

STATUTORY PRESUMPTIONS AND REVERSE ONUS

CLAUSES IN THE CRIMINAL LAW : IN SEARCH

OF RATIONALITY

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I. INTRODUCTION

Criminal lawyers use the term “presumption” in various senses.¹ Sometimes the presumptive form disguises what are really rules of substantive law.² The idiom of presumptions is also used to state propositions about the burden of proof,³ to describe inferences that are commonly drawn from given facts, and to affirm general principles of liability.⁵

But the term is most often associated with statutory provisions which declare that one fact shall be “deemed” or “presumed” (the “presumed fact”) on proof of another fact (the “basic fact”). Presumptions in this sense are frequently accompanied by rebuttal clauses that stipulate how the presumed fact can be displaced.⁶ Where the basic fact is treated as “sufficient proof” of the presumed fact “in the absence of evidence to the contrary”,⁷ proof of the basic fact alone will be enough to support a finding that the presumed fact also exists. However, to displace the presumed fact the defendant (D) is subject to no more than an evidential burden of pointing to evidence “reasonably capable of raising a reasonable doubt on the issue”.⁸ By contrast, where the statute states that on proof of the basic fact, a further fact shall be presumed “until/

¹ See generally Garrow and McGechan, *Principles of the Law of Evidence* (7th ed. 1984) ch.21; Mathieson (ed.), *Cross on Evidence* (3rd N.Z.ed. 1979) ch.6.

² Presumptions in this sense are irrebuttable, e.g. Transport Act 1962, s. 58(2) and (3): “shall be conclusively presumed”. Other provisions to the same effect avoid presumptive terminology, e.g. Crimes Act 1961, s.21(1): see Mathieson, *supra* n.1 at 125; *Stewart v Police* [1970] N.Z.L.R.560 at 571-572 per North P.

³ Thus the presumption of innocence is merely another way of saying that the prosecution must prove guilt beyond reasonable doubt. The presumption of sanity is a further example: see Mathieson, *supra* n.1 at 123-124.

⁴ Such inferences are usually described as “presumptions of fact”. They formalise “frequently recurring examples of circumstantial evidence”: Mathieson, *supra* n.1 at 124. The best known example in the criminal law is the inference of guilty knowledge arising from possession of recently stolen goods.

⁵ So the courts talk of a “presumption” that *mens rea* is an essential ingredient of criminal offences e.g. *Police v Creedon* [1976] 1 N.Z.L.R. 571 (C.A.) at 573 per McCarthy P. and at 587 per Richmond J.; *Civil Aviation Department v MacKenzie* [1983] N.Z.L.R.78 (C.A.) at 81 and 85 per Richardson J. for the court; *Millar v Ministry of Transport* (1986) 2 C.R.N.Z.216 (C.A.) at 232 per McMullin J. and at 237 per Casey J.

⁶ Not all presumptions that are dependent on proof of a basic fact incorporate a rebuttal clause. Some provide only that proof of the basic fact shall be “prima facie evidence” or “sufficient proof” of the presumed fact: e.g. Animals Act 1967, s.98; Dangerous Goods Act 1974, s.43; Dog Control and Hydatids Act 1982, s.84(2); Explosives Act 1957, s.59; Sale of Liquor Act 1962, ss.239(2) and 270(2). As to the effect of such permissive provisions see *Bowles v Police* [1970] N.Z.L.R.303.

⁷ For example, Commerce Act 1986, s.42; Gaming and Lotteries Act 1977, s.121(1) and (3); Pesticides Act 1979, s.60(1).

⁸ *Machirus v Police* [1983] N.Z.L.R.764 (C.A.) at 767 per Cooke J. for the court. See also *Parker v Police* (1983) 1 C.R.N.Z.25 at 28 per Barker J.

unless the contrary is proved”,⁹ a persuasive burden (a “reverse onus”) is shifted to D. In order to rebut the statutory inference D must adduce proof to the contrary on a balance of probabilities.¹⁰

Both kinds of presumption give the prosecution (P) a very helpful shortcut to proof of the presumed fact. But this is only achieved by depriving D of the full protection of the presumption of innocence in his favour. This presumption, widely held to be the fundamental principle of our adversarial system,¹¹ consists of two elements. First, it places the burden of persuasion in criminal proceedings on P; and secondly, it establishes proof beyond reasonable doubt as the standard of persuasion. Together these elements are the twin strands of what Viscount Sankey described in *Woolmington v Director of Public Prosecutions* as that “golden thread” always to be seen throughout the “web of the English criminal law”.¹²

In practical terms, the reasonable doubt standard is the “operational form”¹³ of the presumption of innocence. It puts a thumb, as it were, on the scales of justice.¹⁴ By assigning the risk of non-persuasion beyond reasonable doubt to P the law improves the accuracy of the fact-finding process and compensates for any systemic bias towards P, thereby reducing the possibility of wrongful conviction. But it is precisely this protective function that is imperilled by statutory presumptions which relieve P of the full load of proof of criminal

⁹ For example, Arms Act 1983, s.66; Animals Act 1967, s.64(2); Clean Air Act 1972, s.8(2); Dog Control and Hydatids Act 1984, s.41; Impounding Act 1955, s.59; Misuse of Drugs Act 1975, s.6(6); Sale of Liquor Act 1962, ss.270(1) and 272(1). For variant formulae see Civil Aviation Regulations 1953, reg.36(2)(a); Medical Practitioners Act 1968, s.69(4); Native Plants Protection Act 1934, s.5; Traffic Regulations 1976, regs.97(6) and 128(7). A further group relates to averments or allegations made by P: e.g. Customs Act 1966, s.299(1); Distillation Act 1971, s.97; Wildlife Act 1953, s.69(1). Several statutes also provide that the production of a certificate or document shall be “prima facie/sufficient evidence” of its authenticity or contents “unless/until the contrary is proved” e.g. Clean Air Act 1972, s.27(3) and (4); Fisheries Act 1983, s.106(1)-(4), (7) and (8); Immigration Act 1987, s.143(1); Misuse of Drugs Act 1975, s.31(2); Transport Act 1962, ss.22(5), 30A(3), 42A(8), 58B(9)(b), 58D(3), 69B(8), (9) and (11), 113B(8) and (9), 139(2), (3) and (4), 170(1), 171(1)(b), (f), (g) and (h), 197(1), (2), (3), (5) and (7).

¹⁰ See *Collector of Customs v Murray* [1979] 1 N.Z.L.R. 76 (C.A.) at 82 per Cooke J.; *Esekielu v Department of Labour* [1980] 2 N.Z.L.R. 229 (C.A.) at 234 per Cooke J.; *Transport Ministry v Garry* [1973] 1 N.Z.L.R. 120 at 123 per Haslam J.; *Police v Gardiner* (1983) 1 C.R.N.Z. 178 at 182 per Roper J.; *Malcolm v Police* (1986) 2 C.R.N.Z. 66 at 68 per Hardie Boys J.

¹¹ See e.g. Cross, “The Golden Thread of the English Criminal Law: The Burden of Proof” (Rede Lecture, University of Toronto, 1976); Stuart, *Canadian Criminal Law* (1982) 32-33. For recent affirmation of this view of the presumption in this country see Ministry of Foreign Affairs, *Human Rights in New Zealand: The Presentation of New Zealand’s Report under the International Covenant on Civil and Political Rights, Geneva, November 1983* (Information Bulletin No 6, January 1984) p.46, para.175; Auckland District Law Society, *The Presumption of Innocence*, Report of the Public Issues Committee, 27 May 1986; Kaburise, “On Transferring the Burden of Proof to the Accused” in 1984 New Zealand Law Conference Papers (1984) vol.2, p.109. The role of the presumption and other protective rights under libertarian and utilitarian conceptions of the criminal process is considered in Australian Law Reform Commission, *Evidence*, Interim Report No.26, 1985, vol.1, pp.5-7, 30-32; *Evidence*, Report No.28, 1987, 18-28; Royal Commission on Criminal Procedure, *Report* (Cmnd 8092, 1981) 4-12.

