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AN ANALYSIS OF THE CONSTITUTIONALITY OF STATUTORY PRESUMPTIONS THAT LESSEN THE BURDEN OF THE PROSECUTION

ALLEN FULLER* AND ROBERT URICH**

I. INTRODUCTION

Over the years, Congress has enacted a number of statutory provisions which operate as presumptions in criminal prosecutions. These provisions operate to lessen the burden of the prosecution and are found principally, though not exclusively, in the fields of narcotics control and taxation of liquor. Perhaps the best example of such a device was the presumption found in the recently repealed federal narcotics drug law. The crime proscribed consisted of three elements: (1) illegal importation of a narcotic drug; (2) knowledge that the drug was illegally imported; and, (3) possession of an illegally imported drug. Once possession was established, a statutory presumption[1] came into play which enabled the trier of fact to presume the existence of the other two elements of the crime. Proof of one element of a three element offense thus became sufficient to sustain a conviction. Similarly, presence at the sight of an illicit "still" had been made sufficient to authorize conviction of a variety of offenses under the federal alcohol tax acts.[2] The constitutionality of these presumptions has been the subject of extensive judicial and scholarly comment. The arguments questioning the constitutionality of such devices were recently brought into focus by Mr. Justice Black in a dissenting opinion in *Turner v. United States*.[3]

The purposes of this paper are: first, to examine the validity of the

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1. The Narcotic Drugs Import and Export Act, ch. 9, § 4, 38 Stat. 275, 21 U.S.C. 174 (1964); repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 12 F.C.A. Public Laws and Administrative Material 1347 (1970). The former provision made possession sufficient to authorize conviction of buying or selling narcotics known to have been imported unlawfully, unless explained to the satisfaction of the jury.

2. *See* 26 U.S.C. §§ 5601(b)(1), (b)(2), (b)(3), (b)(4) (1964) (relating to distilling operations). *See also* 50 U.S.C. APP. § 462(b) (Supp. V, 1970) (unlawful to possess draft card not issued to the holder with intent to use for purposes of identification; possession sufficient evidence of intent unless explained) *and* 18 U.S.C. § 545 (1964) (possession of unlawfully imported goods sufficient for conviction of smuggling, unless explained). *And see* 15 U.S.C. § 902(f) (1964) (relating to firearms).

3. 396 U.S. 398 (1970) (dissenting opinion).

objections advanced by Mr. Justice Black; second, to determine whether the value of the above named presumptions warrant their continued application; third, to briefly note the development of the current test for constitutionality of criminal law presumptions and examine the validity of that test; and fourth, to propose an alternative test for determining the permissibility of criminal law presumptions.

II. Mr. Justice Black's Objections

Mr. Justice Black argued that statutory presumptions which operate to establish elements of a crime undermine many of the safeguards of the Federal Bill of Rights.[4] He presented a number of arguments against the use of presumptions generally. Such presumptions, according to Mr. Justice Black, violate the presumption of innocence.

> The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the statutory presumptions of guilt.[5]

The classical presumption of innocence seems to be as crucial to the traditional concept of Anglo-American jurisprudence as the right to a trial by jury.[6] The guarantee to a jury trial has been reported as reflecting "a profound judgment about the way" justice should be administered.[7] Clearly, the classical presumption of innocence reflects an equally profound judgment. Yet, when presumptive devices are employed in criminal proceedings the classical presumption of innocence is necessarily affected to some degree. Mr. Justice Black argued that the effect of presumptive devices on this classical concept of criminal law is impermissible.

> Statutory presumptions such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving that he is not guilty. . . . However, so far as robbing the defendant of his presumption of innocence is concerned, it makes no difference whether the statute explicitly says the defendant can rebut the presumption of guilt . . . or whether the statute simply uses the language of prima facie case and leaves implicit the possibility of the defendant's rebutting the presumption . . . .[8]

Arguably, statutory presumptions violate criminal due process of law in that they affect the presumption of innocence. Additionally, statutory

4. The dissenting opinion in Turner v. United States is the logical outgrowth of several of Mr. Justice Black's previous opinions. *See, e.g.*, United States v. Gainey, 380 U.S. 63, 84-85 (1965) (dissenting opinion); Thompson v. City of Louisville, 362 U.S. 204 (1960); Tot v. United States, 319 U.S. 463, 473 (1943) (concurring opinion).

