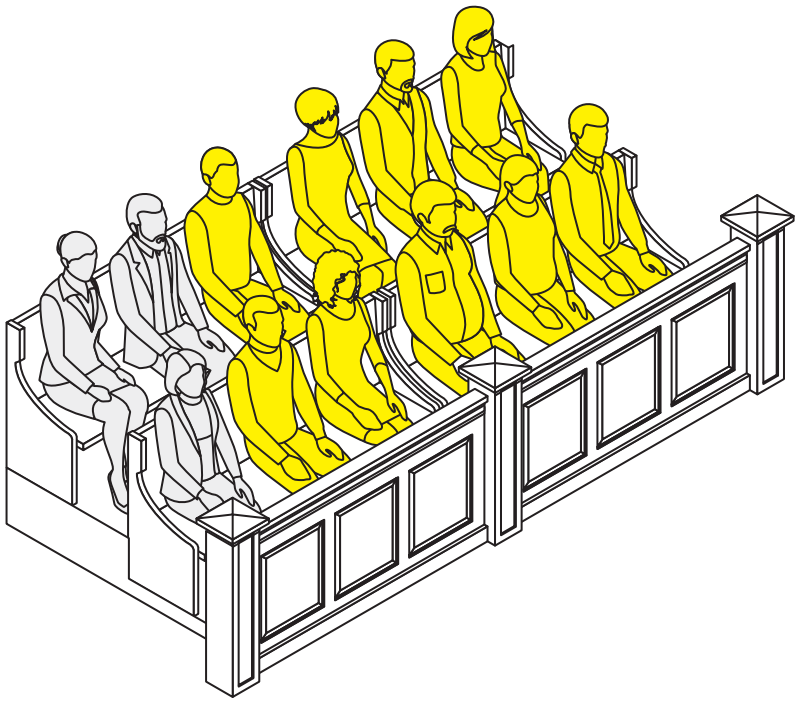
DRC SURVEY

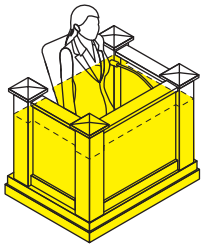
ASSUMPTION OF GUILT IN NEW YORK



77%

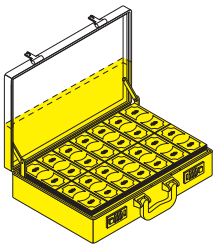
BELIEVE **INDICTED DEFENDANTS** MOST LIKELY **COMMITTED THE CRIME**

56%



FEEL THAT CRIMINAL DEFENDANTS WHO **DON'T TESTIFY** ARE **HIDING SOMETHING**

78%



ASSUME THAT **FINANCIAL PROFESSIONALS** CHARGED WITH WHITE-COLLAR CRIMES **MOST LIKELY COMMITTED** THE CRIME

DRC SURVEY

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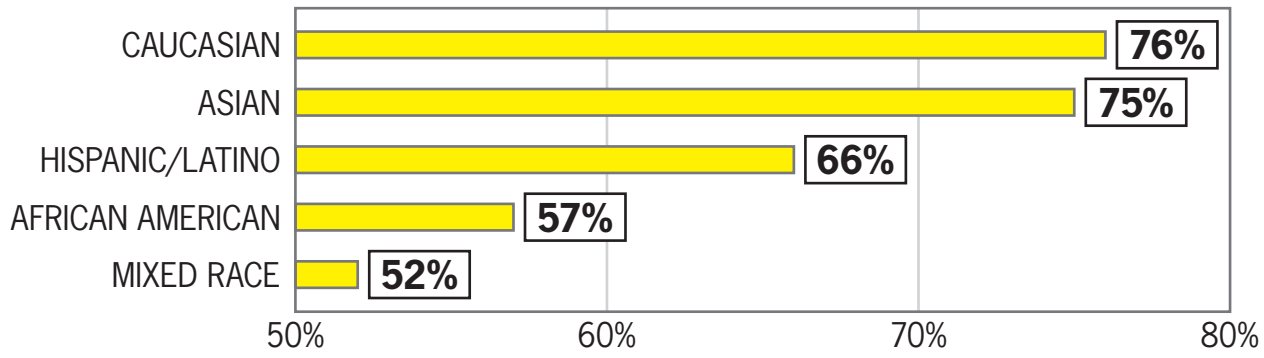
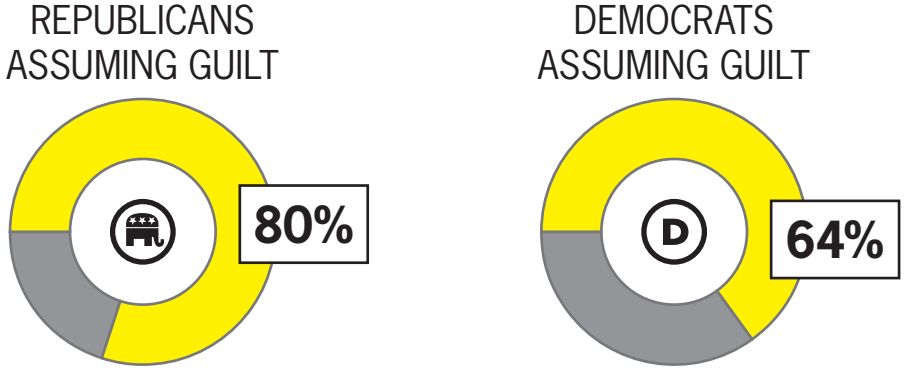
ROLE OF RACE