¹² [1935] A.C. 462 (HL(E)) at 481.

¹³ Sheldrick, “Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses” (1986) 44 U.Tor.Fac.L.Rev. 179 at 180.

¹⁴ See Underwood, “The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases” (1977) 86 Yale L.J. 1299.

accusation. In particular, a presumption in harness with a reverse onus clause undercuts the reasonable doubt standard in two ways. To begin with the presumption itself is mandatory. So the trier of fact must find that the presumed fact has been established once P has proved the basic fact, even if not satisfied that P could prove the presumed fact if put to its usual burden of persuasion. D therefore loses the benefit of any residual doubt that would otherwise arise from P's case. And no less importantly, even though D raises a reasonable doubt against the existence of the presumed fact he will remain ensnared by the presumption because under the reverse onus clause nothing less than proof to the contrary will do. In effect, therefore, where D cannot meet the standard of proof on a balance of probabilities, the provision amounts to a legislative direction to convict on proof of the basic fact alone. Yet, were it not for the statutory intervention, the reasonable doubt standard would protect D against conviction in both cases.

Such a combination of a presumption of fact and a reverse onus clause might be defended on the ground that proof of the basic fact renders the existence of the presumed fact so probable that it is sensible to assume the presence of the presumed fact until D proves otherwise. On this view presumptions save the cost and time of proving the same relationship between similar facts in different cases and thereby provide for more uniform adjudication.¹⁵ But presumptions frequently do not coincide with the dictates of probability.¹⁶ More often than not they are designed to achieve some procedural convenience or to avoid evidentiary hardship to P.¹⁷ Thus many presumptions express a legislative judgment that D has more convenient access to proof or disproof of a material fact than P, or that it would be an imposition on both prosecutorial and judicial resources to require positive proof of some matter.

In the face of such a presumption we may be far from convinced that there is any probable or necessary connection between the basic and presumed facts — still less that proof of the one is naturally probative of the other. And we might also silently protest that the joint effect of an arbitrary presumption of fact and a reverse onus is to reduce the presumption of innocence to a fiction.

In this paper I want to suggest a way of confining the operation of presumptions and reverse onus clauses within rational limits. I will argue that the courts should be more active in preserving the integrity of the presumption of innocence by strictly construing presumptive provisions that arbitrarily encroach upon it. To bring the matter into relief, in the first part of the paper I will discuss a recent case where argument to this effect was advanced before the Court of Appeal. The remainder of the paper will consider the argument in broader context, including some observations on its application under the proposed Bill of Rights.

II. VELENSKI v CONSERVATOR OF FORESTS

1. *Facts*

The appellants (A) were passengers in a helicopter that had been taking

¹⁵ See Fuller and Urlich, "An Analysis of the Constitutionality of Statutory Presumptions that Lessen the Burden of the Prosecution" (1971) 25 U. Miami L. Rev. 421 at 427.

¹⁶ See Eggleston, *Evidence, Proof and Probability* (2nd ed. 1983) 108-109.

¹⁷ For cases where presumptions are based on convenience rather than probability see *Stewart v Police*, supra n.2 at 577 per Turner J.

equipment to a ski field. He and the pilot were hunting partners and joint lessees of the aircraft. On one return flight from the ski field to its base the helicopter made a deviation of about fifteen minutes in flying time from its normal course and overflew a farm property. The aircraft did not pursue a straight line of flight at the usual altitude of approximately 500 feet but followed a bush edge at a height of about fifty to sixty feet. The next day a forest ranger examined the aircraft in the course of investigating a complaint from another helicopter operator that A and his partner had been hunting over the farm property without the owner's permission. No permission had been granted to A or his partner. The ranger found that the passenger door had been removed from the helicopter.

A was charged under section 8(2) of the Wild Animal Control Act 1977 with hunting a wild animal on land without the express authority of the owner of the land. Section 8(2) reads in relevant part as follows:

Every person commits an offence against this Act who hunts or kills or has in his possession any wild animal on any land, or discharges a firearm into or over or across any land, without the express authority of the owner or occupier of that land.

The other provisions of the Act material to the charge against A were the extended definition of "hunt or kill" in section 2 and the presumption and reverse onus clause created by section 38(1). So far as applicable to the facts of the case, "hunting or killing" included "searching for any wild animal", "pursuing any such animal" and "using any aircraft while engaged in hunting any such animal". Section 38(1) provides:

In any prosecution for an offence against this Act, proof that any person found in any area where wild animals are usually present had with him or under his control any poison, snare, net, trap, or firearm, or any vessel, vehicle, or aircraft so adapted or equipped as to be capable of being used for hunting or killing any wild animal, or any dog or weapon that could be used for the purpose of hunting or killing any wild animal, *shall be evidence from which the Court shall presume, until the contrary is proved*, that the person was hunting or killing wild animals in the area. [Emphasis added.]

When applied to A's case the presumption in section 38(1) therefore became operative on proof of three basic facts: (i) that A was "found in [an] area where wild animals are usually present"; (ii) that he had an aircraft "with him or under his control"; and (iii) that the aircraft was "so adapted or equipped as to be capable of being used for hunting or killing any wild animal". Once these basic facts were established, section 38(1) provided P with a short-cut to proof of the ultimate fact by compelling the trier of fact to conclude that A was "hunting" as proscribed. It then lay with A to avoid conviction by disproving the presumed fact on the balance of probabilities.

2. Application of the Presumption

The prosecution was conducted on the basis that, quite apart from section 38(1), there was sufficient evidence to establish that A had committed the offence. However P claimed that the application of the presumption reinforced the case against A.

The first basic fact triggering the presumption was not disputed. A had been found in an area where wild animals were usually present. But A contested the second basic fact that he had the helicopter “with him or under his control”. He disclaimed any responsibility for the diversion and denied that he had any control over the manner in which the pilot flew the aircraft or the course he followed. Furthermore, in respect of the third basic fact, he explained that the door had been removed from the helicopter to lessen the laden weight of the aircraft and to facilitate the unloading of equipment at the ski field where the contour of the ground made landing difficult. Nonetheless, the District Court Judge found that the presumption applied and had not been rebutted.¹⁸

A’s appeal against conviction was dismissed in the High Court.¹⁹ While Quilliam J. was prepared to concede that it was open to question whether there would have been sufficient evidence on which to convict A without reliance on the presumption, he took the view that the presumption applied. Notwithstanding the argument against the second basic fact that the pilot and not A had physically guided the helicopter and therefore had it “under his control”, Quilliam J. thought it could properly be said that A had the aircraft “with him”. He considered that A had been “fully identified” with the helicopter on the day in question because he was the pilot’s hunting partner and joint lessee of the aircraft, and its use at that time had been arranged either by A alone or at least by A in conjunction with the pilot.

Quilliam J. also found that P had established the third basic fact. In his view the removal of the passenger door was an adaptation that undoubtedly made the helicopter capable of being used for hunting. He rejected the argument that section 38(1) imported a purposive implication that the aircraft must have been adapted with the specific intention that it be used for hunting. To the contrary, he concluded that the presumption had plainly been introduced to avoid any such requirement. Although in its adapted state the helicopter could of course be used for purposes other than hunting, section 38(1) required no more than proof that it be capable of being used for hunting, and that fact had been established.