5. Turner v. United States, 396 U.S. 398, 430 (1970) (dissenting opinion).

6. *In re* Winship, 397 U.S. 358 (1970). *See also* Williams v. State, 30 Ala. App. 495, 500, 8 So.2d 271, 274 (1942); Mulkey v. State, 1 Ga. App. 521, 57 S.E. 1022 (1907).

7. Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

8. Turner v. United States, 396 U.S. 398, 432 (1970) (dissenting opinion).

presumptions are destructive of other due process guarantees. While legislatures have the power to define crimes, they have no power to relieve the government of the constitutionally imposed burden of proving the essential elements of its case by a mere declaration that certain evidence shall be deemed sufficient to convict.[9] As Mr. Justice Black stated the argument:

> Congress can undoubtedly create crimes and define their elements, but it cannot under our Constitution even partially remove from the prosecution the burden of proving at trial each of the elements it has defined.[10]

In short, statutory criminal presumptions are generally irreconciliable with substantive due process.

Statutory criminal presumptions, in Mr. Justice Black's view, undercut the fifth and sixth amendment requirements that a person held for criminal prosecution shall be charged on presentment or indictment of a grand jury, and that he be informed of the nature and cause of the accusation.

> The purpose of these requirements is obviously to compel the Government to state and define specifically what it must prove in order to convict the defendant so that he can intelligently prepare to defend himself on each of the essential elements of the charge.[11]

When the presumptive device is employed, the accused is unable to determine from the charge itself the specific elements of the offense which the government will attempt to prove by the production of evidence. The legislature's determination replaces that of the grand jury by determining that certain evidence is sufficient to warrant an indictment. Being unable to determine what evidence the government will be required to produce, the defendant is unable to determine what evidence might be pertinent to impeach or rebut the Government's evidence.

Justice Black also argued that criminal presumptive devices also undermine the right to trial by an impartial jury.

> The right to trial by jury includes the right to have the jury and the jury alone . . . find the facts of the case, including the crucial fact of guilt or innocence . . . . This right to have the jury determine guilt or innocence necessarily includes the right to have that body decide whether the evidence presented at trial is sufficient to convict.[12]

When the trial judge, upon the directive of Congress, instructs the jury

9. "The power to create presumptions is not a means to escape from constitutional restrictions." New York Times v. Sullivan, 376 U.S. 254, 284 (1964).

10. Turner v. United States, 396 U.S. 398, 429-30 (1970) (dissenting opinion).

11. *Id.* at 427-28.

12. *Id.* at 431.

that certain evidence shall be sufficient to authorize conviction or to establish a prima facie case, the right to have the jury make an impartial determination as to guilt is inevitably weakened.[13]

> Congress, in enacting the statutory presumptions purporting to define and limit the quantum of evidence necessary to convict, has injected its own views and controls into the guilt-determining, fact-finding process vested by our Constitution exclusively in the Judicial Branch of our Government.[14]

Statutory presumptive devices weaken the power of judges to direct verdicts or set aside convictions in those instances where the evidence is insufficient as a matter of law. Where the legislature interposes its judgment as to the sufficiency of the evidence to warrant conviction for that of the court's, it clearly and simply eliminates the judicial check upon the jury's determination provided for in the constitutional plan of criminal procedure. By substituting its evaluation, the legislature has affected various stages of the criminal trial. "Congress can declare a crime, but it must leave the trial of that crime to the courts."[15]

Statutory presumptions deprive the accused of the right to be confronted with the witnesses against him and the right to compulsory process for obtaining witnesses for his defense in Black's judgment. The appellate courts, in dealing with presumptions, generally do not respond to the weighty constitutional problems inherent in such devices. Rather, they approach the issues with a view toward determining whether the presumptions are "reasonable," "fair," or "rational" in terms of the statutory conclusion that when the proved fact occurs the presumed fact also exists. In making these determinations, the appellate courts consider a great deal of expert testimony in the form of books, studies, and statistics. For example, the footnotes of the Court's opinion in *Turner v. United States* are replete with a vast array of expert testimony cited as evidence of the factual basis of the presumptions.[16] The framework in which this testimony is considered at the appellate level is radically different from that employed in a criminal trial. At the appellate level, the testimony is considered without benefit of a sponsor who can be cross-examined regarding the profferred statistics. Moreover, the opportunity to produce defense witnesses to challenge the validity of the statistics as well as the right to compulsory process for obtaining these witnesses is weakened to the same extent. The appellate court considers these statistics in a bland, non-adversary posture in that it generally relies only upon pub-

13. It is not uncommon to find the statutory language read verbatim as part of the jury's instructions. *See* United States v. Romano, 382 U.S. 136 (1965); Griego v. United States, 298 F.2d 845 (10th Cir. 1962).

