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STATUTORY CRIMINAL PRESUMPTIONS: PROOF BEYOND A REASONABLE DOUBT?

N. HUNTLEY HOLLAND* AND HARVEY H. CHAMBERLIN**

The statutory criminal presumption has become a popular device in criminal proceedings, often enabling the prosecutor to prove elements of an offense and get his case to the jury in circumstances where he might otherwise be unable to do so. Many such presumptions, however, are clearly inconsistent with the standard of reasonable doubt and the presumption of innocence. This inconsistency will be explored in the following discussion. Before doing so, however, it seems appropriate to detail the nature and effect of the reasonable doubt standard and the presumption of innocence.

THE PRESUMPTION OF INNOCENCE

Professor Wigmore tells us that the presumption of innocence is "fixed in our law."[1] The presumption has found expression in many state criminal codes,[2] and most courts have held that it must be included in the instructions to the jury.[3] The United States Supreme Court has held that federal courts must instruct criminal juries on the presumption of innocence.[4] In a recent case, the Court described the presumption as a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' "[5] The presumption of innocence is not actually a presumption in the legal sense that once an underlying fact is proved, another (presumed) fact may be taken as proved. Nor is it a presumption in the popular sense or an inference based on probability, for it is a fact that more persons charged with crime are convicted than acquitted. McCormick explains the presumption:

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1. 9 J. WIGMORE, EVIDENCE § 2511, at 406 (3d ed. 1940).
2. *See, e.g.*, WASH. REV. CODE § 10.58.020 (1961).
3. C. MCCORMICK, EVIDENCE 806 (2d ed. 1972).
4. Coffin v. United States, 156 U.S. 432 (1895). *But cf.* United States v. Agnew, 165 U.S. 36 (1897).
5. *In re* Winship, 397 U.S. 358, 363 (1970).

> The phrase is probably better called the 'assumption of innocence' in that it describes our assumption that, in the absence of contrary facts, it is assumed that any person's conduct upon a given occasion was lawful.[6]

Professor Fletcher states that the presumption of innocence first appeared in civil cases, and developed independently of the reasonable doubt standard.[7] It was not until the 1850's, he says, that American judges began to equate the presumption with the rule on the prosecutor's burden of persuasion.[8] Today, however, the presumption is regarded simply as another way of stating the rule that the prosecutor must prove the guilt of the defendant beyond a reasonable doubt.[9] While some contend that it is an unnecessary amplification of the prosecutor's burden of persuasion,[10] it should not be discarded. The presumption, like the reasonable doubt standard, serves a special purpose by indicating to the jury that if a mistake is to be made it should be made in favor of the defendant, and that above all, guilt should not be inferred from the indictment.[11]

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6. McCormick, *supra* note 3, at 805-06. Judge Alexander, in Carr v. State, 192 Miss. 152, 153, 4 So. 2d 887, 888 (1941), agreed:

> In the first place, the so-called presumption of innocence is not, strictly speaking, a presumption in the sense of an inference deduced from a given premise. It is more accurately an assumption which has for its purpose the placing of the burden of proof upon anyone who asserts any deviation from the socially desirable ideal of good moral conduct.

Professor Slovenko adds:

> The conception of man in the Common Law is that he is good, innocent of crime or evil until proved the contrary by legal evidence. He is presumed to have a natural inclination to be a friend of all other men; he is not considered to be an enemy of man. The Common Law does not follow Thomas Hobbes in his assumption of the basic hostility between men.

Slovenko, *Establishing the Guilt of the Accused*, 31 Tul. L. Rev. 173 (1956).

7. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880 n.2 (1968).

8. *Id.*

9. McCormick, *supra* note 3, at 806.

10. C. McCormick, Evidence 649 (1954); Wigmore, *supra* note 1, at 406.

11. Fletcher, *supra* note 7, at 881; McCormick, *supra* note 3, at 806; J. Thayer, A Preliminary Treatise on Evidence at the Common Law 565 (1898); H. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 12 (1964). Wigmore states:

> [I]n a criminal case the term does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof [reasonable doubt], in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i.e.*, no surmises based on the present situation of the accused.

Wigmore, *supra* note 1, at 407.

Whether one regards the presumption of innocence as merely a restatement of the reasonable doubt standard or a separate principle in itself, the two principles are so closely intertwined that if one is given constitutional stature, it follows that the other should be afforded equal treatment. Thus, since the reasonable doubt standard has been declared an essential element of due process,[12] it follows that the presumption of innocence is also of constitutional dimension. The Supreme Court has twice stated that the presumption's "enforcement lies at the foundation of the administration of our law."[13] The presumption also seems implicit in the eighth amendment protection against excessive bail.[14]

Proof Beyond a Reasonable Doubt

From early times, those who prized freedom have required a strong justification for condemning a defendant and depriving him of either his life or liberty. The minimal demand is that the state punish only those who have contravened the law. This concern for the dignity of the individual has been manifested in various rubrics. It prompted Hale to proclaim that it is better to acquit five guilty men than to convict one who is innocent.[15] It also found expression in the presumption of innocence, and later in the rule that the prosecution must prove the defendant's guilt beyond a reasonable doubt.