On further appeal the Court of Appeal²⁰ confirmed Quilliam J.’s conclusion that the third basic fact had been established because removal of the passenger door was an adaptation within the terms of section 38(1). However the court was unable to agree with him as to the second basic fact. According to Richardson J. for the court, it could not properly be said that A had the helicopter “with him”. In A’s case where he was a passenger in an aircraft in flight, the court considered that to rely on the first limb of the composite expression “had with him or under his control” worked violence to the ordinary use of language. But in appropriate circumstances it would be open for a court to find that a passenger was sharing “control” with the pilot. In the present case, however, Quilliam J. had not specifically addressed the question of A’s control in determining the general appeal. Having reached the conclusion that A had the helicopter “with him”, he did not review the findings made

¹⁸ *Conservator of Forests v Velenski* unreported, District Court, Rangiora, 16 May 1984, Frampton D.C.J.

¹⁹ *Velenski v Conservator of Forests* unreported, High Court, Christchurch, 26 November 1984, Quilliam J.(M 382/84).

²⁰ *Velenski v Conservator of Forests* unreported, Court of Appeal, 1 November 1985 (C.A. 39/85).

in the District Court on the alternative basis that the aircraft was “under [A’s] control”. The appeal was therefore allowed and the matter remitted to the High Court to determine whether the presumption in section 38(1) was applicable, and, if not, whether in the absence of the presumption there was sufficient evidence to support a finding that A had been hunting wild animals.²¹

3. *The Rational Connection Argument*

In the Court of Appeal A also advanced a wider argument that, quite aside from the question whether the basic facts triggering the presumption in section 38(1) had been proved, section 38(1) was itself inapplicable because it enacted an arbitrary presumption of fact and a reverse onus clause inconsistent with the presumption of innocence in A’s favour.

This argument was based on two propositions: (i) that the presumption of innocence in criminal proceedings is a fundamental common law right, any derogation from which should be strictly construed, and (ii) that where the derogation arises from an arbitrary presumption of fact and a reverse onus clause the appropriate principle of construction is to be found in the requirement of a rational connection between the basic and presumed facts.

(a) *The Presumption of Innocence*

In several recent Court of Appeal decisions Cooke J., as he then was, has identified a number of common law rights so deeply embedded in our legal system that the legislature may not be able to override them.²² These include the right of citizens to have recourse to the constituted courts,²³ the right of an office-holder to natural justice,²⁴ the right to be free from physical compulsion,²⁵ and the right against self-incrimination.²⁶

Undoubtedly, the presumption of innocence expresses a fundamental common law right no less deeply embedded in our law than those identified by Cooke J. Furthermore, whether or not there are limits to legislative abrogation of fundamental rights, it must surely be open to the courts to construe statutory abridgments of those rights very strictly. Where privative clauses are concerned, for example, courts of general jurisdiction have been reluctant to conclude that the power to decide a question of law conclusively has been conferred on a statutory authority or tribunal in derogation of the right of access to the courts.²⁷ Similarly, in the case of a presumption and reverse onus clause, the courts could properly adopt a principle of strict construction on the basis that such provisions fundamentally undercut the presumption of innocence.

²¹ When the case was remitted to the High Court Quilliam J. upheld the District Court Judge’s finding that the helicopter was “under [A’s] control”. Accordingly, the presumption applied and had not been rebutted. The general appeal against conviction was dismissed: *Velenski v Conservator of Forests* unreported, High Court, Christchurch, 30 June 1986 (M 392/84).

²² See generally Caldwell, “Judicial Sovereignty — A New View” [1984] N.Z.L.J. 357; Joseph and Walker, “A Theory of Constitutional Change” (1987) 7 Oxford J.Leg.Stud.155.

²³ *L v M* [1979] 2 N.Z.L.R. 519 at 527; *New Zealand Driver’s Association v New Zealand Road Carriers* [1982] 1 N.Z.L.R. 374 at 390.

²⁴ *Fraser v State Services Commission* [1984] 1 N.Z.L.R. 116 at 121.

²⁵ *Taylor v New Zealand Poultry Board* [1984] 1 N.Z.L.R. 394 at 398. See further *Keenan v Attorney-General* [1986] 1 N.Z.L.R. 241 (CA) at 244 per Cooke J.

²⁶ *Taylor*, supra n.25. See further *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 N.Z.L.R. 191 (C.A.) at 193 per McMullin J. for the court.

²⁷ See e.g. *Bulk Gas Users Group v Attorney-General* [1983] N.Z.L.R. 129 (C.A.) at 133 per Cooke J.

(b) *The Appropriate Principle of Strict Construction: the Rational Connection Test*

In *Velenski* A argued that a qualification of rational connection between the basic and presumed facts afforded the appropriate principle of strict construction. It would allow the courts to test the reliability of statutory presumptions and so reduce the possibility of inaccurate fact-finding by confining the application of presumptions to cases where proof of the basic fact at least raises the probability that the presumed fact also exists.

This approach to the interpretation of presumptions was supported by a number of Canadian appellate decisions under the 1960 Bill of Rights and the 1982 Charter of Rights and Freedoms. The first was the decision of the Supreme Court of Canada in *R. v Shelley*.²⁸ There the court was required to consider the operation of a reverse onus clause under federal customs legislation which provided that where any question arose as to the identity, origin or importation of goods, the burden of proof lay with the person in whose possession they were found. On a charge of possession, without lawful excuse, of unlawfully imported goods with a specified dutiable value, P proved the facts of possession, foreign origin and dutiable value. But to establish that the goods had been unlawfully imported P relied on the reverse onus provision.

Delivering the majority judgment of the Supreme Court, Laskin C.J. held that a reverse onus clause which went no further than requiring D to prove an essential fact on a balance of probabilities would not necessarily infringe the presumption of innocence under section 2(f) of the Bill of Rights,²⁹ provided that the relevant fact was one rationally open to D to prove or disprove, as the case may be. On the facts of the case, however, it was quite unreasonable to have expected D to prove lawful importation. In the absence of additional proof by P of some knowledge or means of knowledge of the circumstances of importation by D, which would have enabled D to establish that the goods were lawfully imported, D could have been left with an impossible burden. To have required less would have amounted to an irrefutable presumption of guilt against D, depriving him of the right to be presumed innocent under section 2(f) of the Bill of Rights. Furthermore, in a separate qualification on the operation of the reverse onus clause, Laskin C.J. found that there was no "rational or necessary connection" between the proved facts of possession of dutiable goods of foreign origin and the presumed fact of unlawful importation that D had to disprove in order to escape conviction.³⁰

Although the decision in *Shelley* concerned the application of a reverse onus clause under an express provision in the Canadian Bill of Rights, A argued in *Velenski* that the seed of the rational connection test sown in Canada by Laskin C.J. could be transplanted to New Zealand. The 1960 Bill of Rights is not an entrenched document with transcendent constitutional authority. It is merely a statutory declaration of pre-existing rights and freedoms;³¹ and,

²⁸ (1981) 123 D.L.R. (3d) 748.

²⁹ This provision states, in relevant part, that "no law of Canada shall be construed or applied so as to . . . deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal . . ."

³⁰ *Supra* n.28 at 752.

³¹ See *R v Big M Drug Mart Ltd* (1985) 18 D.L.R. (4th) 321 (S.C.C.) at 358-359 per Dickson J.; *R v Therens* (1985) 18 D.L.R. (4th) 655 (S.C.C.) at 675-676 per Le Dain J.

so far as the presumption of innocence is concerned, section 2(f) amounts to no more than a legislative affirmation of a principle that applies with equal peremptory force in New Zealand. In addition, the majority in *Shelley* felt able to reach its decision despite the Supreme Court's earlier decision in *R.v Appleby*³² that the words "presumed innocent until proved guilty according to law" in section 2(f) must be taken, in the light of *Woolmington v Director of Public Prosecutions*,³³ to envisage the existence of statutory exceptions reversing the onus of proof with respect to one or more elements of an offence. Even so, in *Shelley* the court was prepared to engraft a qualification of rationality to the reverse onus clause so as to maintain basic faith with the presumption of innocence.

