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Statutory Presumptions and the Federal Criminal Law: A Suggested Analysis

Gerald H. Abrams*

I. INTRODUCTION

The criminal laws and the institutions charged with the administration of those laws are now the subjects of extensive study. The federal government¹ and various states² are in the process of revising their criminal codes. The purpose of this article is to discuss what kind of presumptions should be enacted by a legislative body.³

The term presumption has been used in several ways.⁴ I use the

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I extend my deepest and sincerest appreciation to Professor Louis B. Schwartz of the University of Pennsylvania Law School for the aid and thoughts he offered to me on the problems covered in this article.

1. The National Commission on Reform of Federal Criminal Laws is now engaged in the monumental task of drafting a proposed criminal code for congressional consideration.

2. For example, Delaware and Pennsylvania are considering drafts of their respective proposed criminal codes. New Jersey embarked upon code revision in the summer of 1969.

3. For general discussions bearing on this problem, see C. MCCORMICK, EVIDENCE 639-68 (1954); Comment, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17 (1930); Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A.B.A.J. 287 (1928); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); Martin, *The Burden of Proof as Affected by Statutory Presumptions of Guilt*, 17 CAN. BAR REV. 37 (1939); Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34 (1952); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291 (1927); Sandler, *The Statutory Presumption in Federal Narcotic Cases*, 57 J. CRIM. L.C. & P.S. 7 (1966); Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277 (1968); Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966); Comment, *Traffic Violations: Vicarious Liability of Owners and Presumptive Owner-Operation*, 23 U. CHI. L. REV. 532 (1956); Comment, *Necessity of Logical Inference to Support a Presumption*, 17 S. CAL. L. REV. 48 (1943).

4. For a survey of how the word has been used see Laughlin, *supra* note 3, at 196-204. For example, some have used the term in the sole sense of shifting the burden of coming forward to the defendant—that is, to treat an issue as a matter for defense. See text accompanying notes 6-15 *infra*. One commentator has suggested that the word should be used only to indicate that once sufficient evidence of the basic facts is adduced, the presumed fact is established unless the defendant comes forward with evidence rebutting the presumption. See Laughlin, *supra* note 3, at 207-09. See also Morgan, *supra* note 3, at 43-45. Others use the term in the same sense as I do. See Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967) (“Reduced to functional terms, the presumption allows the fact finder to infer fact B from the proof of fact A.”).

word (hereinafter in italics) as a collective term to embrace situations in which a legislative body declares that proof of certain facts (the basic fact) has an effect in establishing other facts (the presumed fact which is the alleged crime or an element of the alleged crime).

In Part II of this article I shall consider situations in which I believe *presumptions* are improperly used—that is, when they are employed to accomplish substantive results which could be achieved through enactment of ordinary statutes. I shall also discuss cases in which a *presumption* concept is employed unnecessarily—that is, when it is used to allocate the burden of coming forward⁵ to a defendant on a particular issue when the proof allocation could be made directly without the benefit of a “presumption.”

In Part III, I shall analyze the test used to determine the constitutionality of a *presumption*—the rational connection standard. Here, I offer an interpretation of the standard that places substantial, but fair, limits on the Congress in this area.

In Part IV, I recommend adoption of two varieties of *presumptions*: a natural inference *presumption* and an empirical data *presumption*. The former involves only the designation of the basic facts that establish a prima facie case. An empirical data *presumption* has two consequences: (1) submission of the case to the jury unless the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt, and (2) a required instruction to the jury of the probative value of the basic facts.

The subject of this article is the federal criminal law, and, therefore, the discussion is concerned with congressional action. However, I believe my conclusions apply equally to state criminal codes.

II. “PRESUMPTION” IMPROPERLY USED

In the federal criminal law, the term *presumption* and *presumptions*, as I have defined them, have been employed in several ways that are unnecessary and improper. In one class of cases, the

5. I use the burden of coming forward to mean that unless there is evidence to raise the issue it does not enter the case. See C. McCORMICK, EVIDENCE 635-38 (1954). See also note 8 *infra*. Professor Morgan prefers to use the term “risk of non-production” to indicate that it makes no difference as to who produces the evidence. See Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34, 35 (1952).

I use the term “burden of persuasion” to indicate the extent to which the evidence must convince the fact finder. Here, the Constitution requires proof beyond a reasonable doubt. See text accompanying notes 45-47 *infra*.

judiciary has used a *presumption* concept solely as a means of allocating to a defendant the burden of coming forward and/or persuasion on a specific issue. In other situations, the Congress has used a *presumption* to achieve a substantive solution which could have been achieved through enactment of a well-drafted statute.

The presumption of sanity is an excellent example of a presumption that acts solely as a proof allocation device.⁶ In *Davis v. United States*, the Court stated that “the law presumes that everyone charged with a crime is sane” and that the issue does not enter the case unless there is evidence “that will impair or weaken the force of the legal presumption in favor of sanity.”⁷ This means simply that the burden of coming forward with evidence tending to establish insanity is on the accused. Such allocations can be accomplished directly without invoking a presumption. Use of the term does not aid analysis of the relevant factors that might justify a shift of the burden of coming forward to the accused. Here, for example, it would be appropriate for the Congress to treat insanity as an affirmative defense;⁸ if the prosecution had to disprove insanity in every criminal case, the administration of justice would be unduly delayed since most individuals are legally sane.⁹

An enigmatic use of the term presumption occurs in conspiracy prosecutions. When defendants have raised the defense of the statute of limitations, courts have stated that once a conspiracy is shown to have existed it is presumed to continue until it is affirmatively terminated or, as to a particular defendant, until he specifically withdraws.¹⁰ With respect to termination, it has been suggested that the effect of the presumption of continuance is to shift the burden of proving termination to the defendant.¹¹ This is contrary to the

6. See Soules, *supra* note 3, at 279-80. The author suggests that presumptions that relate solely to the allocation of proof are false presumptions and cites as an example the presumption of sanity.