McCormick says that the demand for a higher burden of persuasion in criminal cases than in civil cases has roots in antiquity.[16] This demand first appeared in the form of the reasonable doubt standard about 1798.[17] Because of the "nearly complete and long-standing acceptance"[18] of the standard by states in criminal trials, it was not until 1970 that the United States Supreme Court had occasion to give it constitutional stature.[19] In *In re Winship*,[20] the Court stated:

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12. *See* notes 15-25 *infra* and accompanying text.

13. *In re* Winship, 397 U.S. 358, 363 (1970). The Court also noted the principle in the early case of Coffin v. United States, 156 U.S. 432, 453 (1895). There are also references to the presumption of innocence in several other Supreme Court opinions. *See, e.g.*, Deutsch v. United States, 365 U.S. 456, 471 (1961); United States v. Fleischman, 339 U.S. 349, 363 (1950); Sinclair v. United States, 279 U.S. 263, 296-97 (1928); Dunlap v. United States, 165 U.S. 486, 502 (1897); Lilienthal's Tobacco v. United States, 97 U.S. 237, 266 (1877).

14. Slovenko, *supra* note 6, at 174.

15. M. Hale, Pleas of the Crown 289 (1964); G. Williams, Proof of Guilt 186-90 (3d ed. 1963).

16. McCormick, *supra* note 3, at 799.

17. *Id.*

18. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J. concurring).

19. There are, however, references to the reasonable doubt standard in several earlier opinions. For example, in Leland v. Oregon, 343 U.S. 790, 802-03 (1952), Mr. Justice Frankfurter said in dissent that "it is the duty of the Government to establish . . . guilt beyond a reasonable doubt."

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> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. . . .
>
> . . . .
>
> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[21]

The reason the law demands a higher burden of persuasion in criminal than in civil trials bears repeating. The purpose of civil litigation is to arrive at an efficient and fair settlement of a dispute. For this reason it is viewed as no more serious for there to be an error in the defendant's favor than in the plaintiff's.[22] Accordingly, a standard based on probabilities, such as the preponderance of the evidence rule, is appropriate for such cases. But in the criminal context, the social disutility of convicting an innocent man is not equivalent to acquitting one who is guilty. The problem, then, in a criminal trial is not one of reaching a fair settlement but of justifying the use of the state's coercive powers to condemn and punish. Because the potential loss is so much greater in criminal than in civil trials, the risk of factual error must accordingly be reduced. The rule that the prosecution must prove the defendant's guilt beyond a reasonable doubt is based on an attempt to reduce this risk of error to a minimum.

The Supreme Court's decision in *Winship* calls for a reassessment of some practices concerning the allocation of burdens of proof.[23] It

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In Brineger v. United States, 338 U.S. 160, 174 (1949), the Court said that "guilt in a criminal case must be proved beyond a reasonable doubt." Finally, in Christoffel v. United States, 338 U.S. 84, 89 (1949), it was noted that "[a]n essential part of a procedure which can be said fairly to inflict . . . punishment is that all elements of the crime charged shall be proved beyond a reasonable doubt." It should be noted that the comments in the latter two cases were made in dictum. *See also* Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881); United States v. McGlue, 26 F. Cas. 1093 (No. 15,679) (C.C.D. Mass. 1851).

20. 397 U.S. 358 (1970).

21. *Id.* at 363-64.

22. *Id.* at 371.

23. The term "burden of proof" encompasses two separate burdens of proof. Professor McCormick states:

> One burden is that of producing evidence, satisfactory to the judge, of a particular fact in issue. [This is often labelled the "burden of production."] The second is the burden of persuading the trier of fact that the alleged fact is true. [This is generally labelled the "burden of persuasion."]

McCORMICK, *supra* note 3, at 783-84.

Holland and Chamberlin: Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?

seems that our criminal law has not fully accepted the notion that acquittal should result whenever reasonable doubt as to guilt exists, in the sense that it demands proof beyond a reasonable doubt as to some issues, but not as to all.[24] Thus there is a range of issues on which the defendant is not given the benefit of any residual doubt.[25] As noted earlier, there is another similar inconsistency in our criminal law that deserves analysis. This is the inconsistency between the reasonable doubt standard (and presumption of innocence) and statutory criminal presumptions.

STATUTORY CRIMINAL PRESUMPTIONS

At common law, presumptions, such as the inference of guilt from possession of stolen property,[26] were developed to aid the prosecution. Around the turn of the century, legislatively-created presumptions became a popular device for aiding prosecutors.[27] Today, statutory criminal presumptions form an integral part of our criminal law. Their popularity has been termed "an instinctive response to counterbalance the expanding constitutional protections afforded criminal defendants by the courts."[28] This may be true. But while legislatures may be showing less concern for the reasonable doubt standard (and presumption of innocence), the Supreme Court has fairly recently reevaluated its approach to the validity of statutory criminal presumptions.[29] This reappraisal is consistent with a current tendency to favor defendants with respect to the burden of proof.[30]

As noted earlier, criminal presumptions often allow the prosecutor to get his case to the jury in circumstances where he might other-

24. Fletcher, *supra* note 7.

25. *Id.* at 883.

26. WIGMORE, *supra* note 1, § 2513, at 417.

27. Chamberlain, *Legislative Corrections in Criminal Procedure*, 13 A.B.A.J. 703 (1927).

28. Note, *Statutory Criminal Presumption: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967).

29. Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969).