Since the entry into force of the Canadian Charter of Rights and Freedoms in 1982, the rational connection test has been expanded and used extensively to assess the constitutional validity of reverse onus and related provisions. In *R. v Oakes*³⁴ a unanimous Ontario Court of Appeal held that a reverse onus clause under the federal Narcotic Control Act was both inoperative by reason of section 2(f) of the Bill of Rights and also constitutionally invalid under section 11(d) which entrenches the presumption of innocence in terms substantially the same as section 2(f).³⁵ The effect of the statutory provision in *Oakes* was that once the basic fact of possession of a narcotic was proved by P, a mandatory presumption arose that D intended to possess the drug for the purpose of trafficking. D would then be found guilty of the more serious offence of trafficking unless he could rebut the presumed fact by proof to the contrary on a balance of probabilities.

Writing for the court Martin J.A. considered that a reverse onus clause requiring D to disprove an essential element of an offence did not contravene the right to be presumed innocent under the Charter, so long as the imposition of a persuasive burden on D was a "reasonable" limitation "demonstrably justified in a free and democratic society".³⁶ To determine whether a reverse onus clause was "reasonable" he constructed a two-stage test. The threshold question was whether the clause was justifiable in the sense that it was reasonable for the legislature to have transferred to D the burden of proving an element of the offence. In answering that question a number of factors had to be considered, including (i) the magnitude of the harm sought to be suppressed, which in turn could be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both; (ii) the difficulty faced by P in proving the presumed fact; and (iii) the relative ease with which D could prove or disprove the presumed fact. In relation to the last criterion, a reverse onus clause placing the burden of proof on D with respect to a fact which it was not rationally open to him to prove or disprove could not be justified.

But even if a reverse onus clause satisfied these criteria and crossed the threshold, it could not be upheld as a reasonable limitation of the right to be presumed innocent in the absence of a rational connection between the

³² (1971) 21 D.L.R. (3d) 325.

³³ *Supra* n.12.

³⁴ (1983) 145 D.L.R. (3d) 123.

³⁵ Section 11(d) of the Charter provides that "any person charged with an offence has the right . . . to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal".

³⁶ Canadian Charter of Rights and Freedoms 1982, s.1.

basic and presumed facts. Drawing from United States authorities,³⁷ Martin J.A. concluded that such a connection would exist only where the basic fact raised a *probability* that the presumed fact also existed. If it were otherwise, the trier of fact would be compelled to convict D on the strength of an arbitrary assumption of fact that would make the presumption of innocence itself "wholly illusory and fanciful".³⁸

Measured against this test the reverse onus clause in *Oakes* was arbitrary and unreasonable. There was no rational connection between the basic fact of possession of a narcotic and the presumed fact of an intention to traffic in the substance. The legislature had not specified minimum quantities making possession presumptive evidence of an intention to traffic,³⁹ and possession of small quantities did not support an inference of possession for the purpose of trafficking or even "tend to prove"⁴⁰ such an intent. Indeed Martin J.A. doubted whether there was any need for a statutory presumption in cases where the possession of the drug was of such a nature — be it by reason of quantity, packaging or other *indicia* of trafficking — as to indicate that the drug was not for personal use. Where the circumstances of possession were so indicative of an ulterior intention "the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion".⁴¹

Since *Oakes* several other Canadian provincial appellate courts have also held that the presumption of possession for the purpose of trafficking under the Narcotic Control Act is an unconstitutional infringement of the presumption of innocence guaranteed by the Charter.⁴² The principal basis of decision in these cases has been the *Oakes* rational connection test. In addition, a number of other reverse onus clauses under both federal and provincial legislation have failed to survive constitutional challenge on this ground.⁴³

³⁷ See *infra* pp.23-25.

³⁸ *Supra* n.34 at 137.

³⁹ But cf. Misuse of Drugs Act 1975 (N.Z.), s.6(6).

⁴⁰ *Supra* n.34 at 147.

⁴¹ *Ibid.* at 148.

⁴² *R v Carroll* (1983) 4 C.C.C. (3d) 131 (P.E.I. S.C. *in banco*); *R v Cook* (1983) 4 C.C.C. (3d) 419 (N.S. S.C. App. Div.); *R v Landry* (1983) 7 C.C.C. (3d) 555 (Que. C.A.); *R v O'Day* (1983) 5 C.C.C. (3d) 227 (N.B. C.A.); *R v Stanger* (1983) 7 C.C.C. (3d) 337 (Alta. C.A.); *R v Stock* (1983) 10 C.C.C. (3d) 319 (B.C. C.A.). See also *R v Hinds* (1983) 9 C.C.C. (3d) 447 (Court Martial Appeal Court).

⁴³ See *R v Alston* (1985) 22 C.C.C. (3d) 563 (B.C. C.A.); *R v Burany* (1985) 23 C.C.C. (3d) 373 (Ont. Dist. Ct.); *R v Gough* (1985) 18 C.C.C. (3d) 453 (Ont. C.A.); *R v Grift* (1986) 28 C.C.C. (3d) 120 (Alta. Q.B.); *R v Headley* (1986) 26 C.C.C. (3d) 271 (Ont. Prov. Ct.); *R v Johnson* (1984) 14 C.C.C. (3d) 92 (B.C. S.C.); *R v Smith* (1985) 26 C.C.C. (3d) 278 (Ont. Prov. Ct.). The rational connection test has also been considered or applied in the following cases where reverse onus and related clauses have withstood constitutional challenge: *R v Bezanson* (1983) 8 C.C.C. (3d) (N.S. S.C. App. Div.); *R v Bunka* (1984) 12 C.C.C. (3d) 437 (Sask. Q.B.); *R v Godfrey* (1984) 11 C.C.C. (3d) 233 (Man. C.A.); *R v Gutting* (1983) 4 C.C.C. (3d) 1 (Ont. Dist. Ct.); *R v Holmes* (1983) 4 C.C.C. (3d) 440 (Ont. C.A.); *R v Laviolette* (1985) 21 C.C.C. (3d) 106 (P.E.I. S.C. App. Div.); *R v Lee's Poultry Ltd* (1985) 17 C.C.C. (3d) 539 (Ont. C.A.); *R v Kowalczyk* (1983) 5 C.C.C. (3d) 25 (Man. C.A.); *R v MacKenzie* (1983) 6 C.C.C. (3d) 86 (Alta. Q.B.); *R Milton v R* (1986) 32 C.C.C. 160 (B.C. C.A.); *R v Schwartz* (1983) 10 C.C.C. (3d) 34 (Man. C.A.); *R v Somers* (1984) 16 C.C.C. (3d) 357 (Man. Q.B.); *R v Soucy* (1982) 4 C.C.C. (3d) 150 (Que. Dist. Ct.); *R v Tassou* (1984) 16 C.C.C. (3d) 567 (Alta. Prov. Ct.); *R v Van Den Elzen* (1983) 10 C.C.C. (3d) 532 (B.C. CA); *R v Whyte* (1983) 10 C.C.C. (3d) 277 (B.C. C.A.); *R L Crain Inc v Couture and Restrictive Trade Practices Commission* (1983) 10 C.C.C. (3d) 119 (Sask. Q.B.).

Furthermore, in *Re Boyle and the Queen*⁴⁴ the Ontario Court of Appeal extended the scope of the *Oakes* test by applying it to a mandatory presumption that placed an evidential, rather than a persuasive, onus on D. The statutory provision in issue in *Boyle* effectively created two presumptions. Proof of the basic facts of possession of a motor vehicle, the identification number of which had been removed or obliterated, required the trier of fact to conclude (i) that the vehicle had been dishonestly obtained; and (ii) that the possessor of the vehicle knew that it had been so obtained.