7. 160 U.S. 469, 486-87 (1895).

8. I use the phrase “affirmative defense” to mean that the issue does not enter the case until it is raised by the proof, but that once it is in the case the government has the normal burden of persuasion on the issue. Some states denote the same procedural consequences by use of the term “defense.” See N.Y. PEN. LAW § 25 (McKinney 1967). I prefer the term “affirmative defense” because it indicates that the matter generally is not to be considered until it is raised affirmatively.

9. The federal courts have uniformly taken this position. *E.g.*, *Davis v. United States*, 160 U.S. 469 (1895). See *McKensie v. United States*, 266 F.2d 524 (10th Cir. 1959).

10. *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *Poliafico v. United States*, 237 F.2d 97 (6th Cir.), *cert. denied*, 352 U.S. 1025 (1956).

11. *Developments in the Law—Conspiracy*, 72 HARV. L. REV. 920, 961 (1959).

traditional rule that requires the government to establish that the action is timely beyond a reasonable doubt.¹² Furthermore, the concept of a presumption of continuance is unnecessary. The statute of limitations runs from the time the crime ends; that is, when the agreement is abandoned or its objects accomplished. When this occurs depends essentially on an analysis of the conspiratorial agreement.¹³ It can be recognized factually that a conspiracy may involve a continuous course of conduct without using a presumption concept that may carry with it an unintended or improper procedural consequence.¹⁴ With respect to withdrawal prior to the end of the agreement, the presumption of continuance may mean that the defendant has the burden of coming forward and/or persuasion.¹⁵ Here, the presumption is not needed since the proof allocation can be made directly.¹⁶

The traditional example of the use of a "presumption" to accomplish solely a substantive result is the so-called conclusive presumption. This is merely a substantive rule of law.¹⁷ For example,

12. See *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

13. See *Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). See generally Weschler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 979-91 (1961).

14. See MODEL PENAL CODE § 5.03(7)(a) (Proposed Official Draft, 1962) which provides that a "conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and those with whom he conspired"

15. See, e.g., *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States v. Markman*, 193 F.2d 574 (2d Cir.), *cert. denied*, 343 U.S. 979 (1952).

16. The presumption of innocence also falls into this category; it is but another way of saying the government must prove its case beyond a reasonable doubt. See C. McCORMICK, EVIDENCE 648 (1954); Soules, *supra* note 3, at 279. Moreover, the inference that the concept suggests—people charged with crime are more likely to be innocent than not—does not accord with the actual facts. See C. McCORMICK, EVIDENCE 647-78 (1954). This is not to say, however, that the presumption of innocence is unimportant. The Supreme Court has emphasized its significance in guaranteeing a defendant a fair trial. See *Deutch v. United States*, 367 U.S. 456 (1961). Also, the concept has been used in a variety of ways in the lower federal courts to protect the defendant. See *Armstead v. United States*, 347 F.2d 806 (D.C. Cir. 1965) (trial court's order that prosecutor refrain from calling the accused "Mister," as other witnesses were addressed, was held to violate the presumption); *Communist Party of the United States v. United States*, 331 F.2d 807 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 968 (1964) (a burden may not be shifted to the defendant if it unduly jeopardizes the presumption); *United States v. Campbell*, 316 F.2d 7 (4th Cir. 1963) (trial judge may not sit on a case in which his personal knowledge of the defendant's criminal activities may jeopardize the presumption of innocence).

17. The authorities are virtually unanimous on this point. E.g., Brosman, *supra* note 3, at 24; Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34 (1952); Soules, *supra* note 3, at 278-79.

Title 15 United States Code, section 77b provides that any security given or delivered with, or as a bonus on account of, any purchase of securities is conclusively presumed to constitute a part of the subject of such purchase and to have been offered or sold for value. The provision could be redrafted to state that any security delivered with or on account of any purchase of a security or other thing is deemed to have been offered and sold for value.¹⁸

Congress has enacted *presumptions* to accomplish ends that could be more easily attained by passage of ordinary statutes. The existing kidnapping *presumption*¹⁹—that interstate transportation is rebuttably established by the failure to release a victim within 24 hours after the perpetration of the abduction—is needless. Seemingly, the purpose of the provision is to enable the Federal Bureau of Investigation to aid local authorities in the investigation of kidnapping cases. The *presumption* could be replaced by a statute conferring upon the F.B.I. the aforementioned power. Since there are a number of federal interests that are likely to be affected or involved in kidnapping cases it seems that the constitutionality of the proposed statute could hardly be questioned; whereas the constitutionality of the existing provision is doubtful.²⁰ Congress has also enacted a *presumption* that provides that removal of goods from an interstate pipeline is prima facie evidence of the interstate character of the goods.²¹ The apparent purpose of this provision is to ensure that all robberies, even of goods moving intrastate, are within federal investigative and prosecutorial jurisdiction. Rather than achieving this end through enactment of a *presumption*, Congress could simply make any theft from an interstate pipeline a federal crime. Such a statute is clearly constitutional under the commerce clause.²² This

18. In short, a conclusive presumption is a way of modifying the definition of the crime. See, e.g., Brosman *supra* note 3, at 18; Laughlin, *supra* note 3, at 198-99. So viewed, the only constitutional problem raised by a conclusive presumption is whether the crime as it is defined violates the due process clause. See Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 721 n.117 (1967). See also Note, *Constitutionality of Rebuttable Presumptions*, 55 COLUM. L. REV. 527, 545 (1955).