14. Turner v. United States, 396 U.S. 398, 431 (1970) (dissenting opinion).

15. *Id.* at 432.

16. *See also* Leary v. United States, 395 U.S. 6 (1969); Gonzales v. United States, — F.2d —, Case nos. 33618, 33624, and 33625 (2d Cir., decided Sept. 16, 1970); Erwing v. United States, 323 F.2d 674 (9th Cir. 1963).

lished reports and opinions. An attempt to introduce these same statistics at a criminal trial would be subject to far greater defense scrutiny and control than their mere inclusion in an appellate brief.

Justice Black argued that statutory presumptive devices undermine the right to counsel. To the extent that the accused is denied the right to confront witnesses against him, to call witnesses in his own behalf, and to be informed of the specific elements involved within the offense charged, his right to counsel becomes less meaningful. The elements of the offense are not set forth in a fashion which will inform the defendant of which elements the government must attempt to produce evidence to prove. If the defendant misjudges the government's reliance on the statutory presumption, he may find himself unprepared to meet evidence of importation or knowledge which the government decides to establish without benefit of the presumption. If the defendant prepares extensive statistical arguments regarding the validity of the presumption, he is subject to the same uncertainty. This inability to ascertain the precise elements in issue diminishes the effectiveness of counsel.

Finally, Mr. Justice Black argued that statutory presumptive devices violate the defendant's right against self-incrimination.

> This privilege has been consistently interpreted to establish the defendant's absolute right not to testify at his own trial unless he freely chooses to do so . . . [t]he privilege is fulfilled only when the person is guaranteed "the right . . . to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . ."[17]

The denial of the privilege not to be compelled to be a witness against oneself is the most frequently litigated constitutional challenge to criminal presumptive devices. These attacks have been almost universally rejected,[18] in spite of the spirit of the self-incrimination decisions which is broad enough to encompass the type of compulsion to testify that statutory criminal presumptions create.[19]

These arguments enunciated by Mr. Justice Black are both emotionally compelling and logically persuasive. The fact remains, however, that they have been rarely expressly considered and never accepted by the Supreme Court. The only argument which has been subject to significant judicial consideration, that presumptive devices violate the protections against self-incrimination, is the argument most susceptible to dispute. Several courts have rejected this self-incrimination argument, reasoning that the presumed facts could be rebutted by evidence other than

17. Turner v. United States, 396 U.S. 398, 432-33 (1970) (dissenting opinion).

18. *See* Anglin v. State, 244 Md. 652, 224 A.2d 668 (1966); Note, *The Privilege to Remain Silent and the Presumption of Larceny Based on Unexplained Possession*, 24 U. MIAMI L. REV. 200 (1969) and cases cited therein. *But see* People v. Summerfield, 262 Cal. App. 2d 626, 69 Cal. Rptr. 10 (1968).

19. *See* Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). The tendency of the recent decisions is to look into circumstances for compulsions to testify.

the defendant's testimony.[20] Mr. Justice Black did not dispute this fact. Rather, he maintains that as a practical matter, because of the nature of the presumed element, e.g., knowledge of importation of narcotic drugs, the only effective way to rebut the presumption is for the defendant to take the stand.[21] The courts simply ignore the practical result, reasoning that where there is a possibility to rebut the presumption with other evidence the defendant is not really compelled to take the stand.

III. Possible Justifications for Retaining Presumptions

The courts and legislatures have indicated a desire to preserve presumptions as well as a reluctance to confront Justice Black's constitutional objections by weakening the impact of the presumptions, thereby avoiding several of the constitutional infirmities. As several commentators have indicated,[22] the term "presumption" is presently applied to four separate types of devices. In order of strength these are: (1) devices which do not involve any instruction to the jury but merely preclude directed verdicts or summary judgments by prescribing prima facie evidence in the sense that proof of the basic fact is sufficient evidence of the presumed fact to support a verdict requiring the finding of the presumed fact;[23] (2) devices which take the form of permissive instructions as to what the trier of fact *may* infer from proven facts;[24] (3) devices which switch the burden of producing evidence on one or several issues;[25] and (4) devices which switch the burden of persuasion on one or several issues.[26]

As the impact of presumptions is weakened by eliminating or qualifying the device, an increasing number of constitutional infirmities can be avoided. For example, where a judge interprets a presumption as merely precluding a directed verdict and thus leaves the jury free to presume some facts from the proven facts, it cannot be said that the presumptive device undermines the right to trial by an impartial jury, although several other of the constitutional arguments remain applicable. These attempts to avoid the constitutional infirmities by both the courts and legislatures indicate a recognition and, perhaps, a tacit acceptance of Mr. Justice Black's position.