Caucasians and Asians were more likely to assume guilt than those of other races. Over 75% of Caucasians and Asians polled believe that a person charged with a crime most likely committed the crime.



POLITICAL AFFILIATION

Republicans were more likely to assume guilt than Democrats – 80% of Republicans agreed that a suspect most likely committed the crime for which he/she is accused.

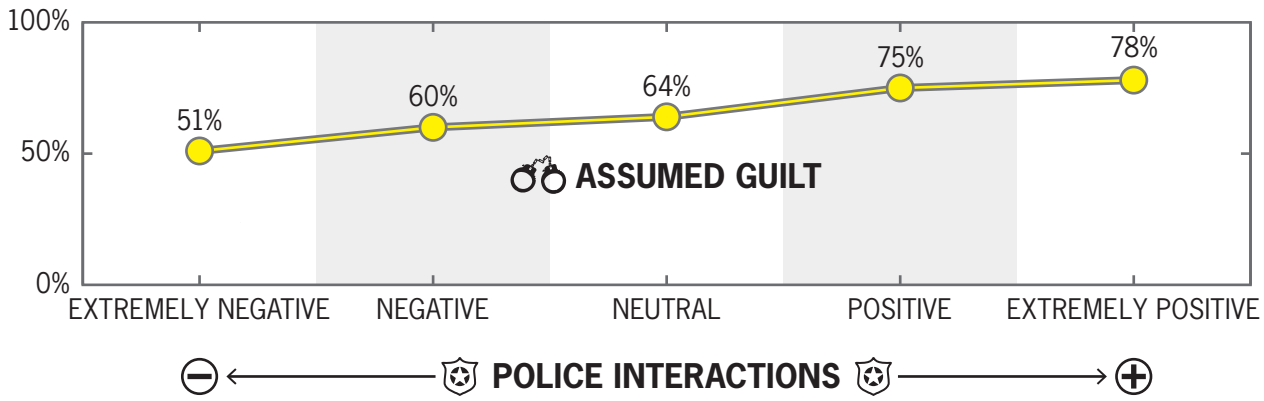


DRC SURVEY

ASSUMPTION OF GUILT IN NEW YORK

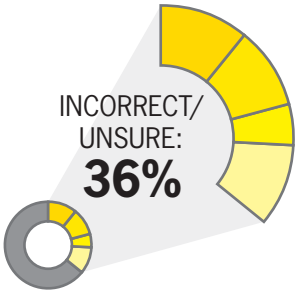
ROLE OF POLICE INTERACTIONS

Respondents who report favorable interactions with police were more likely to assume guilt than those who have had negative or neutral interactions.