30. For an excellent account of how this trend has influenced the defendant's position with regard to the affirmative defenses, see Fletcher, *supra* note 7. *See also* MCCORMICK, *supra* note 3, at 802.

> The [presumption] statutes have helped the prosecuting officer by allowing him to show in evidence facts which are comparatively easy of proof and then permitting the jury to draw inferences . . . from the facts proven.

Chamberlain, *Presumption as First Aid to the District Attorney*, 14 A.B.A.J. 287 (1928). Professor Slovenko says plainly that presumptions are "procedural device[s] to supply a deficiency." Slovenko, *supra* note 6, at 175.

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wise be unable to do so. As well as in aiding convictions, they provide an incentive to the defendant to produce evidence.[31]

The term "presumption" is only a general label and does not describe the operative effect of a particular provision. Professor Thayer provides a good general definition of the term "presumption":

> Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience.[32]

CONSTITUTIONAL LIMITATIONS ON THE TYPES OF STATUTORY PRESUMPTIONS IN THE CRIMINAL LAW

Statutory criminal presumptions may be classified according to two sets of criteria. First, presumptions may be classified according to their evidentiary effect. A *conclusive presumption* precludes argument on an issue once certain operative facts have been proved. The facts proved may be disputed, but their evidentiary effect in creating the presumed fact may not. The authorities are virtually unanimous in holding that a conclusive presumption is not a presumption at all, but a substantive rule of law.[33] A *mandatory presumption* has the evidentiary effect of compelling the jury to find the presumed fact if the proved fact is believed and the accused does not come forward with evidence rebutting the presumed fact.[34] However, the jury is not compelled to find the presumed fact once rebutting evidence has been introduced by the defendant. Because of the harshness of the procedure, statutory presumptions of this character have seldom been employed in the criminal law.[35] A *permissive presumption* permits, but does not require, the jury to find the presumed fact upon proof of the operative fact.[36]

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31. It has been argued that this "encouragement" is a violation of the fifth amendment protection against self-incrimination. United States v. Gainey, 380 U.S. 63, 71-88 (1965) (Justices Black and Douglas dissenting); Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 157, 174-77 (1970).

32. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 314 (1898).

33. MCCORMICK, *supra* note 3, at 804; Brosman, *The Statutory Presumptions*, 5 TUL. L. REV. 17, 24 (1930); Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277, 278-79 (1968); Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34 (1952).

34. Stumbo, *Presumptions—A View at Chaos*, 3 WASHBURN L.J. 182, 189 (1964).

35. Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 142 (1966). The reporter for the Model Penal Code proposed the use of foreclosure, but his suggestion was not followed. MODEL PENAL CODE § 1.13 (Tent. Draft No. 4, 1955).

36. *See* MCCORMICK, *supra* note 3, at 831; United States v. Gainey, 380 U.S. 63, 70 (1965); Turner v. United States, 396 U.S. 398, 406-07 (1970).

Second, mandatory presumptions may be classified according to whether they shift either the burden of going forward with the evidence as to the existence of the presumed fact, or the burden of persuasion, or both.

Only permissive presumptions are found in criminal statutes.[37] To allow a conclusive or mandatory presumption to operate against a criminal defendant on an element of the crime would violate his right to be free from a directed verdict of guilty.[38] This right precludes the court from even directing the jury to find against the defendant on an element of the crime.[39]

> The notion is that for the court to decide that all elements, or that a single element, of the crime exist would improperly invade the province of the jury, which in fact if not in theory has the power to disregard the applicable law given it by the court by finding, in favor of the defendant, that an element does not exist even when it knows very well that it does exist.[40]

Thus, the only permissible evidentiary effect of a statutory criminal presumption is to establish a prima facie case for the prosecution allowing, but not requiring, the jury to infer the presumed fact from proof of the operative fact. Once the operative facts are proved and the presumption attaches, the case must go to the jury—there can be no directed verdict of acquittal.[41] Assuming that all other elements of the crime have been proved as well—even in the absence of any rebuttal evidence by the accused—the jury may acquit; the defendant does not, strictly speaking, have the burden of producing evidence to overcome the pre-

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37. McCormick, *supra* note 3, at 831.

38. United Bhd. of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947); Sparf and Hansen v. United States, 156 U.S. 51 (1895). Conclusive and mandatory presumptions also infringe upon the defendant's right to a jury trial. *See* authorities cited *supra* note 36.

39. United States v. Manuszak, 234 F.2d 421 (3d Cir. 1956); Konda v. United States, 166 F. 91 (7th Cir. 1908).

40. W. LaFave & A. Scott, Criminal Law 53 (1972).

41. There is language in United States v. Gainey, 380 U.S. 63, 68 (1965), which is seemingly to the contrary:

> Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury when the evidence is insufficient as a matter of law to support a conviction.

While this language gives the trial judge the power to keep a case from the jury when the evidence is insufficient, it means no more than that the rational connection test must be met with regard to statutory criminal presumptions. Once the test is met and the operative fact is proved, there is sufficient evidence to establish the presumed fact.

