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PRESUMPTIONS IN CRIMINAL CASES: A NEW LOOK AT AN OLD PROBLEM

James T. Ranney*

I. INTRODUCTION¹

This article will seek to clarify somewhat the area of statutory presumptions in criminal cases and to suggest a new approach to this old problem area. The need for a new analytical approach is clear. The test last approved by a majority of the United States Supreme Court for assessing the constitutional validity of such presumptions, the so-called "more-likely-than-not" test,² is conceded by virtually all commentators to be totally inadequate. As will be seen, the test bears no reasonable relation to the vital due process fairness considerations actually involved, and has only a haphazard relationship to just constitutional decisions. But the suggestion of most commentators—that the "beyond-a-reasonable-doubt" standard should replace the existing test—is likewise inadequate, being a much too simplistic response to the problem.

Critical to a full understanding of the courts' treatment of statutory presumptions are two closely interrelated doctrines—the presumption of innocence³ and the beyond-a-reasonable-doubt requirement.

II. THE PRESUMPTION OF INNOCENCE

Although probably the single most well-known principle of American law among the general populace, the "presumption of innocence" is not expressly mentioned in the United States Constitution. Indeed, the proposition emerged as an explicit principle relatively recently in this country's common law. According to Professor Fletcher, the first express mention of the presumption of

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1. This article is adapted from a treatise the author is writing for West Publishing Company on criminal law and procedure. In order not to detract from the principal thrust of the argument without deleting much purely descriptive legal discussion, it has been necessary to relegate certain textual material to footnotes, including citations to pertinent Montana law. For the resultant occasional surfeit of footnotes, the author offers his apologies to those who feel obliged to wade through them. The author would also like to thank John Spooner, Editor-in-Chief, for his assistance, especially with relevant Montana statutes and cases.

2. Cf. discussion at notes 41-49 *infra*.

3. As will be seen, this is not actually a presumption proper at all. Cf. discussion at notes 7, 12-14 *infra*.

innocence appears in British private law cases in the early 1800's.⁴ Then, in the 1850's, American judges equated the proposition with the proof-beyond-a-reasonable-doubt requirement.⁵ The principle's origins go back much further, however, to the very birth of the common law itself.⁶

As will be seen, the so-called presumption of innocence is actually not a presumption in the proper legal sense at all, for the doctrine says nothing about the use of certain reasoning or legal processes leading from one factual proposition to another.⁷ Further, the principle is hardly a presumption in the everyday sense of being something which is factually more likely than not to be true. Rather,

[t]he presumption of innocence grew up as a policy of law and is not based upon probabilities at all. It represents the law's humane approach to the solution of a dispute which may result in the loss of life or liberty.⁸

While the presumption of innocence has thus been viewed as another way of stating the requirement that the prosecution prove the defendant's guilt beyond a reasonable doubt,⁹ the proposition also seeks to prevent the jury from reaching a conclusion based on the mere fact of arrest or indictment and promotes verdicts based solely on the evidence presented.¹⁰ Indicative of the close relation-

4. 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).

5. *Id.*

6. Reynolds v. United States, 238 F.2d 460, 463 (9th Cir. 1956)(presumption of innocence "predicated . . . upon ancient concepts antedating the development of the common law"); Coffin v. United States, 156 U.S. 432, 453 (1895)(presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law").

7. Cf. notes 12-14 *infra*. The Montana legislature nonetheless viewed this doctrine as a presumption by placing it in MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 26-1-602(1) (1979), titled "disputable presumptions," and in MCA § 46-16-601 (1979). This presumption has been used in civil cases in Montana. Kern v. Eichhorn, 111 Mont. 171, 176, 107 P.2d 873, 875 (1940); State *ex rel.* Tillman v. Dist. Court, 101 Mont. 176, 181, 53 P.2d 107, 109 (1936); Hawaiian Pineapple Co. v. Browne, 69 Mont. 140, 147, 220 P. 1114, 1116 (1923). The presumption is generally used in criminal cases. *E.g.*, State v. McLeod, 131 Mont. 478, 489, 311 P.2d 400, 406 (1957). See also Clarke, *Statutory and Common Law Presumptions in Montana*, 37 MONT. L. REV. 91, 98 (1976).

8. Commonwealth v. Bonomo, 396 Pa. 222, 229, 151 A.2d 441, 445 (1959).

9. See Taylor v. Kentucky, 436 U.S. 478, 483-84 n.12 (1978); *In re Winship*, 397 U.S. 358, 363 (1970)(the reasonable doubt standard "provides concrete substance for the presumption of innocence"). Cf. W. LAFAVE AND A. SCOTT, CRIMINAL LAW 58 (1972) [hereinafter cited as LAFAVE AND SCOTT]; Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U. MO. AT KANSAS CITY L. REV. 30, 57 (1963).

10. Taylor v. Kentucky, 436 U.S. 478, 483-85 (1978). Cf. Estelle v. Williams, 425 U.S. 501, 504 (1976)(dictum implying that forcing defendant to wear prison garb would impinge upon the presumption of innocence).

ship between the presumption of innocence and the proof-beyond-a-reasonable-doubt requirement, where an instruction on reasonable doubt has been given, the refusal to give an instruction on the presumption of innocence has been held error only where, under the totality of the circumstances, the absence of such an instruction amounted to a denial of due process.¹¹

Commentators and most courts have often noted that the so-called "presumption" of innocence is not actually a presumption at all, for the presumption of innocence doctrine is not a mandatory inference drawn from a fact in evidence.¹² It has been said to be more properly characterized as an "assumption" invoked in the absence of contrary evidence.¹³ Partly because of the general use of the "presumption" terminology, the assumption of innocence has occasionally been misconstrued and confused, most often by defense counsel seeking to extend the doctrine to the area of bail decisions.¹⁴

III. THE PROOF-BEYOND-A-REASONABLE-DOUBT REQUIREMENT

The requirement of proof beyond a reasonable doubt is intimately related to the presumption of innocence principle. The precise formula of proof beyond a reasonable doubt is of surprisingly recent vintage—1798 according to Professor McCormick—although the principle itself is of ancient derivation.¹⁵ Almost equally surprisingly, the United States Supreme Court only recently had occa-

11. Compare *Taylor v. Kentucky*, 436 U.S. 478, 492 (1978) (refusal to give such instruction reversible error where court's instruction on reasonable doubt was "truncated" and "hardly a model of clarity," the lower court had refused an instruction that the indictment was not evidence, the prosecutor had engaged in argument suggesting that defendant's status as a person indicted tended to show his guilt, and the evidence against the defendant was weak) with *Kentucky v. Whorton*, 99 S.Ct. 2088, 2090 (1979) (rejecting lower court's reading of *Taylor* as creating a per se rule requiring the giving of an instruction on the presumption of innocence upon request). The Montana Supreme Court has adopted a more rigid standard, interpreting MONT. CONST. art. II, § 26 to require that an instruction on the presumption of innocence be given whenever it is requested. *State v. Williams*, — Mont. —, 601 P.2d 1194, 1196 (1979).