The validity and applicability of the arguments advanced by Mr. Justice Black must ultimately depend upon whether the guarantees of the Bill of Rights apply to the determination of guilt as to each element of

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20. *See* note 18 *supra*.

21. For example, it is almost ludicrous to require an accused to trace the origin of contraband narcotics. This would be especially true of an indigent defendant.

22. Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969); Brown, *The Constitutionality of Statutory Criminal Law Presumptions*, 34 U. Chi. L. Rev. 141 (1966) [Hereinafter cited as Brown].

23. Brown at 141.

24. *Id.* at 142.

25. *Id.*

26. *Id.*

the crime charged or only to the determination of guilt of the crime in its entirety. For example, must the accused be presumed innocent of every element of the offense charged or merely presumed innocent of the offense in its entirety? Apparently, the courts refuse to recognize that the determination of the constitutionality of presumptive devices must ultimately rest upon this question because its logical answer is that the safeguards of the Bill of Rights apply to each element.[27]

> Mr. Justice Black assumed, as the courts have in the past,
>
> that the Government, before it can secure a conviction, must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense.[28]

Yet, if presumptions are to be preserved without abandoning intellectual honesty, the courts must take the position that the accused is not entitled to all of the Bill of Rights' safeguards in the determination of each and every element of the offense. The Supreme Court apparently recognized this situation in a footnote to *Leary v. United States*,[29] when it suggested that proof beyond a reasonable doubt may require a correlation stronger than mere rational connection. By leaving the question unanswered, the Court ostensibly took the view that it has not been previously decided. As it is obvious that "more likely than not"[30] is not equivalent to "beyond a reasonable doubt," the question referred to was apparently whether the presumption of innocence beyond a reasonable doubt was applicable to each element of the offense.

In order to understand why the courts have sought to preserve presumptive devices despite what is, at best, dubious constitutionality, one must examine the actual or supposed value of presumptive devices in the system of criminal justice. Mr. Justice Black hinted at the supposed utility of these devices. While recognizing the grave consequences of the traffic in narcotic drugs which these devices help contain, he bitterly denounces the

> "activist" philosophy of some judges [who] construe our Constitution as meaning what they now think it should mean in the interest of 'fairness and decency' as they see it.[31]

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27. The Court may have determined this question in the affirmative in Cristoffel v. United States, 338 U.S. 84 (1949), but the case is not cited for the proposition in the presumption cases. *See also* Sapir v. United States, 216 F.2d 722 (10th Cir.), *modified*, 348 U.S. 373 (1955); 29 AM. JUR. 2D. *Evidence* § 148 (1967).

28. Turner v. United States, 396 U.S. 398, 427 (1970) (dissenting opinion). *See also* United States v. Collier, 381 F.2d 616 (6th Cir. 1967), *cert. denied*, 390 U.S. 1043 (1968); Bryan v. United States, 373 F.2d 403 (5th Cir. 1967). The requirement that the prosecution prove every element of the crime may be the functional equivalent of the proposition that the defendant must be presumed innocent of every element of the crime, but the conceptual differences are significant for the discussion below.

29. 395 U.S. 6, 36 n.64 (1969).

30. "More likely than not" is the degree of "rational connection" the Court was applying in Leary v. United States, 395 U.S. 6 (1969).

31. Turner v. United States, 396 U.S. 398, 426 (1970) (dissenting opinion).

He denounced those who attempt to strike a balance between the need for individual safeguards and the need to protect society from the drug traffic.

> Neither the Due Process Clause nor any other constitutional language vests any judge with such power . . . . One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law—that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" or "decent."[32]

Again, Mr. Justice Black's argument follows logically if one adopts his premises. Where, as here, the interpretation of the intent of the framers of the Constitution is not as clear as he indicates, (presumptions, after all, antedate the Constitution[33]) consideration of the consequences of finding criminal statutory presumptions unconstitutional is warranted.