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sumption. As a practical matter, however, he will probably be convicted if he fails to offer rebuttal evidence.[42]

CONSTITUTIONAL LIMITATIONS ON THE USE OF STATUTORY PRESUMPTIONS IN THE CRIMINAL LAW: THE RATIONAL CONNECTION TEST

Due process principles not only prohibit the use of certain types of presumptions in criminal prosecution, but also set limits upon the use of the permitted presumptions. Prior to its 1943 decision in *Tot v. United States*,[43] the Supreme Court took the position that there was no single test for determining the constitutionality of statutory presumptions. The Court felt that

> [t]he decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula.[44]

In *Tot*, the Court established the "rational connection" test as *the* constitutional standard for judging statutory criminal presumptions. The defendant in *Tot* was convicted under a provision of the Federal Firearms Control Act making it unlawful for one previously convicted of a crime of violence to receive any firearm in interstate commerce. The statute created a presumption that the firearm was received in interstate commerce in violation of the Act from possession of a firearm by one previously convicted of a violent crime. The Court struck down this presumption as violative of due process, stating:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is strained as not to have a reasonable relation to the circumstances of life as we know it, it is not competent for the legislature to create it as a rule governing the procedure of courts.[45]

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42. *See* United States v. Gainey, 380 U.S. 63, 71-78 (1965) (Justices Black and Douglas dissenting).

43. 319 U.S. 463 (1943).

44. Morrison v. California, 291 U.S. 82, 91 (1934).

45. Tot v. United States, 319 U.S. 463, 467-68 (1943).

The Court found that, although state firearms laws made acquisition difficult, it did not necessarily follow from proof of possession that the firearms were received in interstate commerce subsequent to the adoption of the federal act. The firearms possessed by defendant could have been acquired intrastate in violation of state law or received in interstate commerce prior to the adoption of the federal act.

The Court's treatment of two earlier tests used to judge statutory presumptions was as significant as its adoption of the rational connection test. The first, the "greater includes the lesser" test, was never applied in a criminal setting. Its only use came in 1928 in *Ferry v. Ramsey*.[46] There Mr. Justice Holmes devised the rule that if the state could constitutionally enact a criminal statute which did not require proof of the presumed fact, then the presumption was constitutional. The statute in *Ferry* imposed liability upon bank directors who, knowing of their bank's insolvency, assented to the reception of deposits. The statute further provided that proof of insolvency should be prima facie evidence of the directors' knowledge and assent. The Supreme Court upheld the presumption, stating:

> It is said that the liability is founded by the statute upon the directors' assent to the deposit and that when this is the ground the assent cannot be proved by artificial presumptions that have no warrant from experience. But the short answer is that the statute might have made the directors personally liable to the depositors in every case, if it had been so minded, and that if it had purported to do so, whoever accepted the office would assume the risk. The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartful or clumsy way of reaching it.[47]

The Holmes reasoning was completely rejected in *Tot* as inapplicable to a criminal prosecution.[48]

The second test, the "comparative convenience" test, was first proposed in dicta in *Morrison v. California*.[49] Essentially, the test is whether "it would be more convenient for the defendant or for the prosecution to adduce evidence of the presumed fact."[50] In *Morrison* the Court held

46. 277 U.S. 88 (1928).
47. *Id.* at 94.
48. 319 U.S. at 472.
49. 291 U.S. 82 (1934).
50. Leary v. United States, 395 U.S. 6, 33 n.56 (1969).

invalid a statute making it unlawful to conspire to place an alien in possession of land. The statute placed the burden of production and the burden of persuasion as to the citizenship of the co-conspirator with the defendant. In *Tot* the Court reduced the comparative convenience test to the status of a "corollary" to the rational connection test:[51] "The argument from convenience is admissible only where the inference is a permissible one . . . and . . . will not subject him to unfairness or hardship."[52]

In two important cases decided in 1965, the Supreme Court further explained the rational connection test. In *United States v. Gainey*,[53] the defendant was convicted of violating a statute making it unlawful to operate an unbonded still. The statute included a presumption making presence at an unregistered still sufficient evidence on which to convict a defendant of the crime of carrying on the business of distilling without giving bond unless the defendant was able to explain his presence to the satisfaction of the jury. The Court upheld the conviction on the ground that it was well-known that bootleggers hid their stills and that very few people were likely to be found at the hidden sites unless they were parties to the illegal activity.[54] This created a sufficient rational connection between presence at the site of an illegal still and participation in the illegal activity to sustain the presumption.

A few months later in *United States v. Romano*,[55] the Court held unconstitutional a presumption identical to that in *Gainey* with regard to the companion offense of possession of an unbonded still. The presumption made presence at the site of the still sufficient evidence to support a conviction for possession of the still. The Court found that possession of the still was only one of several possible reasons for the defendant's presence at the distilling site. Whereas "participation" in illegal distilling (the offense in *Gainey*) was likely to explain one's presence at the distilling site, "possession" was only one of several activities amounting to "participation." Therefore, a constitutionally sufficient

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51. 319 U.S. at 467.

52. *Id.* at 469-70.

53. 380 U.S. 63 (1965).

54. The Court noted that:

> Congress was undoubtedly aware that manufacturers of illegal liquors are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusions only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy.