12. See *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978).

13. *Id.* Cf. LAFAVE AND SCOTT, *supra* note 9, § 8; MCCORMICK ON EVIDENCE §§ 342, 346 (2d ed. 1972) [hereinafter cited as MCCORMICK].

14. Cf. Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1501 (1966) ("But the strict presumption of innocence . . . does not require that all defendants be treated as though in fact innocent during the period prior to trial."); *Bell v. Wolfish*, 99 S.Ct. 1861, 1870-71 (1979) (presumption of innocence doctrine allocates burden of proof at trial and may serve as cautionary instruction to jury, but "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.").

15. MCCORMICK § 341. This doctrine is codified in Montana at MCA § 46-16-601 (1979).

sion to 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."¹⁶ The significance of this holding can only be understood by analyzing subsequent opinions.

The principal impact of the proof-beyond-a-reasonable-doubt requirement has been in the area of so-called "affirmative defenses." The United States Supreme Court has gone a long way toward requiring that the prosecution prove beyond a reasonable doubt *all* of the elements affecting culpability for an offense, even those dominated "defenses."¹⁷ Yet it has not precluded the possibility of placing the burden of proof on the defendant as to certain issues of justification, excuse, or mitigation where the state could constitutionally impose the statutory sanctions for the crime involved without considering any mitigating factor at all.¹⁸ In *Patterson v. New York*, the court stated:

The Due Process Clause, as we see it, does not put New York to the choice of abandoning [all of its affirmative] defenses or undertaking to disprove their existence in order to convict for a crime *which otherwise is within its constitutional powers to sanction by substantial punishment*. . . . (emphasis added)¹⁹

16. *In re Winship*, 397 U.S. 358, 364 (1970)(this standard applicable to juvenile delinquency proceedings based on acts which would constitute a crime if committed by an adult).

17. *See Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975)("The Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."); *Sandstrom v. Montana*, 99 S.Ct. 2450, 2459 (1979)(instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," which could have been interpreted as either a conclusive presumption or one shifting the burden of persuasion as to defendant's intent, had the effect of relieving the state of the burden of proof beyond a reasonable doubt as to the state-of-mind element, in violation of the Fourteenth Amendment).

18. *See Patterson v. New York*, 432 U.S. 197, 198 (1977)(defendant's conviction for second degree murder did not violate due process because the New York murder statute placed the burden of proof as to the defense of "extreme emotional disturbance" on defendant).

19. 432 U.S. at 209. The Court went on to state:

[I]n each instance of a murder conviction under the present law New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.

Id. *See generally* Jeffries and Stephan, *Defenses, Presumptions, and the Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979) [hereinafter cited as Jeffries and Stephan]; Allen, *The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal*

As will be seen, the question of the constitutionality of placing a burden of proof upon the defendant as to affirmative defenses is intimately related to the whole problem of the constitutional validity of statutory presumptions. The primary reason for this is that such presumptions have the effect of shifting the burden of production or the burden of persuasion on a given issue to the defendant.²⁰

IV. PRESUMPTIONS IN CRIMINAL CASES

The subject of presumptions in criminal cases has been most aptly described as an area of "entrenched confusion."²¹ A large part

Cases After Patterson v. New York, 76 MICH. L. REV. 30, 36-53 (1977); Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 295-301 (1977); *The Supreme Court*, 1976 Term, 91 HARV. L. REV. 70, 94-100 (1977).

20. Cf. Allen, *The Restoration of In Re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 MICH. L. REV. 30, 56-61 (1977); Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 288 (1977); Ashford and Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 170 (1969); Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 937-38; Note, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 146-47 (1966); Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871, 883-86 (1976); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1, 24-25 (1954).

21. A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSES OF CRIMINAL CASES § 427 (3d ed. 1974). Cf. Morgan, *Presumptions*, 12 WASH. L. REV. 255, 255 (1937) ("Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair."); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 300(01) (1975) ("Despite the thousands of pages that have been written since the days of Thayer describing, defining and detailing the consequences of presumptions, the subject remains elusive and confusing."). See generally Jeffries and Stephan, *supra* note 19, at 1237-38, 1335-38, 1387-97 (an excellent attempt at clarification of this area); J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE §§ 300(01)-(03), 303(01)-(08) (1975); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979); D. LOUISELL AND C. MUELLER, FEDERAL EVIDENCE §§ 65-70, 83 (1977) [hereinafter cited as LOUISELL & MUELLER]; McCORMICK, §§ 342-44, 346; LaFAVE AND SCOTT, *supra* note 9, § 21; Note, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966); Abrams, *Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis*, 22 VAND. L. REV. 1135 (1969); Christie and Pye, *Presumptions and Assumptions in Criminal Law: Another View*, 1970 DUKE L.J. 919; Ashford and Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969); Comment, *Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct*, 18 U.C.L.A. L. REV. 157 (1970); Note, *An Analysis of the Constitutionality of Statutory Presumptions That Lessen the Burden of the Prosecution*, 25 U. MIAMI L. REV. 420 (1971); Note, *Due Process, Self-Incrimination, and Statutory Presumptions in the Wake of Leary and Turner*, 61 J. CRIM. L. & CRIM. 367 (1970); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 404 (1969); B. LAUB, PENNSYLVANIA TRIAL GUIDE §§ 8.24-8.61 (1973); 1 NATIONAL

of this confusion stems from the inability of many courts and commentators to realize that presumptions come in a wide variety of shapes and sizes, their consequences depending upon precisely what their creator intended (or, more frequently, upon precisely what a court says was intended).²² In short, there is no substitute in this difficult area for a careful analysis of all the practical consequences of a given presumption within a particular fact situation, for efforts to force reality into a single theoretical mold have served only to further confuse matters.