UNDERSTANDING THE BURDEN OF PROOF

When asked about their understanding of the burden of proof in criminal cases, 26% of respondents were incorrect in their response and 10% were unsure of the correct standard.



PREPONDERANCE OF EVIDENCE	**11%**
CLEAR AND CONVINCING EVIDENCE	**10%**
BEYOND ANY DOUBT	**5%**
UNSURE OF CORRECT STANDARD	**10%**
CORRECT (BEYOND REASONABLE DOUBT)	**64%**

The presumption of innocence is on life support. To believe otherwise would be to ignore the empirical data. The accused are convicted at an alarmingly high rate in both Federal and State courts. Regrettably, New York sets the standard in this regard –with a conviction rate approaching 99% in the Southern and Eastern District according to the latest available data. It does not get much better in Manhattan State Supreme Court, where the conviction rate is north of 80%. These percentages are not a reflection of some stark reality where the vast majority of the accused are in fact guilty. In fact, a close examination of how these figures are compiled does not offer any comfort. For instance, in the Southern and Eastern District, approximately 95% of convictions can be attributed to guilty pleas. And we now can be certain that the accused plead guilty for a number of reasons – lack of education or resources to mount a defense, or, ironically, because of the elevated conviction rates.[1] In the cost versus benefit analysis, many criminal defendants fear that because there is such a high likelihood they will be convicted, they would rather accept a guilty plea (and the attendant more lenient punishment) than roll the dice with a jury and risk a lengthy prison sentence.

Once guilty pleas are siphoned off, we are still left with an extraordinarily high number of guilty verdicts. Judges, prosecutors, and many in law enforcement resort to the simple reasoning on this – people are found guilty because they are in fact guilty. But that conclusion ignores several important realities. First, while it is difficult to quantify how often it occurs,

[1] *See,* Judge Jed S. Rakoff. "Why Innocent People Plead Guilty." *New York Review of Books,* November 2014, http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; Judge John L., Kane. "Plea Bargaining and the Innocent." The Marshall Project, December 2014, https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent

prosecutors and members of law enforcement sometimes just get it wrong. Whether it is tunnel vision, failure to follow proper identification procedures, *Brady* violations, or due to the actions of rogue cops or prosecutors, the innocent are sometimes accused of crimes that they simply did not commit.

Next, there are instances of mistaken eyewitness identifications, fabrications of jail-house snitches, and other scenarios in which witnesses blame the wrong person. So isn't this where the presumption of innocence comes in to act as the ultimate safety net for the accused? If so, it is riddled with gaping tears. To put it simply, people are more apt to take the word of prosecutors and members of law enforcement than someone who says "I didn't do it." Jurors are by-products of a culture that *assumes guilt*, rather than presumes innocence. This is not hyperbole; rather, it is scientific fact.

DRC conducted a study to gauge the extent to which the *assumption of guilt* exists in the counties that comprise the Southern and Eastern Districts of New York. Here are the findings:

- ***STUDY DESIGN***

  DRC conducted an anonymous survey of 1,261 jury-eligible citizens in the following counties: Bronx, Dutchess, Kings, New York, Orange, Putnam, Queens, Richmond, Rockland, Sullivan, Westchester, Suffolk, and Nassau. The sample matched the collective demographic characteristics of jury-eligible citizens of the combined counties.

- ***SEVENTY-SEVEN PERCENT (77%) OF RESPONDENTS BELIEVE THAT A PERSON WHO IS INDICTED MOST LIKELY COMMITTED THE CRIME***

  Without being provided with any specific evidence or details related to a case, respondents were asked: *"Do you believe that if there was enough evidence to indict (*i.e.*, formally accuse or charge with a serious crime) a suspect most likely committed the crime?" Seventy-seven percent* answered affirmatively.

