrative for reform and restoration of the heralded presumption of innocence, as an operative principle of law, not just a remotely admired adage.

Joseph W. Bellacosa is a retired judge of the New York State Court of Appeals and retired dean and professor of St. John’s University School of Law.