19. 18 U.S.C. § 1201(b) (1964).

20. Applying the rational connection test (see text accompanying notes 25-65 *infra*) it is difficult to see the relationship between holding the victim 24 hours and interstate transportation. One guesses that the abductors would make an interstate transportation immediately after the crime when they go to their hideout or not at all. Of course, if an empirical study of past kidnapping cases indicated a pattern contrary to my factual estimate, this would be highly relevant.

21. 18 U.S.C.A. § 659 (Supp. 1968).

22. E.g., *United States v. Sullivan*, 332 U.S. 689 (1948); *Wickard v. Filburn*, 317 U.S. 311 (1942).

course of action avoids the difficulty in marshalling and analyzing the empirical evidence necessary to establish the rational connection of the existing *presumption*.

III. THE RATIONAL CONNECTION PRINCIPLE

Before discussing specific legislative proposals, it is worthwhile to consider the major test of the constitutionality of a *presumption*—the rational connection principle. In this way, the parameters of congressional authority can be defined. The standard was adopted by the Supreme Court in *Tot v. United States*. It was stated that:

[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 experience²³

The *Tot* decision has been criticized vigorously by scholars.²⁴ But, in 1965, the Court in *United States v. Gainey*²⁵ and *United States v. Romano*²⁶ established firmly that rational connection is the main test of a *presumption's* constitutionality. This conclusion was confirmed on May 19, 1969, by the Supreme Court in *Leary v. United States*.²⁷

Most commentators have been critical of the rational connection standard. Some have argued that the term "rational connection" represents a vague concept that fosters inconsistent results (*Gainey* and *Romano* allegedly are inconsistent).²⁸ Others have asserted that the Court's exclusive concern with rational connection is misplaced and that other factors such as the comparative ease with which proof can be adduced should be major considerations in a due process inquiry.²⁹ In part, these criticisms stem from a failure to recognize that rational connection is a limitation on the power of the Congress to legislate evidential effects. That is, the standard is relevant when

23. 319 U.S. 463, 467-68 (1943).

24. See Morgan, *Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324 (1943); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

25. 380 U.S. 63 (1965).

26. 382 U.S. 136 (1965).

27. 395 U.S. 6 (1969).

28. See Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 712 (1967). See also Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 150-52 (1966).

29. See Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 713-14 (1967); Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 535 (1955). See also *Mobile, Jackson & Kansas City R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910).

Congress states that the basic facts constitute sufficient evidence or prima facie evidence.³⁰ Different problems are presented when a *presumption* has such procedural consequences as a required jury instruction or a shift of a burden.

With respect to rational connection the cardinal, and as yet unresolved, question is what level of probative value must a *presumption* attain to be rational and hence constitutional. In *Leary*,³¹ the Court held unconstitutional the portion of the statute that provides that possession of marijuana is sufficient evidence of the defendant's knowledge of the marijuana's illegal importation unless his explanation convinces the jury to the contrary. After reviewing the precedents, Justice Harlan, for the Court, stated that "[t]he upshot of *Tot*, *Gainey*, and *Romano* is . . . that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' . . . 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."³² Appended to the above quotation was a significant footnote in which the Court said that since section 176(a) was unconstitutional under the "more likely than not" test, "we need not reach the question [of] whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."³³ The Court's reliance on precedent seems to be unjustified; *Gainey*, *Tot*, and *Romano* in no way mention the standard adopted by the Court. Nevertheless, the important problem is whether the "more likely than not" test comports with reason and sound policy.

I submit that a *presumption* is arbitrary when Congress accords the basic fact an evidential effect that exceeds the fact's natural

30. *See* Morgan, *Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324 (1943); Comment, 17 S. CAL. L. REV. 48 (1943).

31. The grand jury had returned a three count indictment against Leary. He had been charged with smuggling marijuana into the United States in violation of 21 U.S.C. § 176(a) (1964), with the transportation of marijuana, knowing it to have been imported illegally, in violation of 21 U.S.C. § 176(a) (1964), and with transferring the marijuana without having paid the special tax in violation of 26 U.S.C. § 4744 (1964). The trial judge dismissed the smuggling count. Leary was convicted of the other two crimes, and his conviction was affirmed by the Court of Appeals for the Fifth Circuit. The Supreme Court reversed the tax count conviction. It held that the privilege against self-incrimination provided Leary with a full defense and accordingly the Court dismissed the tax count. *See* 395 U.S. 6 (1969). The Court's discussion of the *presumption* thus related to the second count of the indictment.

32. 395 U.S. at 36.