Commentators have traditionally maintained that presumptions save the cost and time of proving the same relationship between similar events in every case, provide a more uniform result, and generally aid in law enforcement.[34] The latter two "benefits" are clearly inconsistent with the basic tenets of our system of criminal justice. Presumptions clearly have an unconstitutional effect when they enable the state to convict a defendant who would otherwise not be convicted if the state were required to prove its case with actual evidence.[35] Moreover, the right of each defendant to be tried by a jury of his peers is probably the cornerstone of our system of criminal justice.[36] Any attempt to induce greater uniformity than the untrammeled exercise of the jury system provides is violative of the principles of our system of criminal justice. Adoption of an accusatorial posture would probably also introduce greater uniformity into the results of criminal trials, but such a benefit clearly could not justify the adoption of such a system nor harmonize it with constitutional requirements.

Despite the grave consequences of overcrowded dockets, it is difficult to rationalize presumptions merely because they might save time and cost. To do so would be to abandon the long accepted axiom "better 100 guilty go free than convict one innocent man."[37] Although the cur-

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32. *Id.*

33. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 1981 (Jones ed. 1916).

34. *See, e.g.*, notes 17, 19, and 21 *supra*, and Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A.B.A.J. 287 (1928).

35. This premise underlies each of the tests used to determine the validity of presumptions although it is not always verbalized. *See, e.g.*, Tot v. United States, 319 U.S. 463 (1943); Morrison v. California, 291 U.S. 82 (1934); Ferry v. Ramsey, 277 U.S. 88 (1928). *See also* Gainey v. United States, 380 U.S. 63, 74 (1965) (dissenting opinion).

36. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

37. As Mr. Justice McReynolds has noted:

Once the thumbscrew and the following confession made conviction easy; but that

rent catchphrase "law and order" seems to question the practicality of this axiom in contemporary society, it certainly cannot be perfunctorily discarded. Those who advocate abandoning this axiom as impractical in a crime-ridden society are advocating, as Mr. Justice Black indicated, that the constitutionally prescribed procedures be set aside in favor of those " . . . that a particular majority of sitting judges may see fit to label as 'fair' or 'decent'."[38]

Criminal presumptions serve another function which is, in fact, a "benefit" to the system of criminal justice. The real value of presumptions can best be visualized by asking what the legislatures would substitute for presumptions if they were found unconstitutional. There are two alternatives. Legislatures could retain the same crimes, and require the state to prove with actual evidence each element of the crimes. On the other hand, legislatures could simply make the crimes more general by eliminating the elements that had been included, and subsequently presumed to exist.[39] With the current pressures directed at legislatures by the amorphous cry of "law and order," the legislators could be expected to simply eliminate the presumed elements. By eliminating the previously presumed elements, the legislatures will enlarge the class of persons who would be convicted by precisely that number who could have been able to rebut the presumptions as to these elements.[40] Regardless of how constitutionally infirm the presumptive device, any person found guilty of the basic fact is better off presumed guilty of the additional elements than he would be if convicted of a crime involving the basic fact alone.[41]

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method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry.

Casey v. United States, 276 U.S. 413, 420 (1928) (dissenting opinion).

38. Turner v. United States, 396 U.S. 398, 426 (1970) (dissenting opinion).

39. The possibility of such an approach was recognized by Mr. Justice Black when he indicated his belief that Congress could make mere possession of narcotics a crime eliminating the currently presumed elements which require illegal importation and knowledge of the illegal importation. *Id.* at 433-34. *See* The Narcotic Drugs Import and Export Act, ch. 9, §§ 3 & 4, 38 Stat. 275 (1964). It was argued that the effect of the former section 174 was to make possession a crime. The argument was rejected. Harris v. United States, 359 U.S. 19, 23 (1959); Roviaro v. United States, 353 U.S. 53, 63 (1957). The current narcotics drug law makes knowing and intentional possession of proscribed drugs a crime. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 12 F.C.A. Public Laws and Administrative Material 1347 (1970). The change in the law which eliminated the elements of illegal importation and knowledge of the illegal importation (*see* note 1 *supra*) may have had the net effect of reducing the elements which a future defendant will be able to rebut. However, the number of defendants capable of rebutting the previously included elements is believed to be small based upon the general lack of successful appellate challenges to the former presumption. The new Act is predicated on the federal powers over interstate commerce and the general welfare. The interstate commerce power would seem broad enough to support the Act. *See* Hipolite Egg Co. v. United States, 220 U.S. 45 (1911); Griego v. United States, 298 F.2d 845 (10th Cir. 1962).