With the above statements as a strong caveat, a few efforts at definition and categorization will nonetheless be made. As a point of initial clarification, it is important to note that many propositions of law labeled presumptions are not presumptions at all. The so-called presumption of innocence, the presumption of sanity, the presumption of competency of witnesses, the presumption of knowledge of the law, and the presumption of the regularity of proceedings, are simply not presumptions in the sense defined above since they do not attempt to guide or affect the process of deduction from one fact to another.²³

Most courts and commentators distinguish a "true" rebuttable presumption from both conclusive presumptions and permissive inferences. The rebuttable presumption requires the assumption of one fact *B*, an element of the crime, from the proof of primary fact

COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 19-32 (1970); 1 WHARTON'S CRIMINAL EVIDENCE §§ 89-150 (13th ed. 1972). For discussion of the early history of presumptions, cf. J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 327-28 (1898)(examples of both conclusive and rebuttable presumptions as early as the reign of King Ine of Wessex, 688-725 A.D.).

22. For an instance where the U.S. Supreme Court found a presumption to operate differently in *practice* than a state high court had held that it operated, cf. *Sandstrom v. Montana*, 99 S.Ct. at 2450 (1979).

23. See MCCORMICK § 346, 829-30 and ABRAMS, *Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis*, 22 VAND. L. REV. 1135, 1136-40 (1969). But see ASHFORD and RISINGER, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 172 (1969)(presumption of sanity dealt with as example of a presumption). A good many presumptions do not deal with proof of an element of a crime, but rather relate to the treatment of the testimony of witnesses or collateral matters at trial. While occasionally such presumptions raise problems similar to those raised by presumptions as to aspects of criminal culpability, they generally raise different problems requiring analysis along different lines. See, e.g., *Cupp v. Naughten*, 414 U.S. 141, 149 (1973)(upheld, as not violative of due process or the beyond-a-reasonable-doubt requirement, and without discussion of the standard for assessing the validity of statutory presumptions, jury charge that, "Every witness is presumed to speak the truth. The presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption."). Cf. Note, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 ST. LOUIS U. L.J. 223, 229, 239-42 (1974); BROSMAN, *Statutory Presumptions*, 5 TUL. L. REV. 17, 48-49 (1930).

A, in the absence of some form of explanation as to why the assumption should not be made, thus seemingly permitting "proof" of certain facts without direct evidence.²⁴

A. Conclusive Presumptions

A conclusive presumption, on the other hand, has been said to be "not, properly speaking, a presumption at all," but rather a substantive rule of law.²⁵ A conclusive presumption demands, rather than permits, that proof of primary fact *A* be deemed sufficient to prove presumed fact *B*, which is listed as an element of the offense. For example, a child under the age of seven may be conclusively presumed unable to commit a felony. In effect, this presumption is merely a substantive law making anyone under seven incapable of committing a felony.²⁶ The constitutionality of a criminal statute containing a conclusive presumption should depend simply upon the constitutionality of imposing criminal liability upon proof of only the primary fact *A* without any direct proof of presumed fact *B*.²⁷ The Supreme Court's recent decision in *Sandstrom v. Montana*, it should be noted, held only that an element of a crime (*mens rea*) which was obviously necessary in order to con-

24. See 1 LOUISELL & MUELLER, *supra* note 21, § 67; Ashford and Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 165 (1969) ("most are agreed that a presumption is a legal mechanism which, unless sufficient evidence is introduced to render the presumption inoperative, deems one fact to be true when the truth of another fact has been established."); 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, Working Papers 19-20 (1970). Cf. *Commonwealth v. Shaffer*, 447 Pa. 91, 105, 288 A.2d 727, 735 (1972), *cert. denied*, 409 U.S. 867 ("A rebuttable presumption is a means by which a rule of substantive law is invoked to force the trier of fact to reach a given conclusion, once the facts constituting its hypothesis are established, absent contrary evidence."). In *Montana*, most of these rebuttable presumptions appear at MCA § 26-1-602 (1979).

25. Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 24 (1930). The sole conclusive presumption recognized in Montana criminal law is found in MCA § 26-1-601(1) (1979), which conclusively presumes "a malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another." This presumption has been interpreted only once tangentially in *State v. Smith*, 57 Mont. 563, 581, 190 P. 107, 113 (1920), an interpretation that consisted of a restatement of what the statute plainly says.

26. 1 LOUISELL AND MUELLER, *supra* note 21, § 67. Cf. MCCORMICK § 342.

27. Cf. *Commonwealth v. Robinson*, — Pa. Super. —, 399 A.2d 1084, 1087 (1979) (statute in effect conclusively presuming defendant's knowledge of age of sex offense victim under fourteen years of age sustained). A few decisions, mainly civil cases, can be found suggesting that a legislature cannot use conclusive presumptions in drafting statutes. Cf. *Bowers v. United States*, 226 F.2d 424, 429 (5th Cir. 1955) (dictum); *People v. Falk*, 310 Ill. 282, 284, 141 N.E. 719, 719-20 (1923); cf. also Note, *Due Process, Self-Incrimination, and Statutory Presumptions in the Wake of Leary and Turner*, 61 J. CRIM. L. & CRIM. 367, 372 (1970); WHARTON'S CRIMINAL EVIDENCE § 94 n.64 (13th ed. 1972). This is complete nonsense, of course, for if the legislature could constitutionally accomplish the same result with a substantive rule of law, then there should be no reason why it could not do so with a conclusive presumption. Cf. *Jeffries and Stephan*, *supra* note 19, at 1348, 1387-97.

stitutionally impose criminal liability could not be conclusively presumed.²⁸

B. *Permissive Inferences*

A permissive inference (often called simply an inference) refers to a process of deductive reasoning, often not embodied in any statute or rule of law as such, which allows but does not require the finder of fact to draw conclusions based upon established facts.²⁹ Although most courts have lately been at pains to distinguish a permissive inference from a rebuttable presumption,³⁰ the practical effect of the two devices may be very similar.³¹ Many courts have strained to find the existence of a mere inference instead of a rebuttable presumption, seeking to avoid the constitutional uncertainties surrounding the latter. These courts permit the use of a permissible inference where the instructions to the jury clearly treat it as such and where the evidence is sufficient to meet the beyond-a-reasonable-doubt requirement.³²

28. *Sandstrom v. Montana*, 99 S. Ct. 2450, 2457-60 (1979). *Cf. also* Jeffries and Stephan, *supra* note 19 at 1365, 1370-79, 1396.