33. *Id.* at 36 n.64.

probative value. For example, if Congress said proof of fact X is some evidence of fact Y, but in truth, fact X is irrelevant to Y, the statute would be unconstitutional. Similarly, if Congress declares proof of fact X establishes, prima facie, crime Y, and if the judiciary disagrees with the conclusion, the provision would be unconstitutional. These observations are borne out by *Gainey* and *Romano*. In the former, the Court upheld a *presumption*³⁴ which provides that presence of a person at an illegal distilling operation is sufficient evidence to authorize conviction for carrying on or being engaged in the operation. Proof of the exact same basic fact—presence at the site of an illegal still³⁵—was deemed constitutionally insufficient in *Romano* to authorize conviction for possession, custody, or control of an unregistered still. Presence, however, is relevant to establishing possession, custody, or control.³⁶ The critical distinction between the two cases lies in the nature of the crimes involved. The *Gainey* Court noted that the crime of carrying on an illegal still operation is very broad, and encompasses anyone who aids and abets in any way.³⁷ Therefore, Congress had accorded the fact of presence its natural, probative force because illegal distilling operations work clandestinely, and only employees are normally allowed on the premises.³⁸ On the other hand, the crime alleged in *Romano* has been defined narrowly, and includes only those who had custody or possession, or those who directly facilitated custody or control—*e.g.*, a caretaker.³⁹ Prior to *Romano*, the courts had uniformly held presence to be insufficient evidence to authorize a conviction for possession of a still,⁴⁰ and, therefore, Congress acted unconstitutionally in attempting to accord the basic fact more than its natural probative value.

My conclusions flow from the principles of procedural due process that have been regularly applied to criminal prosecutions. Each defendant is entitled to a fair trial with all of the fundamental guarantees. One of these guarantees is the obligation of the prosecution to prove the alleged crime beyond a reasonable doubt. “This notion—basic in our law and rightly one of the boasts of a free

34. INT. REV. CODE of 1954, § 5601(b)(3).

35. See INT. REV. CODE of 1954, § 5601(b)(4).

36. 382 U.S. at 141.

37. 380 U.S. at 67.

38. *Id.* at 67-68.

39. 382 U.S. at 139-41.

40. In *United States v. Bozza*, 330 U.S. 160 (1946), it was held that presence alone was insufficient evidence to convict for possession. Presence is relevant to possession, but tells nothing about the accused's particular function. 382 U.S. at 141.

society—is a requirement and safeguard of due process of law”⁴¹ It is founded on the recognition that witnesses may and often do err in their recollections, and on the fundamental belief that criminal penalties are so harsh that they should not be imposed unless the defendant’s guilt is a near certainty.⁴² A *presumption* that provides, for example, that proof of the basic fact is sufficient evidence to authorize a conviction, but is irrational as I use the term, allows the jury to convict on insufficient evidence. Such a provision is unconstitutional because it conflicts with the reasonable doubt standard, and injects caprice into the trial by directing the court to treat something as true which might well be contrary to the actual facts. It is also tantamount to trying a man for a crime with which he is *not* charged—*e.g.*, in *Romano* the defendant was tried for presence rather than possession.

The *Leary* Court’s interpretation of the rational connection standard is directly contrary to my conclusions. A “more likely than not” rule is germane to civil proceedings, but is invoked inappropriately to measure the legality of a *presumption* that authorizes the jury to find a crime or an element of that crime beyond a reasonable doubt. The reasoning of *Leary* is akin to the principle once followed in the Second Circuit⁴³ and *in no other federal court*⁴⁴ that the civil test of sufficiency applies in criminal cases. Assumedly, there are instances in which evidence will support a finding by a preponderance and not beyond a reasonable doubt. In such a situation, *Leary* permits a conviction. This, I believe, is indefensible; the reasonable doubt concept rests on sound, time-tested policies and should not be overturned. Since a footnote in the opinion indicates that the problem remains somewhat open, the Court should take the next opportunity to modify and limit the *Leary* view of rational connection.

It is enigmatic that the Court in *Leary* favored the “more likely than not” test and rejected the so-called “greater includes the lesser” standard. Both, however, qualify for the same criticism. The “greater

41. *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (dissenting opinion).

42. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149 (1960).

43. *United States v. Masiello*, 235 F.2d 279 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956); *United States v. Castro*, 228 F.2d 807 (2d Cir. 1956) (whether there is substantial evidence to support the verdict).

44. See, *e.g.*, *Curley v. United States*, 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); *Isbell v. United States*, 227 F. 788 (8th Cir. 1915).

includes the lesser" theory has received considerable support;⁴⁵ it was first put forth by Justice Holmes in *Ferry v. Ramsay* (a civil case).⁴⁶ There, under a state statute, bank directors who permitted the bank to accept deposits with knowledge of the bank's insolvency were liable to the depositors. A statutory presumption allowed the trier of fact to infer knowledge of insolvency from acceptance of deposits. Here, the basic fact has little or no relevance to the presumed fact. Nevertheless, the provision was upheld on the grounds that it was within the power of the state to impose strict liability, and that the challenged statute imposed only a lesser liability.⁴⁷ The Solicitor General advanced this "greater includes the lesser" theory in support of the presumptions in *Tot*,⁴⁸ *Romano*,⁴⁹ and *Leary*.⁵⁰ In each case, the Court replied that the constitutionality of a *presumption* is tested by what Congress enacts and not by what it may hypothetically enact. I believe the Court's conclusions are valid. The danger of the "greater includes the lesser" theory is that in some cases it will overturn the reasonable doubt requirement and will permit a trial for what Congress could have enacted rather than for what the defendant is charged.⁵¹

There are intimations in *Tot*,⁵² *Leary*,⁵³ and other cases⁵⁴ that even if a *presumption* is rational, it may be unconstitutional if it imposes an undue hardship on the accused; comparative convenience is, in theory, a subsidiary test of constitutionality. In the same vein, it has been argued that a rational *presumption* should be upheld only if the "legitimate interests of the state" outweigh the "hardship borne by the defendant."⁵⁵ Hardship involves a situation in which the

45. Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 147 (1966) (the logic of the standard is unassailable). See C. McCORMICK, EVIDENCE 662 (1954).