- ***SEVENTY-EIGHT PERCENT (78%) BELIEVE THAT WHITE-COLLAR DEFENDANTS ARE MOST LIKELY GUILTY***

  Respondents were asked*: "Do you believe that in most cases when a banker, trader, or another financial professional is charged with a white-collar crime (*i.e.*, fraud*

embezzlement, laundering, etc.) he / she most likely committed this crime?" Seventy-eight percent of respondents answered "Yes."

- ***29% BELIEVE THAT AN INNOCENT PERSON IS RARELY ACCUSED OF A CRIME***

  Respondents were asked: *"How often (i.e., never, rarely, sometimes, often, or unsure) do you believe that an innocent person is accused of a crime?"* Nearly one-third of respondents reported that innocent people are rarely accused of crimes. This assumption was correlated with respondents' likelihood to presume guilt. Specifically, of the 367 respondents who believe that innocent people are rarely accused of crimes, 309 (84%) also believed that in most cases, a person who is charged with a crime has most likely committed the crime.

The foregoing should be frightening to anyone that cares about our system of justice. Unfortunately, it confirms what many criminal defense lawyers have long suspected: while the presumption of innocence is touted as a fundamental Constitutional right that distinguishes this Country and our criminal justice system from the rest of the world, it is, in truth, a mere romantic apparition. These findings should be particularly alarming to those who practice in Federal Courts – where attorney-conducted *voir dire* is essentially extinct and you are lucky to get a judge to ask any meaningful questions about prospective jurors' biases related to important legal concepts, let alone issues involved in the case. So, lest we be judged by history as the generation of lawyers that allowed this to occur without a fight, it is time we tried to resuscitate the critically important ideal of the presumption of innocence by doing the following:

- ***PROPOSE VOIR DIRE QUESTIONS REGARDING THE PRESUMPTION OF INNOCENCE***

  Despite the tendency of most Federal judges to reject *voir dire* questions proposed by counsel, you must make a strong case for the court to ask the following:

  - *How many of you believe that in most cases, a person who is charged with a crime or has been indicted has most likely committed the crime?*
  - *Do you believe that innocent people are rarely accused of crimes they did not commit?*

- *Under the law, a defendant need not testify in his / her own defense. If a defendant does not testify, the jury is not supposed to consider that fact in any way in reaching a decision as to whether the defendant is guilty. Despite this, how many of you have the expectation that a criminal defendant should testify? Why or why not?*

- *How many of you believe that if a defendant decides to invoke his / her Fifth Amendment right and does not testify, he / she is most likely hiding something?*

- ***MAKE A RECORD!***

  When a Federal judge does not ask proposed *voir dire* questions, *make a record!* The objection should be that failure to ask fundamental questions that explore jurors' beliefs regarding the presumption of innocence violate the client's Sixth Amendment right to a fair and impartial jury.[2] Cite DRC's study as a basis to ask the questions listed above. Make the argument that defense counsel cannot make meaningful cause challenges if they are deprived of the right to ask questions designed to expose bias.

- ***MAKE IT AGAIN***

  After *voir dire*, but prior to the jury being sworn, renew the objection. The basis should be that the cumulative effect of the court's jury selection process (deprivation of the ability to meaningfully participate in jury selection by asking questions, limiting the amount of questions, etc.) has deprived the client of his or her Sixth Amendment right to a fair and impartial jury.[3]

The great educator and former President of Yale University, Kingman Brewster, Jr., once said, *"[t]he presumption of innocence is not just a legal concept. In commonplace terms, it rests on that generosity of spirit which assumes the best, not the worst, of the stranger.*" The ideals and fundamental legal concepts that define a free society are nothing, just words that disappear into the ether after they are uttered, if we do not breathe life into them. So cite this study, push back, make a record. This is a cause worth getting behind. Just ask all of the men and women who have been wrongfully convicted and spent time in prisons for crimes they did not commit.

[2] *See United States v. Allen*, 788 F.3d 61, 73-74 (2d Cir. 2015)
[3] *See Fietzer v. Ford Motor Co.*, 622 F.2d 281, 284-85 (7th Cir. 1980)