Although both presumptions were defeasible by evidence raising a reasonable doubt as to the existence of the presumed facts, Martin J.A. considered that this alone should not be determinative of their constitutional validity. In his view, mandatory presumptions and presumptions accompanied by reverse onus clauses shared the common characteristic that when the presumption arose and was not displaced, the trier of fact was required to find that the presumed fact had been established. Despite the difference in the quantum of evidence or proof needed to displace the presumed facts, the *mandatory* nature of the conclusions required to be drawn on proof of the basic facts dictated that they be treated alike for constitutional purposes. Accordingly, a mandatory presumption placing an evidential burden on D was subject to the test of rational connection adumbrated in *Shelley* and elaborated in *Oakes*.

Treating the two presumptions as severable, the court held that the first was constitutionally valid. Proof of the basic facts of possession of a motor vehicle and removal or obliteration of its identification number afforded “cogent evidence” and was “strongly probative” of the illegal history of the vehicle “in the entire absence of any presumption”.⁴⁵ But the second presumption was an unreasonable infringement of the right to be presumed innocent under section 11(d) of the Charter because proof of the same basic facts did not support a “legitimate inference”⁴⁶ that D knew that the vehicle had been dishonestly obtained. The presumption was not restricted to possession of the vehicle by persons of a particular class, such as dealers, who might reasonably be expected to be alert to the possibility of illegal history. It applied to the knowledgeable and the unknowledgeable alike. And, whereas the element of recency gives probative force to the purely permissive presumption of guilty knowledge arising from possession of stolen goods, the presumption in *Boyle* applied to the possession of vehicles that might have been dishonestly obtained at some remote time. In these circumstances the presumption was arbitrary and no legitimate state interest was served by its enactment.

(c) *Application of the Rational Connection Test in Velenski*

In *Velenski* A argued that the *Oakes* rational connection test rendered section 38(1) of the Wild Animal Control Act inoperative. Read subject to this qualification, P would have been required to prove that the basic facts — specifically the removal of the passenger door from the helicopter — raised a probability that A had been hunting.

Like the presumption in *Boyle*, section 38(1) is severable into parts. Each part is hinged on one or other limb of the composite expression “had with him or under his control” which links the person charged with a particular

⁴⁴ (1983) 148 D.L.R. (3d) 449. See Ziff, “The Presumption of Innocence and ‘Evidence to the Contrary’: A Comment on *Re Boyle and the Queen*” (1984) 22 U. West Ont. L. Rev. 129.

⁴⁵ *Ibid.* at 470 per Martin J.A.

⁴⁶ *Ibid.* at 472.

object identified from the three categories listed in the subsection. When disjoined in this way, the presumption is triggered by proof that a person found in an area where wild animals are usually present (i) had "with him or under his control" any vessel, vehicle or aircraft so adapted or equipped as to be capable of being used for hunting; (ii) had "with him or under his control" any dog or weapon that could be used for the purpose of hunting or killing; or (iii) had "with him or under his control" any poison, snare, net, trap or firearm.

In the second and third cases it is not difficult to imagine situations where there would be a rational connection between the basic and presumed facts. Suppose, for instance, that P could prove that D had a firearm and hunting knife in his possession and was accompanied by a tracker dog. Such facts might well be said rationally to sustain the conclusion that D was hunting. It might even be claimed, in light of the ordinary run of experience, that they are naturally probative of the presumed fact. At any rate, the conclusion that D was hunting does not demand a great inferential leap from the basic facts.

But in *Velenski* the presumption was triggered by a cluster of basic facts one of which — the removal of the helicopter's passenger door — was *not* rationally connected with the presumed fact that A was hunting. In terms of the *Oakes* standard, the removal of the door did not raise a probability that A was hunting. Far from it. Measured by common experience, the removal of the door was consistent with various purposes quite unconnected with hunting. Yet section 38(1), as read by Quilliam J and the Court of Appeal, required no more than proof of an adaptation carrying with it the bare *capability* of use for hunting. Since the removal of the door was such an adaptation, proof of that fact foreclosed further inquiry into the presumed fact. In other words, the presumption allowed P to abstract one basic fact from its overall circumstantial context and compelled the trier of fact to invest it with a conclusory effect well beyond its natural probative value.

To compound the arbitrary nature of the provision, section 38(1) then imposed a reverse onus on A to disprove the central element of the charge against him. Such a shift in the burden of proof amounted to an unreasonable infringement of A's right to be presumed innocent. A had offered an explanation for the removal of the door though this had fallen short of proof on a balance of probabilities. But at the same time it was doubtful, as Quilliam J. had observed in the High Court, whether P could have sustained its case against A without calling the presumption in aid. For the reasons already given, the removal of the door was itself not enough to prove beyond reasonable doubt that A was hunting. And relatedly, the remaining circumstantial evidence about altitude, direction of flight and deviation from a direct course would not necessarily have carried enough cumulative weight, even when added to the removal of the door and the facts that A and the pilot were hunting partners and joint lessees of the aircraft, to prove the offence. Moreover, though A's own evidence failed to rebut the presumed fact on a balance of probabilities under the reverse onus clause, it at least cast a long shadow of doubt over the evidence led by P without the aid of the presumption.

In support of his argument A relied on two Canadian decisions which have considered the rational connection test in similar contexts. In *R v. MacDonald*⁴⁷

⁴⁷ (1983) 9 C.C.C. (3d) 80 (N.B. Q.B.).

A was convicted of unlawfully hunting wildlife in the night contrary to the Fish and Wildlife Act 1980 (New Brunswick). On appeal A argued that the reverse onus provision under the statute was constitutionally invalid as an unjustifiable limitation of the presumption of innocence in section 11(d) of the Canadian Charter. The reverse onus clause provided that where, on a prosecution for the offence of unlawfully hunting wildlife in the night, it was proved that D or any person accompanying him was in possession of a firearm, a light capable of being used to attract or locate wildlife, or any device that could be used as an aid to night vision, the onus was on D to prove that he did not commit the offence charged. In fact A had been found in possession of a rifle and a sealed beam light, and P relied on the presumption to prove the offence.

Applying *Oakes* the New Brunswick Court of Queen's Bench reasoned that "one would have to find within the proof of the fact of possession of a gun or light . . . a fact that rationally tends to prove the essential element of the offence, in this case hunting for wildlife".⁴⁸ But, having observed that there are many circumstances where one could have possession of a gun or light and not actually be hunting, the court held that the basic fact did not rationally tend to prove the presumed fact. The reverse onus clause was therefore constitutionally invalid.

Now if in *MacDonald* proof of possession of a firearm and a light capable of being used to attract or locate wildlife did not raise a probability that A was hunting, then the critical predicate fact that the helicopter in *Velenski* had been adapted in a way that gave it the capability of use for hunting would seem to have an even more tenuous connection with the presumed inculpatory fact that A had been hunting.

The second case with some factual similarity to *Velenski* was the decision of the Nova Scotia Supreme Court in *R. v Pye*.⁴⁹ There P appealed from the dismissal of a charge of unlawfully hunting with the assistance of lights contrary to the Lands and Forests Act 1967 (Nova Scotia). D had been found in possession of a shotgun and ammunition, and his vehicle had been seen with its headlights flashing across adjacent fields. At trial P relied on a provision in the statute to the effect that possession of a firearm and light at night was "prima facie evidence" of their use for unlawful hunting. The Supreme Court held that this provision was not an unconstitutional infringement of the presumption of innocence in section 11(d) of the Charter. The expression "prima facie evidence" was used in a permissive sense, allowing the trier of fact to draw an inference of guilt on proof of the basic facts but not compelling him to do so. However, had the provision been a mandatory presumption of the type challenged in *Boyle*, or a presumption coupled with a reverse onus clause as in *Oakes*, one suspects it would not have withstood constitutional scrutiny under the rational connection test.