40. The courts seem to believe the class of persons is fairly large but no competent statistics appear to exist to substantiate this belief. *See* note 39 *supra*.

41. Assuming sentences do not change, the increase or decrease in convictions under the new narcotics law should provide a possibility for empirical verification of this assumption.

At least in the current state of events there exists a possibility that the accused can rebut the presumption. In summary, presumptions, as a practical matter, seem to provide the accused with defenses to the crime not available under the foreseeable alternative.

It is believed that legislators choose to provide these "defenses" when they are unable to define a crime broadly enough to encompass activities harmful to the society without including in that definition persons they do not wish to punish as criminals. For example, Congress, in order to stop the production and sale of untaxed alcohol, outlawed "possession, or custody, or control, of any still or distilling apparatus set up which is not registered . . ."[42] as well as providing penalties for any person who "carries on the business of a distiller or rectifier without having given bond as required by law . . ."[43] and created a presumption of "possession" and "carrying on" from "unexplained presence" at a still.[44] Clearly, Congress desired to include everyone participating in the illegal operation yet wished to exclude those who just happened upon the scene. The presumptive device enabled this to be done. If the actual effect of presumptions is to keep legislatures from creating general crimes which would make innocent behavior criminal, they may be worth saving.[45]

As previously indicated, the courts generally do not question whether presumptions should be preserved or are worth preserving. Indeed, they not only seem to assume they are worth preserving, but often treated them as indispensable. When the constitutionality of presumptions is questioned, the courts simply decide whether the presumption in question is "fair" or "permissible." The test unanimously applied by the courts is whether there is a "rational connection" between the fact proved and the fact presumed.[46]

IV. The Current Test and Its Development

Historically, three separate tests have been suggested for determining the constitutionality of presumptions: (1) the "rational connection" test; (2) the "greater includes the lesser" test; and (3) the "comparative convenience" test. The rational connection test, the earliest and most widely accepted test, was first propounded by the Supreme Court in

42. 26 U.S.C. § 5601 (a)(1) (1964).

43. 26 U.S.C. § 5601 (a)(4) (1964).

44. 26 U.S.C. §§ 5601 (b)(1), (b)(2) (1964). *See* United States v. Gainey, 380 U.S. 63 (1965), which found this device to be constitutional. *See also* Bozza v. United States, 330 U.S. 160 (1947).

45. What the authors are suggesting is that voters will put pressure on legislatures to broaden the definitions of crimes in an attempt to secure more convictions. In so doing, the electorate will be depriving itself of its constitutional safeguards. The authors realize that, in essence, this statement says that courts should "stretch" the Constitution to protect us from ourselves.

46. *See, e.g.*, Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); State v. Kahler, 232 So.2d 166 (Fla. 1970).

Mobile J. & Kansas City Railroad v. Turnipseed.[47] This test was based upon the notion that presumptions are regularized inferences from circumstantial evidence and that such inferences are fair if the basic facts have some reasonable tendency to establish the fact presumed. There has been considerable discussion as to how strong this tendency must be; that is, whether the test requires a "rational connection" or merely an "inferential connection."[48] The earlier cases seem to require only the latter, but this view has been abandoned by the Supreme Court, at least since the decision in *United States v. Leary*.[49] Today, there is no question that the presumed fact must be at least more likely than not to occur whenever the basic fact exists.[50]

The other two tests differ in that they are both non-inferential, they are not concerned with the inferences between the proved fact and the presumed fact in determining the constitutionality of the presumption.

The "greater includes the lesser" test, promulgated by Mr. Justice Holmes in *Ferry v. Ramsey*,[51] as applied to criminal statutes,[52] would simply ask whether the legislature had the power to make a crime of the basic or proven fact alone. This test is based upon the premise that if the legislature had the constitutional power to impose liability even absent the presumed elements, it could clearly create a possible defense by adding an element, presuming its existence and allowing the accused to negate it. Although this case has been frequently discussed by commentators, it has received a less enthusiastic reception in the courts.[53]

The "comparative convenience" test, first promulgated by Mr. Justice Cardozo in dicta in *Morrison v. California*,[54] asks whether proof of the basic fact is enough, in view of the comparative access of the parties to the evidence on the particular question, to make it just to compel the defendant to come forward with the evidence.