29. *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2224 (1979); *Commonwealth v. DiFrancesco*, 458 Pa. 188, 199-200, 329 A.2d 204, 211 (1974). *Cf. generally* A. AMSTERDAM, B. SEGAL, AND M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, § 427 (3d ed. 1974); McCORMICK § 342; 1 LOUISELL AND MUELLER, *supra* note 21, § 67.

30. *See, e.g.*, *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2224-25 (1979); *Commonwealth v. Shaffer*, 447 Pa. 91, 105-110, 288 A.2d 727, 735-38 (1972), *cert. denied*, 409 U.S. 867. According to the Montana Supreme Court, "the difference between an inference and a presumption escapes all but the most nimble legal minds." *Helmke v. Goff*, — Mont. —, 597 P.2d 1131, 1133 (1979).

31. *See, e.g.*, *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2225 n.16 (1979) ("To the extent that a presumption imposes an extremely low burden of production—*i.e.*, being satisfied by 'any' evidence—it may well be that its impact is no greater than that of a permissive inference and it may be proper to analyze it as such."); *Barnes v. United States*, 412 U.S. 837, 846 n.11 (1973) ("It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant."). *Cf. Commonwealth v. DiFrancesco*, 458 Pa. 188, 193-94 n.3, 329 A.2d 204, 207-08 n.3 (1974) (since the burden-shifting function of a presumption does not, in criminal cases, entail the possibility of a directed verdict against the defendant, the court felt it "apparent that virtually all so-called 'criminal presumptions' are really no more than permissible inferences."); *cf. also* McCORMICK § 342. *But cf.* discussion accompanying notes 33-37 *infra* describing the functions of rebuttable presumptions. It would seem entirely possible to have a "hybrid" provision having some characteristics of a rebuttable presumption and some characteristics of a permissive inference.

32. *See, e.g.*, *United States v. Gainey*, 380 U.S. 63, 70, 76-77 (1965) (provision stating that "presence of the defendant shall be deemed sufficient evidence to authorize conviction" for carrying on the business of running an illegal still unless defendant explains his presence, read, in context of jury charge as a whole, as merely authorizing a permissive inference!); *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2226-27 (1979) (statute making presence of a firearm in an automobile "presumptive evidence of its possession by all persons occupying such automobile at the time" unless the firearm is found on the person of one of the occupants, similarly read in view of jury instructions); *Commonwealth v. DiFrancesco*, 458 Pa. 188, 199-

C. The Operation of Presumptions

There is a critical need to analyze the practical consequences of a presumption within a given statutory framework, in order both to be sure what a presumption entails during a trial and to intelligently assess its constitutionality. Upon analysis, presumptions ordinarily appear to have three basic functions or consequences. First, a rebuttable presumption shifts³³ to the defendant either the burden of production or the burden of persuasion as to an issue affecting criminal liability.³⁴ Unlike presumptions in civil cases, however, any such shifting in a criminal case cannot be accompanied by a directed verdict because a court cannot direct a verdict against a defendant in a criminal case.³⁵ Secondly, a rebuttable presumption may allow the prosecution to meet its burden of production by taking the case to the jury where it might not otherwise have survived a directed verdict.³⁶

Thirdly, in jury cases a rebuttable presumption will usually

200, 329 A.2d 204, 211 (1974)(statutory "presumption" of intoxication from .10% alcohol content treated as only an inference subject to the reasonable doubt standard and evidence found sufficient to convict). *See also* Barnes v. United States, 412 U.S. 837, 843 (1973)(sustained as not violative of due process a jury instruction that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.")

33. To some extent the use of the word "shifts" may in some cases be erroneous, for a given statutory scheme may *always* so place the burden.

34. *See* Commonwealth v. DiFrancesco, 458 Pa. 188, 193 n.3, 329 A.2d 204, 207 n.3 (1974)("A presumption . . . also shifts to the opposing party the burden of producing evidence to disprove the presumed fact."); Ulster County Ct. v. Allen, 99 S.Ct. 2213, 2225 n.16 (1979)(noting that the mandatory presumptions the Court has examined thus far have almost uniformly involved only a shift in the burden of production). *Cf. generally* J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE, § 300(01) (1975)("Thayerian" presumption merely shifts burden of production and disappears from the case once the opponent comes forward with evidence of some kind, courts having adopted varying standards as to the quantity of evidence required to wipe out such a presumption; a "Morgan" presumption entails a shift in the burden of persuasion); McCORMICK § 342. It has been cogently suggested that if the only consequence desired by legislative draftsmen is a shifting of the burden of production or persuasion, it would be better to simply so state rather than use the cumbersome "presumption" technique. *Cf.* Model Penal Code, at 115 (Tentative Draft No. 4, 1955).

35. Sandstrom v. Montana, 99 S.Ct. 2450, 2455 n.5 (1979); Commonwealth v. DiFrancesco, 458 Pa. 188, 193 n.3, 329 P.2d 204, 207-08 n.3 (1974).

36. *See, e.g.,* People v. Kirkpatrick, 32 N.Y.2d 17, 19, 295 N.E.2d 753, 755 (1973). *Cf.* Model Penal Code, § 1.12(5)(a) (Tentative Draft 1962)(A presumption with respect to any fact which is an element of an offense has the consequence that "when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact."); Holland and Chamberlin, *Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?*, 7 VAL. U. L. REV. 147, 153 n.41 (1973); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 341 n.1 (1970); and Jeffries and Stephan, *supra* note 19, at 1336.

entail the giving of a jury instruction of some kind, the validity of such a jury instruction not necessarily being determined by the general validity of the presumption in question.³⁷ In fact, jury instructions using presumption terminology can run afoul of the beyond-a-reasonable-doubt requirement even where no statutory presumption at all is involved or none of the other incidents or consequences of a statutory presumption is called into play. This is well illustrated by the United States Supreme Court's recent unanimous decision in *Sandstrom* where the Court reversed a homicide conviction following use of a jury instruction on the key element of intent to kill.³⁸ The instruction told the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts."³⁹ The Court held that since the jury might have viewed this instruction as mandating either a conclusive presumption or a burden-shifting presumption as to an element which was constitutionally necessary for imposition of criminal liability, the instruction violated the proof-beyond-a-reasonable-doubt requirement.⁴⁰

37. Even a statutory presumption which is sustained as constitutional could, due to careless language, result in an instruction violative of the beyond-a-reasonable-doubt requirement. See *Commonwealth v. DiFrancesco*, 458 Pa. 188, 199-200, 329 A.2d 204, 211 (1974) (instruction reciting verbatim a statutory presumption which had been sustained as constitutional, held insufficient to point out non-binding nature of rebuttable presumption or inference). Of course, jury instructions will often serve as a strong clue as to precisely what type of presumption or inference is involved. See *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2225 n.16 (1979) ("In deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling . . .").