(d) *The Court of Appeal's Response*

The Court of Appeal rejected the rational connection test in *Velenski*. Speaking for the court, Richardson J. stated that "[t]he short answer is that there is nothing in the scheme of the principal statute or in the Acts Interpretation Act 1924 to warrant not giving full effect to [section] 38(1)".⁵⁰ The subsection

⁴⁸ Ibid. at 84 per Jones J.

⁴⁹ (1984) 11 C.C.C. (3d) 64.

⁵⁰ Supra n.20 at 7.

provided that proof of specified facts was evidence from which the court "shall presume" that the person charged was hunting wild animals in the area, and the onus was then cast on that person "to disprove an essential element of the offence on the balance of probabilities".⁵¹ As the court saw it, applying the rational connection test "required reading into the subsection a further limitation markedly changing the thrust of the provision".⁵² Such a change would involve "legislating rather than interpreting the subsection".⁵³

III. AN AFTERWORD

1. *Some Further Objections to the Rational Connection Test*

Those who have travelled this far with me may well now wish to part company. After all, the Court of Appeal gave the "short answer" to the rational connection test in *Velenski* and that should be an end to it. What is more, the principle that P must prove D's guilt beyond reasonable doubt — the "golden thread" of *Woolmington* — is subject to "any statutory exception",⁵⁴ and a presumption reversing the onus of proof plainly qualifies as such. So it could be said that the Court of Appeal was quite correct in concluding that applying the rational connection test would involve "legislating rather than interpreting" section 38(1).

Besides, the rational connection test may be open to objection on other grounds. For one thing, it amounts to "second-guessing" the legislature's special fact-finding abilities about the correlation between proven and presumed facts. It would also seem to engage the courts in endless inquisitions into the rationality of the relationship between basic and presumed facts in different cases arising under the same presumption. Some might even say that the legislature could have enacted the relevant offence in narrower terms, predicating guilt on proof of the basic fact/s alone. This would in turn deprive D of the opportunity of avoiding conviction by disproving the presumed fact. So the enactment of a presumption in tandem with a reverse onus clause is really an act of legislative "grace" that should not be impugned by harping insistence on a qualification of rational connection.

These objections warrant brief reply. First, as to the charge of constitutional apostasy, the rational connection test does not demand of the courts that they arrogate to themselves some latter-day notion of judicial supremacy. Rather, it requires of them a doctrinal commitment to the presumption of innocence and an activist approach to the interpretation of statutory provisions that undermine this fundamental principle of the criminal law. If judges are prepared to concede the "theoretical possibility of far-fetched allegations, even allegations in bad faith"⁵⁵ made by P in reliance on presumptions, then surely we may expect more from them than the homiletic aside that "the more extravagant the allegation the easier it should be for an innocent defendant to rebut it"⁵⁶ under a reverse onus clause.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Supra* n.12 at 481 per Viscount Sankey.

⁵⁵ *Collector of Customs v Murray*, *supra* n.10 at 82 per Cooke J.

⁵⁶ *Id.* But cf. *R v Samuels* [1985] 1 N.Z.L.R. 350 (C.A.) at 356 per Cooke J.: "A Statutory provision shifting the onus regarding mens rea for a serious crime is obviously not one to be construed at all loosely".

Regrettably, however, the courts have never felt it necessary to elaborate either a comprehensive doctrine of the burden of proof in criminal proceedings⁵⁷ or an interpretative methodology that would protect the presumption of innocence from erosion by legislative stealth. Indeed, contrary to Viscount Sankey's admonition in *Woolmington* that "no attempt to whittle it down can be entertained",⁵⁸ the "golden thread" is presently somewhat the worse for wear.⁵⁹ But still the presumption of innocence is daily affirmed as axiomatic in our criminal courts, with only the occasional expression of judicial unease at statutory provisions that push it aside.⁶⁰

So far as "second-guessing" the legislature is concerned, most presumptions do not concern matters of fact about which the legislature can lay claim to special knowledge or information. This is especially so with such subjective issues as intention and knowledge where there is no reason to believe that the legislature has any unique ability, beyond that of the courts, to draw inferences from circumstantial evidence.⁶¹ Similarly, in other areas presumptions usually dictate inferences that the courts might well draw on proof of the basic facts, though without the compulsion to do so where the facts of the case indicate another conclusion.⁶² Here, far from being enacted "to ensure rational verdicts and to avoid the possibility of a guilty defendant being acquitted simply because the trier of fact lacked information necessary to arrive at proper inferences",⁶³ presumptions and reverse onus clauses function as a form of statutory "first-aid" to P. Their existence has rather more to do with considerations of procedural economy and comparative convenience⁶⁴ — that it is quicker and easier for D to disprove the presumed fact than for P to prove it — than with any special legislative capacity "to amass the stuff of actual experience and cull conclusions from it".

The presumption at issue in *Velenski* is a case in point. It began life as a purely permissive device. In the words of the statute it was a "prima facie

⁵⁷ See Healy, "Proof and Policy: No Golden Threads" [1987] Crim.LR 355 at 366.

⁵⁸ *Supra* n.12 at 481-482.

⁵⁹ The current position is that the "rule" in *Woolmington* must now be taken as subject to any authoritative exception, be it express or implied by statute or simply declared by courts of final authority. As to implied statutory exceptions see *R v Hunt* [1987] A.C. 352 (H.L.(E)) and the critical review of that decision by Healy, *supra* n.57. The Court of Appeal in this country has also sacrificed principle upon the altar of consequentialist reasoning by declaring a further exception to *Woolmington* in *Civil Aviation Department v MacKenzie* [1983] N.Z.L.R. 78. See Cato, "Woolmington in Retreat: *MacKenzie v Civil Aviation Department*" [1983] N.Z.L.J. 341.

⁶⁰ For example, *Police v Gardiner*, *supra* n.10 at 182 per Roper J.

⁶¹ See Comment, "Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct" (1970) 18 U.C.L.A. L.Rev.157 at 182.

⁶² See Sheldrick, *supra* n.13 at 205.

⁶³ *Ibid.* at 207.

⁶⁴ In the United States the comparative convenience test attracted limited judicial support as a means of measuring the constitutional validity of statutory presumptions: see *Morrison v California* 291 U.S.82, 78 L.Ed. 664 (1934). However in *Tot v United States* 319 U.S. 463, 87 L. Ed.1519 (1943) the Supreme Court reduced comparative convenience to the status of a corollary to the rational connection test. The *Tot* court concluded that the argument from convenience was admissible only where there was a rational connection between the proved and presumed facts and where requiring D to prove/disprove the presumed fact would not subject him to unfairness or hardship. *Tot* and other United States cases are considered further at pp.23-25 *infra*.

⁶⁵ *United States v Gaine* 380 U.S.63, 13 L.Ed.658 (U.S. S.C.) at 662 per Justice Stewart for the court.

⁶⁶ Wild Animal Control Act 1977, s.38(1).

presumption⁶⁷ that treated proof of the basic facts as evidence from which the court was authorised, but not compelled, to infer the ultimate fact. But within a few years it had been recast in mandatory form, directing the court to find the presumed fact once P had established the basic facts, and reversing the onus of proof on the issue.⁶⁸ Are we to assume, then, that the legislature's original judgment was wrong and that the courts could not reach rational conclusions without being directed as to the inferences they must draw from the particular facts of specific cases? Or was the change simply intended to expedite the process of prosecution of regulatory offences by relieving P of part of the burden of persuasion of criminal allegation?