46. 277 U.S. 88 (1928).

47. *Id.* at 94.

48. 319 U.S. at 472.

49. 382 U.S. at 144.

50. 395 U.S. at 36 n.63.

51. Professor Morgan states that if a defendant is charged with the crime of transporting a firearm, and a *presumption* makes possession prima facie evidence of transportation, the provision is irrational if it permits the jury to convict for possession and not the alleged crime. Thus, the defendant would not have had a real opportunity to defend. Morgan, *Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324 (1943).

52. 319 U.S. at 470.

53. 395 U.S. at 34.

54. *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79 (1916); *Mobile, Jackson & Kansas City R.R. v. Turnipseed*, 219 U.S. 35, 41 (1910).

55. Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 735 (1967).

defendant cannot easily rebut the evidential effect of the particular enactment. The hardship arguments are insignificant under my interpretation of rational connection. If a *presumption* is clearly rational, I can see no reason to reach the hardship issue. In such a circumstance, with or without codification, proof of the basic fact justifies a certain evidential effect. Even if the evidence tending to refute the presumed fact were not readily accessible to the accused, I do not think that the due process clause would preclude the government from establishing its case as it chooses.

In evaluating the rational connection test, it is important to consider whether the courts will defer to the expertise or judgment of the Congress. In *Gainey*, the Court stated that in empirical matters “not within specialized judicial competence or completely common place, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.”⁵⁶ This statement was quoted with approval in *Leary*. However, to date, the Court has not exercised the deference it has suggested is appropriate.

Prior to the passage of the *Gainey* provision, various courts disagreed as to whether proof of presence was sufficient to authorize a conviction for engaging in an illegal distilling operation. Congress enacted the *presumption* to resolve this disagreement. The Court in *Gainey* noted that the special legislative finding that illegal distilleries operate in secrecy “only confirms what the folklore teaches.”⁵⁷ The Justices apparently believed that they were as qualified to assay the probative value of the inference as was the Congress. Moreover, a legislative attempt to overturn uniform judicial decisions by stating that proof of presence alone is sufficient to authorize a conviction for possession of a still was deemed unconstitutional in the *Romano* decision.⁵⁸ In *Gainey* and *Romano* the reluctance of the Court to defer to the Congress may be explained by one or a combination of the following possibilities: (1) information concerning the operation of illegal distilleries is completely commonplace, or (2) Congress did not develop an adequate legislative record, and, therefore, the Court was in the same posture as the legislature. The opinions are not clear as to which rationale was relied upon.

In *Leary* the Court expressed its conception of the role of the

56. 380 U.S. at 67.

57. *Id.*

58. The Court emphasized that the fact of presence tells very little about the defendant's specific function. 382 U.S. at 139-40.

Congress in this area. Justice Harlan stated that in order "to determine the constitutionality of the 'knowledge' inference, one must have direct or circumstantial data regarding the beliefs of marijuana users generally about the source of the drug they consume" and that "such information plainly is 'not within specialized judicial competence or is completely commonplace.'"⁵⁹ The Court concluded, however, that the legislative record was inadequate to resolve the empirical questions raised by the constitutional challenge to the *presumption*. Apparently, little attention was paid to the knowledge inference in the House or Senate debates. Furthermore, according to Justice Harlan, the testimony before the legislative committees was contradictory, inconclusive, and out-of-date on the crucial question of the source of domestically consumed marijuana.⁶⁰ Therefore, the Court felt obliged to review various treatises and governmental reports and found that most domestically consumed marijuana comes from Mexico. Justice Harlan then discussed the various ways a possessor may acquire knowledge of the source; on this issue, for the most part,¹ the legislative record was silent. After considering several treatises and the testimony of experts given in another case, the Court could not say with substantial assurance that a majority of marijuana possessors know the source of the drug they consume.⁶¹

The conclusion must be reached that Congress should develop the type of empirical record established by the Court in *Leary*. With its vast resources Congress can hire experts to gather all pertinent empirical data on a particular question and can hold hearings to examine every side of an issue. Congress can do this more efficiently than the courts, and when it is done, it is anticipated that the Court will pay more heed to the legislative evaluation of the probative value of a presumption. While, under my view of rational connection, the function of the Congress is limited insofar as it can give the basic facts no more evidential effect than they have anyway, in another sense the function of the Congress can be quite extensive and significant. It can efficiently gather relevant empirical data and thereby demonstrate the probative value and rationality of *presumptions*.

59. 395 U.S. at 37-38.

60. *Id.* at 39.

61. *Id.* at 52.

IV. RECOMMENDATIONS FOR LEGISLATIVE ACTION

A. Introduction

I begin with the premise that the evidential effect of a *presumption* should be to establish a prima facie case—a case sufficient for submission to the jury. Any lesser effect would be tantamount merely to a declaration that the basic fact is of some relevance to the presumed fact and is not of sufficient consequence to warrant congressional attention. Nor is a declaration of relevance likely to be of significant aid to the prosecution. On the other hand, it seems clear that the Constitution prohibits passage of a *presumption* with a greater evidential effect than establishing a prima facie case. Practically speaking, the only possible greater effect is a directed verdict for the prosecution on the strength of the evidence; this would be contrary to due process of law.⁶² Given the premise that a *presumption* should have only the effect of establishing a prima facie case, I think two varieties of *presumptions* are necessary.