380 U.S. at 67-68.

55. 382 U.S. 136 (1965).

rational connection between the accused's presence and his presumed possession was lacking.[56]

In *Romano*, the Court again rejected the "greater includes the lesser" test advanced in *Tot*, but this time more explicitly:

> It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter.[57]

Tot, Gainey and *Romano* left important questions unanswered. To begin with, "rational connection" is a vague term, susceptible to more than one meaning. It was unclear whether "rational connection" meant no more than that the operative fact must be relevant to the presumed fact, regardless of how slightly it raises its probability, or whether it was a test of probative significance. If it was the latter, it was unclear what level of probability was required to sustain a presumption. It was not until 1969, in *Leary v. United States*,[58] that the Court eliminated some of the vagueness associated with "rational connection" and gave the test a more precise meaning.

The petitioner, Dr. Timothy Leary, was driving from New York to Mexico when he was denied entry by Mexican customs officials and had to return to Texas. In Texas, American customs officials discovered marijuana in Leary's automobile. He was subsequently indicted and, after a jury trial, convicted of knowingly transporting and concealing marijuana with knowledge that it had been illegally imported into the United States. The statute under which Leary was indicted included a presumption permitting the jury to infer from the defendant's possession of marijuana his knowledge that it had been illegally imported into the

56. The Court stated:

> Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—the inference of the one from proof of the other is arbitrary . . . .

382 U.S. at 141.

57. *Id.* at 144.

58. 395 U.S. 6 (1969).

Valparaiso University Law Review, Vol. 7, No. 2 [1973], Art. 1

United States.[59] The Court struck down the presumption as failing the rational connection test. It concluded that, though scholarly studies indicated that most domestically consumed marijuana is of foreign origin, this did not warrant the assumption that users of marijuana had read the literature and deduced therefrom that their marijuana was unlawfully imported. The presumption, said the Court, could be upheld only if a very small amount of marijuana were domestically grown. After reviewing the different means by which a possessor of marijuana might learn of its foreign origin, the Court held that it was impossible to say with "substantial assurance" that most possessors know their marijuana to be illegally imported. The chief import of *Leary* lies in its reformulation of the rational connection test. While purporting simply to follow *Tot, Gainey* and *Romano*, the Court employed language defining a "rational connection" which "represents some stiffening of the absolute minimum degree"[60] of connection required to sustain a statutory criminal presumption. The Court stated:

> The upshot of *Tot, Gainey* and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can *at least* be said with substantial assurance that the presumed fact *is more likely than not* to flow from the proved fact on which it is made to depend.[61]

Neither *Tot* nor its progeny stated that a presumed fact must "more likely than not" follow from proof of the operative fact. The language in *Tot* did not foreclose a "more likely than not" test; therein the Court said:

> [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.[62]

This sentence left open the possibility that a presumption short of "more likely than not" but not excessively "strained" and having "a reasonable relation to the circumstances of life" could still pass constitutional muster.

59. 21 U.S.C. § 176a (1964).

60. Note, *Standards for Statutory Criminal Presumptions*, 83 HARV. L. REV. 103, 106 (1969).

61. Leary v. United States, 395 U.S. 6, 36 (1969) (emphasis added).

62. 319 U.S. at 468.

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Leary is also significant for its requirement that the prosecution carry the burden of persuading the trial and appellate court that one fact is "more likely than not" to flow from proof of another fact. The Court stated that "it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden could be placed upon the defendant."[63] This marked a departure from earlier rational connection cases decided by the courts of appeals. Out of deference to Congress, those courts had effectively placed the burden of invalidating the presumption upon defendants.[64]

Leary was careful to say only that a statutory criminal presumption must "at least" meet the "more likely than not" test. The Court did not foreclose the possibility that, at a later date, it might set an even stricter standard. Indeed, in a footnote, it was stated:

> Since we find that the Para. 176a presumption is unconstitutional under the standard ["more likely than not"], we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use.[65]

A later intimation that the Court may be moving toward adoption of a "beyond a reasonable doubt" test came in *Turner v. United States*.[66] There petitioner was charged and convicted on four counts of federal narcotics violations. The first and third counts charged receipt and concealment of heroin and cocaine with knowledge that the two drugs had been illegally imported into the United States. The second and fourth counts charged purchase or distribution of heroin and cocaine removed from the original stamped package. Two presumptions were involved. The first was identical to the presumption struck down in *Leary* except that it dealt with heroin and cocaine rather than marijuana. The second provided that the absence of appropriate taxpaid stamps from narcotic drugs found in the defendant's possession would be prima facie evidence that he purchased or distributed the drugs removed from the original stamped package. The Supreme Court af-

63. 395 U.S. at 45.

64. *See, e.g.*, Costello v. United States, 324 F.2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1964); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962).

65. 395 U.S. at 36 n.64. There is also a faint suggestion in United States v. Romano, 382 U.S. 136, 144 (1965), that the rational connection test should require an inference meeting the reasonable doubt standard.

66. 396 U.S. 398 (1970).

firmed the heroin convictions but reversed the convictions involving cocaine. In doing so, the Court upheld both presumptions as applied to heroin but invalidated the presumptions as applied to cocaine.