Although the continued validity of comparative convenience as an alternative test is subject to some dispute,[55] at least since *Tot v. United States*,[56] it has been generally accepted that comparative convenience is

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47. 219 U.S. 35 (1910). It is worth noting that *Turnipseed* was a civil action for personal injuries caused by railroad equipment. "Rational connection," originated in a *civil* action where the burdens of proof and persuasion differ radically from those in the criminal area where the test has subsequently been applied.

48. Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 537 (1955); Note, *The Validity of Statutory Presumptions of Crime Under the Federal Constitution*, 22 TEX. L. REV. 75 (1944).

49. *See* note 30 *supra* and accompanying text.

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

51. 277 U.S. 88 (1928). *See* the state court opinion at 122 Kan. 675, 253 Pac. 416 (1927).

52. *Ferry*, like *Turnispeed*, was also a civil action.

53. *See* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 534 (1955) [Hereinafter cited as Note, *Constitutionality*].

54. 291 U.S. 82 (1934). *Cf.* Yee Hem v. United States, 268 U.S. 178 (1925).

55. Note, *Constitutionality*, at 535-56.

56. 319 U.S. 463 (1943).

not an independent test of validity of presumptions but only a corollary to the doctrine of rational connection.[57]

V. Infirmities of the Present Test

The authors maintain that the rational connection test is, in fact, irrational. Its acceptance by the courts has been a source of confusion obscuring the questions of the constitutionality of criminal statutory presumptions. While the relationship between the fact proved and the fact presumed is relevant in determining the fairness of the presumption, it is not relevant or responsive to the constitutional questions involved. The attacks upon criminal statutory presumptions as espoused by Mr. Justice Black are not that presumptions are "unfair,"[58] but that they are unconstitutional. To reply to arguments that presumptions deprive the accused of designated constitutionally protected rights by saying the presumption is fair because there is a certain relationship between the proved and presumed facts is simply illogical and unresponsive. The rational connection test rests upon the premise that if the presumption is fair it is constitutional. Mr. Justice Black indicated that such a premise substitutes the shifting standards of fairness of a majority of the Court for the fixed standards of the Constitution.[59] Perhaps in no other area is the conflict in constitutional philosophy between the "activists" and the "literalists" so clearly discernible as it is here. In this area, however, it is submitted that the "activist" philosophy proves too much. Its application undercuts guarantees that are clear, unambiguous, and essential, and substitutes no greater guarantee than a transitory concept of what appears fair to the Court today. The framers of the Bill of Rights determined what was fair and expressed their determination in language which is far from inartful. The Court has only to decide whether the constitutional standards have been satisfied.

Even aside from the fact that the application of the rational connection test is totally unresponsive to the constitutional arguments, the decisions applying this test are among the most poorly reasoned decisions of the Court. At times the reasoning is nearly circular. In *United States v. Gainey*,[60] the Court wrote concerning statutory presumptions:

> Yet it is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmos-

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57. *See* note 54 *supra* and accompanying text.

58. Turner v. United States, 396 U.S. 398, 425-26 (1970) (dissenting opinion).

59. As Mr. Justice Black stated:

> Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind which brings new political administrations into temporary power. Rather, our Constitution was fashioned to perpetuate liberty and justice by marking clear, explicit, and lasting constitutional boundaries for trials.

Id. at 426.

60. 380 U.S. 63, 67 (1965).

> phere pregnant with illegality that Congress' resolution is appropriate.

The significance of the remark is somewhat obscure. According to the rational connection test, the validity of the legislative action will depend upon the courts' determination of the relevance of these same frequently occurring facts. If the courts, after reasonable inquiry into the facts, differ concerning the relevancy of these facts, it would seem that any legislatively created presumption would be invalid according to the rational connection standard. Had the Court delved into the "atmosphere pregnant with illegality" it might be forced to the conclusion that what is really being created is a crime of reputation.[61] The line between such an "atmosphere" with one or two elements added then presumed away, and the crime actually charged in *Thompson v. City of Louisville*[62] is probably too close for intellectual comfort.