38. 99 S.Ct. at 2461.

39. MCA § 26-1-602(3) (1979). The presumption had previously been upheld as constitutional in *State v. Musgrove*, ___ Mont. ___, 582 P.2d 1246, 1254 (1978); *State v. McKenzie*, ___ Mont. ___, 581 P.2d 1205, 1223 (1978); *State v. Sandstrom*, ___ Mont. ___, 580 P.2d 106, 109 (1978), reversed, 99 S.Ct. 2450 (1979). A similar presumption, stating that "an unlawful act was done with an unlawful intent," MCA § 26-1-602(2) (1979), also upheld in *McKenzie*, ___ Mont. ___, 581 P.2d at 1223, has never been reconsidered in light of *Sandstrom*.

40. The Court remanded to the Montana Supreme Court for a determination of whether the error in the instruction was harmless, the lower court then finding that the error was not harmless. *State v. Sandstrom*, ___ Mont. ___, 603 P.2d 244, 245 (1979) (on remand). *But cf.* *State v. Coleman*, ___ Mont. ___, ___ P.2d ___, 36 St. Rptr. 1134 (1979). Query whether the lower courts will not be tempted to use the harmless error doctrine as a means of doing what the United States Supreme Court did in *United States v. Gainey*, 380 U.S. 63, 70 (1965), *i.e.*, find that instructions on reasonable doubt and in terms of "permissible inferences" overrode a momentary lapse into "presumption" language. There is, obviously, quite a tension here between, on the one hand, the proposition relied on in *Sandstrom*, that error occurs whenever two different instructions, one correct and one wrong, are given on a certain point since the court cannot be sure the jury did not follow the wrong one and, on the other hand, both the usual rule allowing analysis of an instruction "as a whole," *United States v. Park*, 421 U.S. 658, 675 (1975), and the harmless error doctrine. The *Sandstrom* holding places substantial doubt upon the future validity of the argument that the mere use of the word "presumption" does not preclude a finding that the instruction as a whole only referred to a "permissive inference." Compare *Sandstrom* with *United States v. Gainey*, 380 U.S. 63,

D. *The Constitutionality of Statutory Presumptions*

One would think that analysis of the constitutionality of a rebuttable presumption would focus upon the actual functions of a presumption. This has not generally been the case. Instead, the Court has sought desperately to establish a single all-inclusive test for assessing the validity of such presumptions. After some early experimentation with several tests,⁴¹ the Court in *Tot v. United States*,⁴² singled out one as controlling, the so-called "rational connection" test. Under *Tot*, in order for a presumption to pass constitutional muster, "there [must] be a rational connection between the fact proved and the fact presumed."⁴³ The Court reduced the earlier "comparative convenience" test to the status of a mere corollary, stating that "[t]he argument from convenience is admissible only where the inference is a permissible one. . . ."⁴⁴ Further,

70 (1965), discussed *supra* notes 32, 47. See *Lopez v. Curry*, 583 F.2d 1188 (2d Cir. 1978). Cf. J. WEINSTEIN AND M. BERGER, *WEINSTEIN'S EVIDENCE*, § 303(07); 1 LOUISELL AND MUELLER, *supra* note 21, § 70. It is interesting to note that the "presumption" involved in *Sandstrom* has been viewed as not properly a presumption at all, being merely an awkward way of stating what is a reasonable inference. Cf. 1 WHARTON'S *CRIMINAL EVIDENCE* § 134 (13th ed. 1972); Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEX. L. REV. 34, 34-35 (1931). Nevertheless, when given in a jury instruction in the form they were in *Sandstrom*, they suddenly enter the whole legal thicket surrounding rebuttable presumptions. A similar problem would no doubt arise if the standard "presumption" of deadly intent from use of a deadly weapon on a vital part of the victim's body were given in "presumptive" terms in a jury instruction. Cf. *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30, 37 (1976)(narrowly sustaining instruction that jury could *infer* intent to kill from use of deadly weapon on vital part of body).

41. Three standards found favor in the Court's early decisions. One test, based upon an early civil case, was whether there was a "rational connection" between the basic fact and the presumed fact. See, e.g., *Yee Hem v. United States*, 268 U.S. 178, 183 (1925); cf. LAFAYE AND SCOTT, *supra* note 9, § 21 n.16. A second test rested upon the "greater includes the lesser" concept, sustaining laws where the state could have constitutionally made the rebuttable presumption into a conclusive presumption, thus requiring no proof of the fact sought to be established by the presumption. See *Ferry v. Ramsey*, 277 U.S. 88, 94 (1928); cf. discussion at notes 55-59 *infra*. A third test has been termed the "comparative convenience" standard, entailing an assessment of the relative hardship of placing the burden of production and/or proof upon the prosecution or the defendant. See *Morrison v. California*, 291 U.S. 82, 94 (1934)(Cardozo, J.).

42. 319 U.S. 463 (1943).

43. *Id.* at 467. The Court stated:

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 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.

Id. at 467-68.

44. *Id.* at 469. Cf. LAFAYE AND SCOTT, *supra* note 9, § 21.

the Court appeared to totally reject the "greater-includes-the-lesser" standard, which would sustain as constitutional those rebuttable presumptions which would pass constitutional scrutiny if treated as conclusive presumptions.⁴⁵

Reviewing the holdings in *Tot*⁴⁶ and two subsequent cases,⁴⁷ the Court in *Leary v. United States*⁴⁸ stated that the upshot of these decisions was "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."⁴⁹ Criticism of the *Tot-Leary*

45. 319 U.S. at 472. The Court simply stated that "for whatever reason" Congress has not chosen to premise criminal liability upon the basic act. 319 U.S. at 472. *But see* discussion at notes 53-59 *infra*.