The further objection that the rational connection test would pitch the courts into case-by-case analyses of the relationship between basic and presumed facts under the same presumption/s is also unfounded. As *Oakes*⁶⁹ and its American antecedents⁷⁰ make clear, the rationality of a presumption depends on its accuracy as a *generalised* statement of a probabilistic connection between statutory facts. The presumption must therefore be tested on its face, divorced from the facts of a particular case. If the presumption does indeed express a relationship between events that holds true as a generalisation, "the party against whom [it] operates is a particular case to which the general truth of the presumption applies".⁷² But if the statutory inference is suspect when tested against probability, then applying it to a particular case would be arbitrary and unreasonable. And once made, the conclusion on rational connection is dispositive of all future cases arising under the same provision. Of course, where the presumption is severable, as in *Boyle* and *Velenski*, there is no good reason why a rational connection may be found to exist under one part but not another.

Viewed in this way, the particular limb of the presumption relied on in *Velenski* stretched probability. This is not to deny that there could be cases where an aircraft had been adapted or equipped in such a way as to compel any reasonable observer to conclude that it was used in fact for hunting. But in contrast to that kind of case, the presumption under section 38(1) was over-inclusive because the statutory inference was drawn on proof of an adaptation or item of equipment making the aircraft barely "capable" of use for hunting. As a "general truth" it was no more reliable in *Velenski* than it would have been had the helicopter been fitted with a more powerful engine, a larger fuel tank, additional lights, special landing skids, a carrying rack or any one of a number of other modifications, each of which could be said to import the bare capability of use for hunting.

Lastly, there is no force whatever to the legislative "grace" or "greater includes the lesser" objection that surely D is better off presumed guilty of an offence on proof of basic facts, but with a chance to escape liability under a reverse onus clause, than accounted liable on proof of the basic facts alone.⁷³ This

⁶⁷ *Ibid.*, s.38(2).

⁶⁸ Wild Animal Control Amendment Act 1982, s.10(1).

⁶⁹ *Supra* n.44 at 148.

⁷⁰ See Note, "The Improper Use of Presumptions in Recent Criminal Adjudication" (1986) 38 *Stan. L.Rev.*423 at 425-429.

⁷¹ *Oakes*, *supra* n.44 at 148.

⁷² Note, *supra* n.70 at 426.

⁷³ The "greater includes the lesser" rationale was postulated by Justice Holmes in *Ferry v Ramsey* 277 U.S.88, 72 L.Ed.796 (1928). It was decisively rejected in *Tot*, *supra* n.64.

apology for presumptive devices overlooks the fact that, as a matter of reality, the effect of a presumption and a reverse onus clause may be to reduce the offence to the basic facts anyway. Thus, where D simply does not have access to disproof of the presumed fact,⁷⁴ the legislature has covertly pared the presumed fact from the statutory definition of the offence, thereby achieving by sleight of hand what it should be doing openly — punishing the basic fact alone.⁷⁵ And no less importantly, in the absence of any extra-legislative determinant of the irreducible elements of particular offences, the task of the courts is to deal with presumptions as they stand and not as they might have been enacted.

2. *The Rational Connection Test Since Velenski*

All this does not mean that the rational connection test is itself beyond improvement. In particular, most of the Canadian cases that have examined presumptions and reverse onus clauses have focussed on the rationality of the inference required to be drawn on proof of the basic facts rather than on the reversal of the burden of proof on the issue.⁷⁶ Put shortly, the emphasis has been on the *probative quality of P's evidence* under the presumption as opposed to the *persuasive quantum required of D* under the reverse onus clause.

This has two important consequences that I foreshadowed at the outset of this paper.⁷⁷ In the first place, P's burden of proof as to the existence of the presumed fact is really translated into a standard of probability — P must show that the proved fact establishes the presumed fact on a balance of probabilities. As the Court of Appeal described it in *Velenski*, “[read subject to the *Oakes* rational connection test] the presumption only converts a probability into proof beyond reasonable doubt, and it does not apply until that balance of probabilities standard is satisfied”.⁷⁸ But P is still not required to establish the existence of the presumed fact beyond reasonable doubt. To this extent, then, D remains without the full protection of the presumption of innocence. The *Oakes* rational connection test gives him only “half a loaf”.

Secondly, where there is a rational connection between the basic and presumed facts (and it is also rationally open to D to disprove the presumed fact), D will still be convicted even though he raises a reasonable doubt against the presumed fact but fails to discharge the reverse onus of proof on a balance of probabilities. Thus, assuming for the moment that there had been a rational connection between the basic and presumed facts in *Velenski*, A would not have escaped conviction because his evidence failed to rebut the presumed fact on a balance of probabilities.

So, while the rational connection test does provide some means of restraining arbitrary legislative tinkering with the normal incidence of the burden of proof,

⁷⁴ *Shelley*, supra pp. 9-10, is a good example. One can imagine cases arising under s.299(1) of the Customs Act 1966 (N.Z.). See *Collector of Customs v Murray*, supra n.10.

⁷⁵ See Comment, supra n.61 at 163; Ashford and Risinger, “Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview” (1969) 79 Yale L.J. 165 at 177-178.

⁷⁶ See Sheldrick, supra n.13 at 194-196. The notable exception is *R v Carroll*, supra n.42. See also *Oakes* at first instance: *R v Oakes* (1982) 38 O.R. (2d) 598 (Ont.Prov.Ct.) at 605-608 per Walker Prov.J.

⁷⁷ Supra p.3.

⁷⁸ *Velenski v Conservator of Forests*, supra n.20 at 7.

it falls short of fully restoring the reasonable doubt standard to its primary protective function under the presumption of innocence.

(a) *The American Solution: the Reasonable Doubt Standard Refulgent*

Although there is no provision expressly protecting the presumption of innocence under the United States Constitution, the Supreme Court has progressively formulated a jurisprudence of strict constitutional scrutiny of statutory criminal presumptions under the due process guarantees of the Fifth and Fourteenth Amendments.⁷⁹

Initially, in *Tot v United States*,⁸⁰ the court adopted the rational connection test from an early civil case⁸¹ as the measure of the constitutional validity of presumptive devices. According to *Tot*, a presumption could not be sustained "if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience".⁸² This test was redefined in *Leary v United States* where, in terms approximate to the *Oakes* standard of probability, the Supreme Court concluded that a criminal presumption must be regarded as irrational or arbitrary, and hence unconstitutional "unless it can 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".⁸³

The *Leary* court left open the question whether a stricter "reasonable doubt" test might be applied to assess the constitutional validity of criminal presumptions.⁸⁴ However, following its decision in *Re Winship* that it is "axiomatic and elementary"⁸⁵ that the state must prove every element of the offence charged beyond reasonable doubt, the court adopted the "reasonable doubt" standard in *County Court of Ulster County v Allen*.⁸⁶ There the majority drew a distinction between permissive and mandatory presumptions. The court held that a permissive presumption, allowing but not requiring the trier of fact to infer the presumed fact on proof of the basic fact/s, was constitutional if it satisfied the *Leary* "more likely than not" test. Since P could rely on all the evidence in the record to meet the *Winship* reasonable doubt standard in cases involving permissive presumptions, the court concluded that "[t]here is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it is admitted".⁸⁷ So long as it was clear that the presumption

⁷⁹ The Fifth Amendment states that no person shall be deprived of "life, liberty, or property, without due process of law". It applies to the Federal Government. The Fourteenth Amendment imposes the same limitation on the States.

⁸⁰ *Supra* n.64.

⁸¹ *Mobile, Jackson & Kansas City Railroad v Turnipseed* 219 U.S.43, 55 L.Ed. 80 (1910).