Moreover, because the courts probably recognize that the rational connection test is not responsive to the constitutional challenges, they frequently try to avoid these issues by loosely interpreting the statutes in question. Mr. Justice Black wrote in dissent in *United States v. Gainey*:[63]

> First of all, let me say that I am at a loss to understand the Court's puzzling statement that "where the only evidence is of presence the statute does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict." The provisions in question both say unqualifiedly that "presence of the defendant shall be deemed sufficient evidence to authorize conviction" unless the defendant explains his presence. The Court holds that this statutory command in § 5601 (b) (2) is valid, but then for some reason adds that judges are free to ignore it or, after telling juries that they may rely on it, are free to set aside the verdicts of those juries that do. In other words, under the Court's holding the judge is left free to take the extraordinary course of following a valid statute or not, as he chooses. Judges are not usually given such unlimited discretion to disregard valid statutes. And as the Court indicates elsewhere in its opinion, it was to prevent judges from setting aside jury verdicts based on presence alone that Congress passed this statute in the first place. Besides being almost self-contradictory, it amounts to an emasculation of these statutory provisions, I think, to say that the judge was not required to tell the jury about them.

Furthermore, when the rational connection test is utilized, the state is not really relieved of the burden of repeatedly establishing the same relationship between facts. While the presumption relieves the state of

61. *See* People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934); Annot., 92 A.L.R. 1229 (1934).

62. 362 U.S. 204 (1960).

63. 380 U.S. 63, 76-77 (1965) (dissenting opinion).

the burden of establishing the relationship between proved and presumed facts at the trial level,[64] the burden is returned on appeal. In fact, on appeal, the rationality of the inference often becomes a determinative issue. Further, at least for several types of presumptions, the same relationship must repeatedly be established, as the rationality of the presumption may vary according to changing conditions. Thus, the time-saving rationale is questionable, especially in light of the congestion of appellate as well as trial dockets.

VI. A Suggested Alternative

As previously indicated, the validity of each of the arguments challenging the constitutionality of these presumptive devices must ultimately turn upon whether the accused's Bill of Rights' guarantees apply to each element of the crime or to the crime in its entirety. If criminal statutory presumptions are to be preserved, the Court must conclude that there is no constitutional requirement that the accused be offered all safeguards in the determination of the existence of each element of the offense charged.

If this conclusion is reached, the "greater includes the lesser" test promulgated by Mr. Justice Holmes becomes the logical test for determining the constitutionality of statutory criminal law presumptions.[65] Viewed in this perspective, the Court would simply maintain that, as to those elements added to the crime by the legislature affording defenses to persons whose activities they did not wish to label as criminal, the accused has no constitutional guarantees. Therefore, so long as the legislature has the power to make the proved fact alone a crime, there are no rights to be undermined despite the logic of Mr. Justice Black's arguments. In short, if criminal statutory presumptive devices are to be maintained, the applicable test should be the "greater includes the lesser" test. In addition, some form of inferential test, along the lines of the "rational connection" test, should be applied to satisfy the requirements of the due process clause, in the sense that totally arbitrary legislative action should be proscribed.

VII. Conclusion

The "rational connection" test is totally unresponsive to the constitutional questions it seeks to resolve. As a test of civil presumptions it might suffice, but as a test of the validity of statutory criminal presumptive devices it is patently inadequate. The constitutional challenges that the

64. However, successful challenges to the validity of a presumptive device at the trial level are not an impossibility. United States v. Cox, 432 F.2d 1326 (D.C. Cir. 1970). *See also Annot.*, 13 L. Ed. 2d 1138 (1965); *Annot.*, 23 L. Ed. 2d 812 (1970).

65. Dean McCormick noted that ". . . the greater includes the less argument seems to be a persuasive counter to the general charge of unfairness implicit in the 'rational connection' atttack." 22 Tex L. Rev. 75, 80 n.18 (1944).

"rational connection" test attempts to answer are logically sound. The validity of these constitutional challenges turns upon whether constitutional safeguards apply to each element of a crime. This question should be answered in the affirmative and criminal statutory presumptions should therefore be abolished. However, if the need for criminal statutory presumptions is compelling, the test of those presumptions should be rational in operation as well as in name. If the issues are confronted, the position that the Bill of Rights does not apply to each element of an offense will probably be reached. If this position is accepted, the adoption of "the greater includes the lesser" test is the next obvious step.

The Court should accept Mr. Justice Black's position. If, however, these presumptions in fact cannot be abolished, the Court should at least adopt a test that resolves the issues presented.