B. Natural Inference Presumption

This device would have the sole consequence of designating certain facts prima facie evidence of a crime or an element of a crime. There are 28 provisions with this procedural effect in the United States Code. I believe enactment of the natural inference *presumption* would be warranted to resolve actual or potential judicial disagreement over submission to the jury of a recurring factual pattern. For this purpose, as the Supreme Court has suggested,⁶³ it is

62. See *Leland v. Oregon*, 343 U.S. 790 (1952). Similarly, a presumption that has the evidentiary effect of establishing a prima facie case with respect to an element of the crime and has the additional procedural consequence of shifting the burden of coming forward with some rebuttal evidence to the defendant with respect to an element of the crime is unconstitutional. It is contrary to the reasonable doubt requirement. Moreover, if the defendant does not introduce any evidence, the judge under this presumption would be obliged to tell the jury that if it finds the basic fact it must find the presumed fact. *Gainey* indicates that it is a violation of the right to trial by jury to instruct in terms of mandatory inferences. 380 U.S. at 70. In any event, there are only a few precedents favoring this type of presumption. Judge Learned Hand, speaking for the Second Circuit, interpreted the predecessor of the *presumption* dealing with smuggling to shift the burden of coming forward on the issue of guilty knowledge once the defendant's possession of the smuggled goods was shown. *United States v. Minneci*, 142 F.2d 428 (2d Cir. 1944). Also, at one time the Reporter of the Model Penal Code and a minority of the American Law Institute Council argued that a presumption should have at least the same effect as an ordinary affirmative defense. MODEL PENAL CODE § 1.13, Comment (Tent. Draft No. 4, 1955). This assumes away the significant question: that is, whether the reasons for enacting a *presumption* parallel those for creating an affirmative defense.

63. *United States v. Gainey*, 380 U.S. 63, 67 (1965).

both reasonable and appropriate for Congress to act to aid the prosecution. It would not be sound to legislate, however, with respect to all evidential problems that might arise in the federal criminal law. The division of authority between the Congress and the courts should be preserved. Therefore, I would employ this procedural device only where especially vigorous law enforcement is needed or where the government has had great difficulty in obtaining compliance with the law.

Since a natural inference *presumption* involves an evaluation of inferences without the benefit of special expertise, a required explanation to the jury of the congressional view of the evidence is not justified.⁶⁴ The foundation of our criminal law administration is the jury; we have confidence in the ability of laymen to find the truth, and a qualification of our system should not be made unless it is clearly warranted. There is no reason to substitute the judgment of legislators for that of jurors when both are equally able to analyze the facts.

A fine example of a situation in which Congress should enact a natural inference *presumption* arises in the area of transportation of stolen cars across state lines.⁶⁵ Numerous violations of this kind occur, and the problem has plagued the F.B.I. for a number of years.⁶⁶ There has been judicial disagreement as to whether presence in a car transported across state lines knowing it to be stolen is *prima facie* evidence of the crime of aiding and abetting the forbidden transportation.⁶⁷ Resolution of the problem would aid the government, since without the cooperation of one of the other travellers, it is difficult for the prosecution to convict a person who is only riding in the car.

Assuming that there are substantial law enforcement problems in the area, another statute which properly falls into this proposed category provides that presence in a vessel or conveyance containing a substantial ratio of dead, crippled, diseased, or starving wild animals

64. See McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291, 302-10 (1927). The author suggests that if an inference is unclear to the jury then an instruction is necessary. If the evidential connection is apparent, however, then the charge may be omitted.

65. 18 U.S.C. § 2312 (1964) prohibits the interstate transportation of stolen motor vehicles, knowing the same to be stolen.

66. In 1965, there were an estimated 486,568 motor vehicle thefts. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 18 (1967).

67. See *Baker v. United States*, 395 F.2d 368 (8th Cir. 1968), in which the court, over Judge Blackmun's dissent, held the evidence insufficient to sustain the conviction.

or birds is prima facie evidence of importation under inhumane conditions.⁶⁸ Without any empirical evidence, legislation might be appropriately enacted. Disagreement as to the probative value of proof showing the condition of the animals might arise from the difficulty in defining "inhumanity," and because some judges might place undue weight on other possible causes of injury to the animals (e.g. storms).

C. Empirical Data Presumptions

An empirical data *presumption* should be enacted only when Congress decides on the basis of empirical evidence that a recurring factual pattern is strong evidence of crime. This procedural device would have two consequences: (1) a jury instruction concerning the probative value of the basic facts would be required; and (2) when there is sufficient⁶⁹ evidence of facts that give rise to the *presumption*, the case would be submitted to the jury unless the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt.

1. *Required Jury Instruction.*—The important feature of the empirical data *presumption* is the required jury instruction. It is necessary since by hypothesis the empirical evidence which is the basis of the provision is not readily available to, or known by, the public at large. Unless the jury receives an adequate explanation, it might acquit when conviction is justified.

The form of the jury instruction is quite important; both the defendant's and government's interests should be considered. Part of the charge should be that all of the evidence must establish the presumed fact beyond a reasonable doubt. This points the jury to all the proof so that the statute is not given undue weight. The court should then state that the jury *may* find the presumed fact from the basic facts alone, since the latter is *strong evidence* of the former. Permitting the jury to make the finding by accepting or rejecting the inference is consistent with existing law. Given the constitutional right to trial by jury and the importance of maintaining the jury as an independent, viable institution, such an approach is valid. On the

68. 18 U.S.C. § 42(e) (1964).