Because heroin cannot be legally produced in the United States and because "the overwhelming evidence is that the heroin consumed in the United States is illegally imported," the Court concluded that "[t]o possess heroin *is* to possess imported heroin."[67] The Court then sustained the presumption which inferred knowledge of the unlawful importation from unexplained possession of heroin, stating:

> Whether judged by the more-likely-than-not standard . . . or by the more exacting reasonable-doubt standard normally applicable in criminal cases . . . [the presumption] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.[68]

Because much more cocaine is lawfully produced in this country, the Court invalidated the same presumption as applied to cocaine.[69] It noted that this presumption could not even be sustained under the "more likely than not" test.[70]

The presumption that possession establishes purchase or distribution of a drug removed from the original stamped package was sustained as to heroin. There are no legally stamped packages in this country and almost all heroin is obtained by purchase. The Court thus concluded that "[t]here is no doubt that a possessor of heroin . . . did not purchase the heroin in or from the original stamped package."[71] Perhaps the most significant part of *Turner* was its invalidation of this same presumption as applied to cocaine. Because of the availability of the drug from legal sources, the Court concluded that there was "a reasonable possibility" that Turner had obtained the cocaine from a legally stamped package.[72] Earlier in the opinion it was noted that thefts from stamped packages were much less than the total smuggled.[73] This fact, plus the Court's willingness to find only "a reasonable possibility" that Turner had obtained the drug from legal sources, leads one to conclude that the presumption could have passed the "more likely than

67. *Id.* at 415-16.
68. *Id.* at 416.
69. *Id.* at 418.
70. *Id.* at 419.
71. *Id.* at 422.
72. *Id.* at 423-24.
73. *Id.* at 419.

not" test. If this is the case, then the Court in *Turner* requires that "the sufficiency of the rational connection between the basic facts and the presumed fact must be judged by the 'beyond a reasonable doubt' test."[74]

Shortly after *Turner* was decided, the Court again hinted that it might be redefining "rational connection" in terms of the reasonable doubt standard. In *Sussman v. United States*,[75] the Court vacated the judgment and remanded a conviction for receiving illegally imported gum opium for further consideration in light of *Turner*.[76] Sussman was convicted under the same statute as Turner, which included a presumption inferring knowledge of the drug's illegal importation from unexplained possession. In *Turner*, it was noted that the opium poppy is not legally or illegally being cultivated in this country.[77] The Court also observed that opium cannot be legally imported except for medical and scientific purposes.[78] While some opium is being stolen from legitimate sources, it constitutes less than .01 percent of all the opium being lawfully imported. The Court could have concluded from this that, judged by the "more likely than not" test, a jury could validly infer that illegally possessed gum opium is a smuggled narcotic. That it did not so hold suggests again a redefinition of the "rational connection" to mean beyond a reasonable doubt.

The failure of the Supreme Court to expressly redefine the rational connection test to require an inference beyond a reasonable doubt, its frequent reference to the "more likely than not test," and its dicta in *Tot* that a rational connection could be less than an inference beyond a reasonable doubt,[79] leaves open the question of how "rational connection" will be defined in future cases. Therefore, we will next discuss what level of proof is constitutionally required to sustain a statutory criminal presumption.

RATIONAL CONNECTIONS AND PROOF BEYOND A REASONABLE DOUBT

The rational connection test is a product of a civil dispute. It was created by the Supreme Court in a 1910 civil case, *Mobile, Jackson &*

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74. Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 923 (1970).

75. 397 U.S. 43 (1970).

76. The Court earlier had sustained a similar presumption as applied to opium in Yee Hem v. United States, 268 U.S. 178 (1925).

77. 396 U.S. at 412-13.

78. *Id.* at 413.

79. The Court stated that a presumption could be "created upon a view of relation broader than a jury might take in a specific case." 319 U.S. at 468.

Kansas City R.R. Co. v. Turnipseed.[80] The case involved an action for negligence over the death of a railroad employee killed in a derailment. The statute in *Turnipseed* provided that proof of an injury inflicted by the operation of railroad cars would be prima facie evidence of negligence by the railroad. The railroad attacked the presumption arguing that it was a denial of due process and equal protection. That statute required the railroad to prove due care in its operations, while the plaintiff in any other negligence case had to prove negligence by the defendant. Holding the presumption constitutional, the Court said:

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of equal protection of the law, it is only essential that there shall be some *rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.[81]

It was not until 1925 that the rational connection test first appeared in a criminal context. Quoting the language in *Turnipseed*, the Court in *Yee Hem v. United States*[82] held constitutional a statute which presumed that any possessor of opium knew it to be unlawfully imported. *Turnipseed* was also cited with approval by the Court in *Tot* when it declared the rational connection test to be the "controlling" standard for judging statutory criminal presumptions.[83]

It is generally felt that civil standards of proof cannot be applied in a criminal setting.[84] A civil standard of proof is simply inappropriate in a proceeding to determine whether criminal sanctions should be imposed upon the accused.[85] The "more likely than not" standard is roughly equivalent to the preponderance of evidence standard. The test is therefore more than satisfactory in a civil context, but its application in a criminal matter can only be justified if it does not conflict with the reasonable doubt standard.[86]

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80. 219 U.S. 35 (1910).

81. *Id.* at 43 (emphasis added).

82. 268 U.S. 178 (1925).

83. 319 U.S. at 469 n.9.