46. The Court in *Tot* held unconstitutional a presumption making possession of a firearm by a person previously convicted of crime "presumptive evidence" (1) that the firearm was received by him directly in interstate commerce and (2) that such receipt took place subsequent to the effective date of the statute, a date only three months prior to defendant's proved possession.

47. *United States v. Gainey*, 380 U.S. 63 (1965) and *United States v. Romano*, 382 U.S. 136 (1965) involved companion sections of the Internal Revenue Code dealing with illegal stills, both involving statutory presumptions based on proof of defendant's presence at the site of a still. *Gainey* sustained a conviction for "carrying on" the business of a distillery, while *Romano* reversed a conviction for being in "possession, custody, and . . . control" of such a distillery. The difference in outcome has subsequently been explained by the Court as attributable to "two important differences": (1) given the broader sweep of the statute in *Gainey*, which dealt with "almost any activity associated with the still," there was "a much higher probability that mere presence could support an inference of guilt" in *Gainey* than in *Romano*, where the statute prohibited only one narrow aspect of the undertaking; and (2) the jury instruction in *Gainey* sounded in terms of a mere permissive inference, while the *Romano* jury was told that presence at the still "shall be deemed sufficient evidence to authorize conviction." *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2225 n.16 (1979). It may be noted that the Court in *Ulster* neglected to note that, while certain permissive language was used in *Gainey*, the precise "presumptive" language used in *Romano* was also used in *Gainey*!

48. 395 U.S. 6 (1969) (holding unconstitutional a statutory provision "authorizing" conviction for possession of imported marijuana having knowledge of its illegal importation on the basis of unexplained possession).

49. *Id.* at 36 (emphasis added). The Court noted that it was unnecessary to decide whether a presumption had to satisfy the beyond-a-reasonable-doubt standard. *Id.* at 36 n.64. The Court also noted that, in applying its "upshot" judicial standard, "the congressional determination favoring the particular presumption must, of course, weigh heavily." *Id.* at 36. *Cf. The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 102 (1969). Utilizing the "more-likely-than-not" standard, the courts have sustained the following presumptions or inferences:

1) A mere "permissible inference" of knowledge of the stolen nature of goods from the fact of recent possession. *See Commonwealth v. Williams*, 468 Pa. 357, 362 A.2d 244, 249 (1976); *Barnes v. United States*, 412 U.S. 837, 846 (1973). *Cf. generally* discussion *supra* note 25. *Cf. also State v. Fitzmaurice*, 126 N.J. Super. 361, 365, 314 A.2d 606, 608 (1974); *Comment*, 58 MICH. L. REV. 429, 434-35 (1960).

2) A rebuttable presumption of knowledge of heroin's illegal importation from the fact of possession. *Turner v. United States*, 396 U.S. 398, 417-18 (1970).

“more-likely-than-not” standard has been universal among the commentators, most of them arguing that the standard is inconsistent with the proof-beyond-a-reasonable-doubt requirement.⁵⁰

3) A rebuttable presumption of knowledge of the obscene content of a magazine from the fact of sale in the course of a bookseller's business. *People v. Kirkpatrick*, 32 N.Y.2d 17, 28, 295 N.E.2d 753, 759 (1973) (4-3 decision), *appeal dismissed*, 414 U.S. 948 (1973). *But cf. Smith v. California*, 361 U.S. 147, 155 (1959) (First Amendment constraints on strict liability for bookseller).

4) A presumption of knowledge that a check was bad where the issuer had no account with the bank drawn on or refused to make good on the check within a specified number of days after nonpayment by the drawee upon timely presentation. *Commonwealth v. Horton*, 465 Pa. 213, 348 A.2d 728, 733 (1975).

5) A rebuttable presumption of intent to deliver drugs from possession of more than 100 milligrams of heroin. *Stone v. State*, 498 S.W.2d 634, 637 (Ark. 1973). *Cf. generally* Annot., 60 A.L.R.3d 1128 (1974).

6) A rebuttable presumption of joint possession of drugs from the fact of presence in an automobile containing un concealed dealership quantities of drugs. *Lopez v. Curry*, 583 F.2d 1188, 1192 (2d Cir. 1978).

7) An inference of joint possession of a firearm in an automobile from the fact of presence in the vehicle where the weapon is not on the person of an occupant. *Ulster County Ct. v. Allen*, 99 S.Ct. 2213, 2224 (1979).

8) A rebuttable presumption of being involved in the carrying on of an illegal distillery business from the fact of defendant's presence at the site of a still. *United States v. Gainey*, 380 U.S. 63, 70-71 (1965).

9) A rebuttable presumption of drivership from the fact of ownership (as to parking but not generally as to moving violations). *Cf. note 61 infra*.

10) An inference of intoxication from the fact of presence of .10% or more alcohol content in the blood. *Commonwealth v. DiFrancesco*, 458 Pa. 188, 329 A.2d 204, 210 (1974).

11) An inference that defendant obliterated a firearm's serial number from the fact of possession of the weapon. *Commonwealth v. Mason*, — Pa. —, 397 A.2d 408, 411 (1979).

The following presumptions or inferences have been held invalid:

1) A rebuttable presumption of malice aforethought from the fact of an illegal and intentional homicide. *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975). *Cf. discussion* at notes 17 and 18 *supra*. *Cf. also* B. LAUB, PENNSYLVANIA TRIAL GUIDE § 8.53 (1973).

2) A rebuttable presumption of knowledge of cocaine's illegal importation based on the fact of unexplained possession. *Turner v. United States*, 396 U.S. 398, 419 (1970). *See also* *Leary v. United States*, 395 U.S. 6, 52 (1969) (similar presumption as to marijuana held unconstitutional).

3) A rebuttable presumption of possession or control of an illegal still from the mere fact of presence at the site of a still. *United States v. Romano*, 382 U.S. 136, 141 (1965).

4) A rebuttable presumption of receipt of a firearm in interstate commerce (at a time shortly after the effective date of the criminal statute) by a person with a prior record, from the fact of possession. *Tot v. United States*, 319 U.S. 463, 467-68 (1943).

For a list of other presumptions and case law assessing their validity, *see* 1 WHARTON'S CRIMINAL EVIDENCE § 94 (13th ed. 1972); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1187-88 n.4 (1979).