69. I would employ the word "sufficient" to encourage trial courts to analyze the evidence in order to determine whether the proofs will support a finding of the basic fact. The latter is essentially a finding by the preponderance of the evidence. The Model Penal Code requires only "evidence." MODEL PENAL CODE § 1.12(5) (Proposed Official Draft, 1962). Compare *United States v. Gitlitz*, 368 F.2d 501 (2d Cir. 1966) (discussing what is sufficient to show possession within the meaning of the narcotics presumption).

other hand, use of the phrase "strong evidence" is a departure from existing law. This seems necessary to give proper emphasis to the provision.

There are two significant omissions in the suggested charge. First, I would make no mention of the congressional finding, because jurors might pay more heed to the opinion of Congress than to the evidence of the case.⁷⁰ Second, I would not, as do many existing statutes, state that the jury may find *unless the defendant adequately explains to the jury's satisfaction*. Such language may compromise the defendant's privilege against self-incrimination;⁷¹ therefore, sound practice dictates its omission.

The constitutionality of this type of required jury instruction was challenged for the first time in *Gainey*. Justice Black argued, in dissent, that Congress may not tell the juries what constitutes sufficient evidence to convict because such a direction constitutes an impermissible abridgment of the right to a jury trial secured by the sixth amendment.⁷² This argument was rejected by a majority of the Court.⁷³ It emphasized that the jury was told only that it *may* convict, and that, in the absence of a statute, such an instruction is permissible.⁷⁴ Thus, in substance, the Court was suggesting that the sixth amendment does not preclude comment on evidence and that this type of legislative directive is tantamount to a proper instruction. I agree with this conclusion, and it would seem that as long as the provision is phrased in terms of a permissible inference it will be upheld. Nor, in my opinion, can the power of the Congress to pass such a provision be questioned. Given its power to enact procedural rules for the courts, and its power to define crimes, there is ample congressional authority to require that juries receive an explanation of the probative value of an empirical data *presumption*. As a practical matter, I do not foresee that this question will be raised frequently. If

70. In *Gainey*, the Court suggested that it was the better practice to omit any explicit reference to the statute in the charge. *United States v. Gainey*, 380 U.S. 63, 71 n.7 (1965).

71. In *Gainey*, the trial judge in one portion of the charge used the phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury." The Court held that this could not have been understood to be a comment on the defendant's failure to testify. The Court did, however, infer that any "allusion" or "innuendo" based on the defendant's decision not to take the stand is illegal. *Id.* at 70-71. See *Griffin v. California*, 380 U.S. 609 (1965).

72. 380 U.S. at 77-78.

73. The trial judge did deliver the instruction in *Gainey*. It, therefore, may be argued that the Court did not pass on the question of whether Congress can require such an instruction. Nevertheless, the Court did stress the propriety of the lower court's action.

74. 380 U.S. at 70.

a provision rests on evidence that is not apparent to or readily known by jurors, most trial courts will instruct the jury about the probative value of the basic facts.⁷⁵

2. *Submission of Case to Jury.*—If there is sufficient evidence of the facts giving rise to the empirical data *presumption*, I would require the court to submit the case to the jury unless the evidence as a whole clearly precludes a finding of the presumed fact beyond a reasonable doubt. The purpose of this standard of sufficiency, as distinguished from deeming certain facts only *prima facie* evidence, is to ensure that the courts take full account of the special legislative finding reflected by the empirical data *presumption*. It also provides guidance for the occasional case in which a judgment of acquittal is justified. The Model Penal Code makes a similar recommendation with respect to its *presumption*; it uses the standard of “unless . . . the evidence as a whole clearly negatives the presumed fact.”⁷⁶ I prefer to include the reasonable doubt concept in the standard because this relates the question to the ultimate burden of persuasion.⁷⁷

It was argued in *Gainey* that Congress may not require submission of a case to the jury. Such a provision, it was asserted, interferes with the constitutional guarantee which gives the trial judge control over a criminal trial.⁷⁸ This contention was avoided by the Court’s strained construction of the statutory language “shall be deemed sufficient evidence to authorize conviction.” According to the Court, the provision did not illegally invade the trial court’s discretion because it neither required the submission of the case nor precluded a directed verdict.⁷⁹ In my opinion, it was unnecessary for the Court to take this approach. As I have suggested, Congress has the power to define crimes and to enact procedural rules for the federal courts. It does not seem to be an unreasonable extension of its power for Congress to declare that certain proof requires the submission of a case to the jury.⁸⁰

75. If the trial courts refuse to so charge, the government does not have an effective remedy. See 18 U.S.C. § 3741 (1964).

76. MODEL PENAL CODE § 1.12(5)(a) (Proposed Official Draft, 1962).

77. The standard of “clearly negatives,” in my opinion, is too vague.

78. 380 U.S. at 76-79 (Black, J., dissenting).

79. *Id.* at 68-69.

80. See Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 205 (1953) (a legislature having the power to define crimes would have the power to prescribe the proof necessary to get to the jury); Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277, 295 (1968) (Congress is qualified on the basis of expertise to make assessments that neither court nor jury can make); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 715 (1967) (Congress may tell judge and jury what is sufficient to convict).