84. *In re* Winship, 397 U.S. 358, 363 (1970). *See also* Curley v. United States, 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); Isbell v. United States, 227 F. 788 (8th Cir. 1915). *But cf.* United States v. Masiello, 235 F.2d 279 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956).

85. *See* notes 15-24 *supra* and accompanying text.

86. The test must not conflict with other constitutional protections such as the right against self-incrimination and the right to a jury trial if its use in a criminal context is to be justified. These constitutional issues will not be treated in this paper. For an analysis of these issues see Comment,

The concept of guilt is not a single entity, but is made up of a "complex of elements."[87] Thus, to establish the defendant's guilt, the prosecution must prove each element ("every fact"[88]) of the crime beyond a reasonable doubt. It is therefore incumbent that when proof of a crime is aided by a presumption, the presumed fact must not receive less evidentiary treatment than other facts constituting the crime. If the jury believe that one element of the crime has not been proven beyond a reasonable doubt, but return a verdict of guilty because they feel the entire case is persuasive beyond a reasonable doubt, their inconsistency reflects a serious misunderstanding of the concepts of guilt and proof of its weakest element. An overwhelmingly persuasive argument as to one fact does not make up for an unpersuasive argument as to another fact, nor does it eliminate the residual doubt as to that fact. One court has said:

> No authority in any relevant context has ever suggested that the statutory inference was intended, or may properly serve, to lighten the prosecution's burden of proof beyond a reasonable doubt. On the contrary, it is routine and standard practice . . . to instruct the jury (or to hold at a bench trial) that no conviction may be had unless the prosecution has proved *each element of the offense* . . . beyond a reasonable doubt . . . . And so when we *allow* the drawing of an inference like the type herein [*sic*] issue, we must be telling juries (or ourselves as triers of fact) that the inference is one sustained by substantially more than a preponderance of the evidence, that the probability is far in excess of 50-50, that is sufficient to warrant a reasonable man's being convinced "to a moral certainty" of the correctness of the inference.[89]

The "more likely than not" test permits presumptions when the evidence supporting the presumption is sufficient to justify a belief that the presumed fact follows from proof of the operative fact in at least a

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Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct, 18 U.C.L.A. L. REV. 157 (1970); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

87. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 138 (1968).

88. In *In re* Winship, 397 U.S. 358, 364 (1970), the Court used the language "every fact necessary to constitute the crime" rather than every element of the crime. Whether this difference is one of substance or form is not important for our purposes. Clearly, when dealing with presumed "facts" the analysis does not turn on whether a presumed fact is a "fact necessary to constitute the crime" or an element of the crime.

89. United States v. Adams, 293 F. Supp. 776, 783-84 (S.D.N.Y. 1968).

preponderance of the cases. A trier of fact that can say *only* that it is more likely than not that a fact necessary to the crime exists *cannot* say that the fact exists beyond a reasonable doubt. Thus, the "more likely than not" test allows a case to reach the jury even though the evidence supporting one of the facts of the crime—the presumed fact—is insufficient to sustain a conclusion that the fact exists beyond a reasonable doubt.[90] In addition to permitting the jury to receive the case, the "more likely than not" test induces the jury to find that the presumed fact exists beyond a reasonable doubt in any particular case on the basis of a general legislative determination that the presumed fact follows from proof of the operative fact in at least 51 percent of the cases.[91] This injects caprice into the trial by directing the court, and often the jury, to treat something as proven to a moral certainty when in fact it has not been.

The Supreme Court, save for Justices Black and Douglas,[92] has discounted this argument through an analysis known as the "permissible inference doctrine." In *United States v. Gainey*[93] and later in *Turner v. United States*,[94] the Court explained that statutory criminal presumptions only *permit* the jury to infer the existence of the presumed fact from proof of the operative fact—they are not *required* to do so. Thus, if the jury finds that the presumption does not prove a material element of the crime beyond a reasonable doubt, they may acquit.

The weakness in this analysis is twofold. First, as mentioned above,[95] a statutory criminal presumption meeting the "more likely than not" standard sends a case to the jury where the evidence is insufficient to allow a rational juror to find guilt beyond a reasonable doubt. In such a case, the accused would normally be entitled to a directed verdict of acquittal.[96]

Second, the presumption induces the jury to find guilt beyond a reasonable doubt upon proof of the operative fact. The "permissible inference doctrine" is predicated upon the existence of two distinct propositions in the jury instructions: (1) that the jury must be convinced

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90. *See* note 41 *supra* and accompanying text.

91. *See* note 96 *infra* and accompanying text.

92. *See* United States v. Gainey, 380 U.S. 63, 71-88 (1965); Turner v. United States, 396 U.S. 398, 425-34 (1970). Justices Black and Douglas dissented in both cases.

93. 380 U.S. 63, 70 (1965).

94. 396 U.S. 398, 406-07 (1970).

95. *See* notes 41 and 90 *supra* and accompanying text.

96. Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); Early v. United States, 394 F.2d 117 (10th Cir. 1968); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1157 (1960).

beyond a reasonable doubt of the existence of every element of the crime, and (2) that they may infer from proof of the operative fact the existence of the presumed fact beyond a reasonable doubt. If the defendant does not present evidence to negate the presumed fact, it stands to reason that the jury, troubled over the meaning of "reasonable doubt," will cling to the one certain piece of information they have—a legislative determination of what constitutes proof beyond a reasonable doubt. Even if the defendant presents evidence to negate the existence of the presumed fact, the jury will be inclined to ask if the defendant's evidence *raises* a reasonable doubt about the existence of the presumed fact rather than to look to the prosecution's evidence and ask if it *proves* the existence of the presumed fact beyond a reasonable doubt. Professors Ashford and Risiner provide an excellent analysis worth quoting:

> Generally [the jury] are not certain as to what is meant by certainty "beyond a reasonable doubt." We believe that the very force and value of this term springs from this uncertainty on the part of jurors. The decisions of fact which most individuals make in every day life are generally based on what is more likely than not. . . . The term "beyond a reasonable doubt" is just difficult enough to comprehend as a concept to break through this everyday behavioral pattern of decision-making standards. More important, it forces the individual juror to ponder the question of how the law wants to decide, and to examine his own soul . . . to answer the question of whether or not he is as sure as the law requires him to be. It is intended to make even the juror who thinks that the defendant "did it," in everyday terms, think twice.
>
> [When instructed as to a statutory presumption], however, the jury knows of one thing for certain that it usually does not know, a factor which may seriously reduce the impact of the requirement of proof beyond a reasonable doubt. They know that the fact proved constitutes sufficient evidence in the eyes of the law to justify a finding of the fact presumed beyond a reasonable doubt. We believe that a jury, having found [the operative fact], and having been informed that a finding of [the presumed fact] is correct in the eyes of the law, will quite naturally look to see if there is any reason to find [the presumed fact]. If there is no evidence which tends to show that the presumed fact does not exist, they will all but inevitably find [the presumed fact]. Thus, while it is true that under the instructions the jury must decide that [the presumed fact] has

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> been proven beyond a reasonable doubt or else find [that the presumed fact does not exist], the instructions have left no doubt in their minds that [finding the presumed fact] is the correct result.[97]

This shift in the focus of the jury's inquiry is inconsistent with the presumption of innocence. It is the responsibility of the prosecution to prove every element of the crime beyond a reasonable doubt. Such a process is constitutionally required in order to overcome the presumption of innocence. Statutory criminal presumptions, on the other hand, tend to undermine this concept by encouraging the jury to inquire whether the accused has created a reasonable doubt as to the existence of an element of the crime. Thus, the presumption of innocence is modified to a presumption of guilt, and proof beyond a reasonable doubt is modified to the requirement that the accused raise a reasonable doubt.

An accused in a criminal prosecution must be acquitted if his guilt is not proven beyond a reasonable doubt. The presumption of innocence is not overcome by a probability that the accused committed a crime.[98] The "more likely than not" test does not adequately protect this presumption of innocence. Such a test often permits a prosecutor to get his case to the jury without producing any evidence, other than operative facts underlying the presumption, pertaining to a material element of the crime. The standard permits the jury to receive a case and return a verdict of guilty when the evidence is insufficient to justify a belief that each element of the crime has been proven beyond a reasonable doubt.

A statutory criminal presumption "must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional,"[99] if there is a reasonable doubt as to the inference of the presumed fact from proof of the operative fact on which it is made to depend.[100]

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97. Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 198-99 (1969).

98. *See* Wolf v. United States, 238 F. 902, 906 (4th Cir. 1916).

99. Leary v. United States, 395 U.S. 6, 36 (1969).

100. A few state courts have reached a similar conclusion. State v. Reynolds, 28 Wis. 2d 350, 359, 137 N.W.2d 14, 19 (1965); State v. Edards, 269 Minn. 343, 348, 130 N.W.2d 623, 626 (1964); State v. Kennedy, 15 Wis. 2d 600, 612, 113 N.W.2d 372, 379 (1962); State v. Mix, 211 La. 865, 872, 31 So. 2d 1, 4 (1947).

Should the above conclusion be accepted by the Supreme Court, the legislatures may be expected to circumvent the mandate as much as possible. They may, for example, attempt to eliminate the presumed fact from the *corpus delecti* of the crime, which would achieve the same result as the statutory presumption.

The legislatures have a great deal of latitude in this respect. Constitutional limitations on their

CONCLUSION

A "more likely than not" rule is germane to civil litigation but is inappropriate when used to measure the constitutionality of a statutory criminal presumption. Our political and legal systems declare freedom to be the underlying postulate of their structure. Based on this traditional regard for individual freedom, our criminal law presumes the innocence of every person charged with crime. Before the state can impose criminal punishment, it must first overcome this presumption by proving beyond a reasonable doubt *every fact* making up his guilt.

The difficulty that this requirement imposes is not insubstantial, but it rests upon sound and clearly defined principles. It is this practical difficulty of proof, not a change in the underlying principles of the presumption of innocence and the reasonable doubt standard, that has led to the improper use of presumptions in our criminal law. Difficulties of proof are legitimate justifications for creating statutory civil presumptions—but not criminal presumptions.

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power to employ criminal sanctions are minimal and ill-defined. Professor Hart wrote that the "legislature's sense of justice" has been the prime constitutional limitation on the use of the criminal sanction where an offense has been related to a Bill of Rights protection. Hart, *The Aims of the Criminal Law*, 23 LAW AND CONTEMP. PROB. 401, 411 (1958).