50. *Cf. note 21 supra* and *note 52 infra*. Some justices and a few commentators have also argued, without success, that rebuttable presumptions violate a number of other constitutional rights, especially the privilege against self-incrimination. *See, e.g., Turner v. United States*, 396 U.S. 398, 425 (1970) (Black, J., dissenting). The Fifth Amendment argument has been rejected several times on the not altogether surprising ground that the *defendant* is not “compelled” to be a witness against himself, remaining free to testify or not, the only compulsion arising being found no different than that which naturally arises when direct evidence makes out a *prima facie* case. *See, e.g., Barnes v. United States*, 412 U.S. 837, 846-47

Indeed, recent decisions of the United States Supreme Court reflect a leaning toward adopting a beyond-a-reasonable-doubt standard for testing the constitutional adequacy of statutory presumptions.⁵¹ But a few recent commentators have suggested that matters are not really quite that simple and that the entire line of Supreme Court decisions relating to both presumptions and allocation of the burden of proof in criminal cases must be completely re-examined.⁵² As Jeffries and Stephan stated in a recent Yale Law Journal article, the beyond-a-reasonable-doubt standard cannot be meaningfully defined without reference to the scope of legislative authority over the substance of the law, since a principle designed to protect the innocent "must take into account not only the certainty with which facts are established but also the selection of facts to be proved."⁵³ They argue convincingly that it is simply illogical to disallow presumptions or other burden-shifting devices which do not meet the beyond-a-reasonable-doubt test regarding elements of a criminal offense that a legislature could constitution-

(1973); *Yee Hem v. United States*, 268 U.S. 178, 185 (1925). But an individual presumption could be worded in such a way as to raise more difficult Fifth Amendment problems or at least add to any due process problems. Cf. LAFAYE AND SCOTT, *supra* note 9, § 21 n.43; 1 WHARTON'S CRIMINAL EVIDENCE § 94, at 159-60 (13th ed. 1972); Note, *Due Process, Self-Incrimination, and Statutory Presumptions in the Wake of Leary and Turner*, 61 J. CRIM. L. & CRIM. at 373-76. The specific Fifth Amendment claim that rebuttable presumptions violate the "no comment" rule of *Griffin v. California*, 380 U.S. 609 (1965) has also been rejected, in *Barnes v. United States*, 412 U.S. at 846 n.12, a result that seems rather strained, cf. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1208-15 (1979), until one takes a hard look at *Griffin*, itself a very strained and, indeed, a simply erroneous reading of the Fifth Amendment. See Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 16 CATH. U. L. REV. 1, 19 (1966); Shafer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U. L. REV. 506, 510-12 (1966); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 938-40 (1965) (devastating critiques of *Griffin*).

51. See *Turner v. United States*, 396 U.S. 398, 422-24 (1970) (because there was "a reasonable possibility" that defendant obtained the cocaine in or from a stamped package, contrary presumption held unconstitutional). The Court in *Turner* also sustained a provision allowing conviction for possessing heroin knowing of its illegal importation on the basis of unexplained possession, the fact that no heroin is produced in this country satisfying either the "more-likely-than-not" or the beyond-a-reasonable-doubt tests; held unconstitutional the same presumption as to cocaine under the "more-likely-than-not" test; and sustained a statutory presumption that a possessor of heroin did not purchase the heroin in or from the original stamped package, there being no reasonable doubt that a possessor could not show the contrary since all heroin is illegally imported. Cf. *Barnes v. United States*, 412 U.S. 837, 843 (1973). The Montana Supreme Court has likewise declined to employ the *Tot-Leary* test and embraced the beyond-a-reasonable-doubt standard in *State v. McBenige*, — Mont. —, 574 P.2d 260, 265 (1978).

52. See Jeffries and Stephan, *supra* note 19, at 1325; Allen, *Mullaney v. Wilbur*, *The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 291 (1977). Cf. Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. U.L.J. 61, 93-111 (1977).

53. Jeffries and Stephan, *supra* note 19, at 1347.

ally choose to disregard.⁵⁴ Their argument is that due process requires proof beyond a reasonable doubt of only a constitutionally adequate basis for imposing the punishment authorized, or "facts sufficient to justify penalties of the sort contemplated."⁵⁵

As stated somewhat differently by Professor Allen, "If a certain punishment may constitutionally be imposed if facts *A* and *B* are proven beyond a reasonable doubt, even if mitigating fact *Z* is present, then a state that provides for mitigation of that punishment if the defendant proves *Z* has not violated an accused's interests in avoiding stigmatization and imprisonment."⁵⁶ To hold otherwise, as a simple-minded and rigid beyond-a-reasonable-doubt standard would require,⁵⁷ can result in a law's being declared unconstitutional "for a reason that can most charitably be described as aesthetic."⁵⁸ Worse, such an approach "would force the legislature to the incongruous choice of proving either more or less, and would therefore raise the specter of retrogressive rules of penal liability adopted by reluctant legislatures in order to comply with a supposedly constitutional command of fairness to criminal defendants."⁵⁹

It is submitted that the analysis of Jeffries and Stephan is irrefutable as far as it goes, and their substantive beyond-a-reasona-

54. As to the "extreme emotional disturbance" of the defendant, *cf.* note 18 *supra*.

55. Jeffries and Stephan, *supra* note 19, at 1365.

56. Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 296 (1977). For other views on the "greater includes the lesser" concept, *cf.* LAFAVE AND SCOTT, *supra* note 9, at 151; Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1191 (1979); Ashford and Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 177-80 (1969); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 100 n.37 (1977); Abrams, *Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis*, 22 VAND. L. REV. 1135, 1143-44 (1969).

57. Jeffries and Stephan, *supra* note 19, concede that such an approach *would* require that the presumed fact follow from the proved fact beyond a reasonable doubt, noting that such a formulation of the requirement "would retain the name 'presumption,' but rob the device of practical significance by demanding an inference of such certainty that no express authorization for it would be needed." *Id.* at 1388.

58. *Id.* at 1393, 1395. The authors also reject the idea that presumptions are in effect a ceremonious fraud because they somehow allow an impermissible legislative choice to escape in "disguised form." *Id.* at 1389-93.