D. *Advantages of the Empirical Data Presumption*

The empirical data *presumption* should be enacted when Congress, on the basis of empirical evidence, resolves judicial disagreements as to the probative value of recurring facts in establishing a particular crime. Moreover, there are other justifications for the passage of this *presumption*. First, evidence relevant to an element may be readily accessible to the defendant but difficult for the prosecution to obtain without a great deal of effort. Thus, one commentator has suggested that the person best able to explain why he was in possession of something is the defendant himself.⁸¹ Similarly, it might be argued that it is within the defendant's power to produce an innocent explanation of why he was on the premises of an illegal distilling operation and that it is burdensome for the prosecution to seek evidence negating all possible explanations. In these circumstances, enactment of a *presumption* on which the government can rely to reach the jury may save valuable prosecutorial and investigative resources. Second, enactment of this *presumption* may aid in proof of elements that are difficult for the prosecution to establish (e.g., state of mind and illegal importation of narcotics and knowledge of the same).⁸² In providing each type of aid to the prosecution, however, Congress has a significant function only when it gathers empirical evidence and acts on the basis of expertise.⁸³

Title 18 United States Code, section 892 is suitable for this type of action, although presently it is only a natural inference presumption. The section provides that a prima facie case of extortionate extension of credit is made out by proving that the loan was usurious and that when it was extended the debtor reasonably believed that the creditor had the reputation for using extortionate means to collect. The provision appears to rest on empirical evidence and expert knowledge of the loansharking industry. Its purpose is to aid the government in proving extortion, which is ordinarily hard to prove unless the defendant makes an express threat to use force. However, unless the probative value of the facts

81. Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A.B.A.J. 287, 288 (1928).

82. *Id.*; Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L.C. & P.S. 7, 8 (1966).

83. If a rational provision involves only an assessment of natural inferences, then it is superfluous. Without codification, the prosecution would get to the jury on the clear chain of circumstantial evidence. No commentator has, to my knowledge, explicitly recognized the distinction between cases in which Congress acts on the basis of expertise and cases which involve only opinion as to natural inferences.

giving rise to the provision are explained to the jury, the enactment will not have its intended effect.

Similarly, the *presumption* involved in *Gainey* should be classified as an empirical data *presumption*. It was passed to aid the government, which had been having difficulty in the enforcement of alcohol tax laws. Since jurors are not likely to have knowledge of the clandestine method of producing liquor illegally, an explanation of the probative value of the *presumption* is necessary. The government is aided by the statute because the explanation of why the accused was on the premises is in his control.

The judicial rule that possession of recently stolen goods *prima facie* establishes knowledge that the goods were stolen⁸⁴ seems to be a situation that also falls into the empirical data *presumption* category. Several states have legislation on this problem and have limited the application of the principle by either the type of goods involved,⁸⁵ the class of people from whom the goods are received,⁸⁶ or the class of people who received the goods.⁸⁷ In my opinion, development of a reasonable rule depends on an empirical study of the illicit traffic in stolen goods. Such a provision would aid the prosecution in proving state of mind.

I would not classify the existing narcotics *presumption*⁸⁸ as an empirical data *presumption*. It provides that possession of a narcotic drug is sufficient evidence to authorize conviction for the crimes of receipt, sale, concealment, purchase, or facilitating the transportation, sale, or concealment unless the defendant makes an explanation satisfactory to the jury. Normally, this inference is explained to the jury. This seems unwarranted as the inference is apparent, clear, and compelling. If the instruction exerts influence on the jury, as one assumes it does, the provision makes possession the crime.

84. *E.g.*, *United States v. Anost*, 356 F.2d 413 (7th Cir. 1966); *United States v. Minieri*, 303 F.2d 550 (2d Cir. 1962). The inference flowing from recent possession is permissive and not mandatory. Therefore, it has been held that a trial judge may not charge that recent possession gives rise to a "presumption" because the word connotes an obligation to find guilty knowledge once the basic fact of possession is established. *Barfield v. United States*, 229 F.2d 936 (5th Cir. 1956); *United States v. Sherman*, 171 F.2d 619 (2d Cir. 1948). It is also error to charge that the defendant has the burden of explaining recent possession. *United States v. Lefkowitz*, 284 F.2d 310 (2d Cir. 1960).

85. *See* ARIZ. REV. STAT. ANN. § 13-621 (1956); MONT. REV. CODE ANN. § 94-2721 (1947).

86. CAL. PEN. CODE § 496 (applies only when the goods are received from one under 18).

87. N.Y. PEN. LAW § 1308.

88. 21 U.S.C. § 174 (1964). The *presumption* also relates to the element of illegal importation and knowledge of the same. This will become obsolete if the jurisdictional portion of the statute is redrafted. *See* text accompanying note 20 *supra*.

V. CONCLUSION

I have recommended legislative action based on a consideration of all possible cases and all relevant distinctions. First, I put to one side those circumstances in which there was no need for the enactment of a *presumption* or the use of a *presumption* concept. This includes situations where the burden of coming forward and/or persuasion is allocated to the defendant and where conclusive *presumptions* are used. Then, I concluded that the minimal evidential effect of a *presumption* should be to establish a prima facie case. It was also stated that Congress may not accord a basic fact more probative value than it has by natural inference nor may it give a *presumption* a greater effect than establishing a prima facie or sufficient case.

These are the cases that are left: (1) the basic facts establish a prima facie case on the basis of natural and apparent inferences; and (2) the basic facts establish a prima facie case on the basis of empirical evidence not readily known by or available to the public. On the basis of my analysis, two kinds of *presumptions* are necessary to cover the above cases: a natural inference *presumption* and an empirical data *presumption*. These were carefully tailored to their particular categories and were carefully limited by what were the justifications for their enactment.