59. *Id.* at 1389. The United States Supreme Court has gone shockingly far in sustaining the constitutionality of strict criminal liability. *See, e.g.,* United States v. Balint, 258 U.S. 250 (1922)(conviction carrying possible five-year prison sentence sustained despite defense allegation of lack of knowledge that substance transferred was cocaine). *Cf. generally* Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUSTON L. REV. 1039 (1973); Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1575 (1978); LAFAVE AND SCOTT, *supra* note 9, § 31. Rebuttable presumptions could be used to alleviate the harshness of such criminal statutes.

ble-doubt standard describes what is at least a *sufficient* condition for the constitutionality of a criminal statute containing a rebuttable presumption or other burden-shifting device. However, a key question not really addressed by the authors is whether their formula is a *necessary* condition for constitutionality. That is, assuming that a rebuttable presumption would *not* satisfy the substantive beyond-a-reasonable-doubt standard, is it necessarily unconstitutional? Is it not conceivable that there are a few statutory burden-shifting devices, even as to elements of an offense which must constitutionally be proven in order to impose the particular kind of criminal liability, which are basically "fair" in the old-fashioned due-process sense? To cite a seemingly mundane example, what of the constitutionality of a provision creating a rebuttable presumption that the registered owner of a vehicle was the driver for purposes of a parking ticket violation? Employing Jeffries' and Stephan's analysis, there might well be some question about the constitutionality of permitting imposition of even this generally mild form of vicarious strict liability.⁶⁰ Assuming that vicarious strict liability would not be constitutional, does it necessarily follow that a statute which, because of the obvious comparative convenience involved, creates a rebuttable presumption of drivership based upon the fact of ownership somehow violates due process? One's instinct is that such a provision is not so bad and ought to survive constitutional scrutiny. Indeed, most courts, using the standard *Tot-Leary* test, have sustained such provisions, at least where the owner is not required to reveal the identity of the driver.⁶¹ While one's instincts surely cannot be controlling in such

60. Compare *State v. Jetty*, — Mont. —, 579 P.2d 1228, 1230-31 (1978); *State v. Scoggin*, 236 N.C.19, 25, 725 S.E.2d 54, 58 (1952); *Seattle v. Stone*, 67 Wash.2d 886, 891, 410 P.2d 583, 585 (1966) with *Chicago v. Hertz Commercial Leasing Corp.*, 71 Ill.2d 333, 346, 375 N.E.2d 1285, 1291 (1978); *Commonwealth v. Ober*, 286 Mass. 25, 32, 189 N.E. 601, 603 (1934). Cf. *Commonwealth v. Koczwar*, 397 Pa. 575, 585, 155 A.2d 825, 830 (1959) (while not appearing to question the propriety of strict liability even where imprisonment is possible, the court holds that imposition of strict vicarious liability is unconstitutional whenever a prison sentence is imposed); *LAFAVE AND SCOTT*, *supra* note 9, § 20 (despite occasional cases holding strict liability unconstitutional, the weight of authority is otherwise).

61. See, e.g., *People v. Bigman*, 38 Cal. App. 2d 773, 100 P.2d 370, 372 (1940); *Iowa City v. Nolan*, 239 N.W.2d 102, 106 (Iowa 1976); *Cantrell v. Oklahoma City*, 454 P.2d 676, 680 (Okla. App. 1969), *cert. denied*, 396 U.S. 1010 (1970); *Portland v. Kirk*, 518 P.2d 665, 668 (Or.App. 1974) (treating the provision as a permissive inference); *People v. Kayne*, 286 Mich. 571, 585, 282 N.W. 248, 253 (1938); *St. Louis v. Cook*, 221 S.W.2d 468, 471 (Mo. 1949); *People v. Rubin*, 284 N.Y. 392, 31 N.E.2d 501, 503 (1940); *Snell v. State*, 518 S.W.2d 382, 383 (Tex.App. 1975). Cf. *generally* Annot., 49 A.L.R.2d 456 (1956). *But compare*, as to use of such a presumption in regard to more serious moving violations, *Commonwealth v. Slaybaugh*, 468 Pa. 618, 364 A.2d 687, 690 (1976) (striking the presumption down in broad language applicable to all vehicle offenses); *Commonwealth v. Russell*, 444 Pa. 4, 9, 279 A.2d 185, 188 (1971) (same holding as *Slaybaugh*); *People v. Hildebrandt*, 308 N.Y. 397, 126

matters, it does seem that in the absence of specific constitutional requirements to the contrary, they are entitled to some consideration as a hint of what the law ought to be.

What is suggested is that the Yale Law Journal analysis does not go far enough; it does not extend the basic substantive due process analysis to ask the ultimate question of whether the statutory scheme is *fair*, utilizing a classic balancing approach. In short, no all-embracing formula will suffice; there is no escaping the very difficult case-by-case assessment associated with substantive due process analysis.⁶² As Justice Cardozo stated many years ago in what could be called prophetic language concerning the problem of presumptions:

The 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. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.⁶³

This analysis suggests, again, that the constitutionality of a given statutory or judicially created rebuttable presumption must be carefully analyzed in terms of the provision's precise consequences in a given case,⁶⁴ as part of an overall assessment of its fairness.

That we are thus brought back to nothing more specific than "due process" should not be too surprising, since it is there, after all, that this particular constitutional inquiry began. It is sometimes forgotten that it is the Due Process Clause upon which *Winship*, *Mullaney*, *Tot*, and *Leary*, and, indeed, all of the Warren Court's "due process revolution" case law must ultimately hang their hats.

N.E.2d 377, 379 (1955)(more thoughtful discrimination between moving and parking violations, the latter involving an unattended car with no one present to be ticketed, so that it is not unreasonable to create rebuttable presumption of drivership in latter case) *with State v. Knudsen*, 3 Conn. Cir. Ct. 458, 217 A.2d 236, 238 (1965)(sustaining such presumption in reckless driving case); *Commonwealth v. Bolger*, 182 Pa.Super. 309, 317, 126 A.2d 536, 540 (1956)(rejected *sub silentio* in *Slaybaugh*).

62. *Cf. generally* concerning substantive due process analysis, Jeffries and Stephan, *supra* note 19, at 1370-79; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, chs. 8, 11 (1978); LAFAVE AND SCOTT, *supra* note 9, § 20; Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 So. CAL. L. REV. 490, 493 (1971).

63. *Morrison v. California*, 291 U.S. 82, 91 (1934). *Cf. Note, Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 734-40 (1967)(basic fairness/balancing test proposed).

64. As noted above, it may be that in a particular case the fact that there is "close" to a Fifth Amendment violation would put sufficient weight on the scales to make a given rebuttable presumption so unfair as to violate due process. *Cf. note 50 supra*.