⁸² *Supra* n.64 at 1524 per Justice Roberts for the court. For the court's subsequent application of the *Tot* test see *United States v Gainey* 380 U.S.63, 13 L.Ed.2d 658 (1965); *United States v Romano* 382 U.S.136, 15 L.Ed.2d 210 (1965).

⁸³ 395 U.S.6, 23 L.Ed.2d 57 (1969) at 82 per Justice Harlan for the court.

⁸⁴ *Ibid* at 83 n.64. See also *Turner v United States* 396 U.S.398, 24 L.Ed. 2d 610 (1970); *Barnes v United States* 412 U.S.837, 37 L.Ed.2d 380 (1973).

⁸⁵ 397 U.S.358, 25 L.Ed.2d 368 (1970) at 375 per Justice Brennan for the court, citing *Coffin v United States* 156 U.S.432, 39 L.Ed.481 (1895).

⁸⁶ 442 U.S.140, 60 L.Ed.2d 777 (1979).

⁸⁷ *Ibid.* at 798 per Justice Stevens for the court.

was not the “sole and sufficient”⁸⁸ basis for a finding of guilt, it was enough if there was a rational connection between the basic and presumed facts on the *Leary* “more likely than not” test.

But the majority reasoned that because a mandatory presumption *compelled* an inference of guilt on proof of the basic fact/s, mere rational connection was not sufficient. Such a presumption could not be relied on as the only evidence of an element of an offence “unless the fact proved is sufficient to support an inference of guilt *beyond a reasonable doubt*”.⁸⁹ In other words, P could not rest its case entirely on a mandatory presumption unless the basic fact triggering the presumption established the existence of the presumed fact according to the normal standard of proof.

Despite criticism that the mandatory-permissive distinction disorients due process requirements by tolerating proof of some essential facts on a “more likely than not” standard,⁹⁰ *Allen* at least overcomes the problem of a shortcut to proof of the presumed fact where P rests its case solely on a mandatory presumption. Moreover, in *Sandstrom v Montana*⁹¹ and *Francis v Franklin*⁹² the Supreme Court has further tightened the focus of constitutional scrutiny by holding that a mandatory presumption which shifts a “burden of persuasion” (a reverse onus) to D in respect of an element of an offence is constitutionally infirm under the due process guarantees.

(b) *Oakes in the Supreme Court of Canada*

In his review of the American authorities in *Oakes*,⁹⁴ Martin J.A. acknowledged the distinction drawn in *Allen* between mandatory and permissive presumptions but did not expressly mention the “reasonable doubt” standard applied by the Supreme Court in that case to mandatory presumptions.⁹⁵ In the result, he adopted a “probability” test of rational connection for a mandatory presumption that was akin to the *Leary/Allen* “more likely than not” standard for permissive presumptions.

Since *Velenski* the Supreme Court of Canada has given judgment on appeal by the Crown in *Oakes*.⁹⁶ The court dismissed the appeal and reached the same conclusion of unconstitutionality as the Ontario Court of Appeal, though

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Note, *supra* n.70 at 439-463; Note, “A New Standard for Presumptions in Criminal Cases: *Ulster County Court v Allen*” (1980) 21 B.C.L.Rev.990 at 1004-1013.

⁹¹ 442 U.S.510, 61 Ed.2d 39 (1979). See earlier *Mullaney v Wilbur* 421 US 684, 44 L.Ed.2d 508 (1975); *Patterson v New York* 432 US 197, 53 L.Ed.2d 281 (1977).

⁹² 85 L.Ed.2d 344, 105 S.Ct.1965 (1985).

⁹³ The Supreme Court has reserved judgment on the question whether a mandatory presumption that shifts only a “burden of production” (an evidential burden) to D violates due process: *Sandstrom*, *supra* n.91 at 45-46 and 48; *Francis*, *supra* n.92 at 351 n.3.

⁹⁴ *Supra* n.34 at 139-144.

⁹⁵ See Finley, “The Presumption of Innocence and Guilt: Why *Carroll* Should Prevail over *Oakes*” (1984) 39 C.R. (3d) 115 at 135. The omission is the more significant in view of Martin J.A.’s reference to *Sandstrom*, *supra* n.91, at the conclusion of his review of the American authorities: *Oakes* *supra* n.34 at 144.

⁹⁶ *R v Oakes* (1986) 26 D.L.R. (4th) 200. The Supreme Court’s decision has been applied in *R v Burge* (1986) 32 C.C.C. (3d) 389 (B.C. C.A.); *R v Driscoll* [1987] 6 W.W.R. 748 (Alta. C.A.); *R v Frank* (1986) 20 C.R. 179 (Ont. Dist. Ct.); *R v Grant* (1986) 28 C.C.C. (3d) 32 (B.C. S.C.); *R v Gray* (1986) 30 C.C.C. (3d) 234 (B.C. Co. Ct.); *R v Renner* (1986) 29 C.C.C. (3d) 138 (N.S. S.C.); *Re Regina and K (John) and D (Jayson)* (1986) 22 C.R. 292 (Ont. Prov. Ct.). See also *R v JS* (1986) 30 C.C.C. (3d) 230 (Ont. Prov. Ct.); *R v Khadikin* (1986) 29 C.C.C. (3d) 154 (B.C. S.C.); *R v Metro News Ltd* (1986) 29 C.C.C. (3d) 35 (Ont. C.A.).

on an analysis of the relevant Charter provisions that is more sensitive to the importance of the reasonable doubt standard under the presumption of innocence.

In the court below Martin J.A. had collapsed the analysis of sections 11(d) and 1 of the Charter into a single inquiry.⁹⁷ Proceeding from the premise that the phrase “according to law” in section 11(d) meant that the presumption of innocence was subject to statutory exceptions or limitations, he then concluded that the requirements of section 1 — that a limitation be “reasonable” and “demonstrably justified in a free and democratic society” — provided the standard for interpreting “according to law”. The rational connection test was then deployed as the critical determinant as to whether the reverse onus clause was “reasonable”. But in the Supreme Court Dickson C.J. held that the appropriate stage for considering the rational connection test was under section 1, which was to be kept analytically separate from section 11(d).

According to the Chief Justice, the presumption of innocence is a “hallowed principle lying at the very heart of the criminal law”.⁹⁸ It is protected expressly under section 11(d) and inferentially by the general guarantee of life, liberty and security of the person in section 7. At a minimum the presumption requires (i) that an individual be proved guilty beyond a reasonable doubt; (ii) that the state must bear the burden of proof; and (iii) that criminal prosecutions be carried out in accordance with lawful procedures and fairness.⁹⁹ Moreover, given the primacy of the presumption and its constitutional entrenchment under the Charter, he could not accept the interpretation reached by Martin J.A. in the Ontario Court of Appeal that the phrase “according to law” comprehended the statutory exceptions acknowledged in *Woolmington*¹⁰⁰ and *Appleby*.¹⁰¹ To do so “would subvert the very purpose of the entrenchment of the presumption of innocence in the Charter”.¹⁰²

From this Dickson C.J. concluded that, quite apart from the question of *rationality*, any statutory provision imposing a persuasive onus on D to disprove the existence of a presumed fact which is an “important/essential element” of an offence, constitutes a prima facie violation of the presumption of innocence under section 11(d).¹⁰³ In his view the rational connection test elaborated by Martin J.A. did not adequately protect the presumption. As explained above,¹⁰⁴ under a reverse onus clause a basic fact may rationally tend to prove a presumed fact but not establish its existence beyond a reasonable doubt. So, because D can still be convicted despite the presence of a reasonable doubt, such a provision remains constitutionally offensive.¹⁰⁵

On this approach the rational connection test arises as a consideration in determining whether or not a reverse onus clause can be upheld as a “reasonable limit” under section 1.¹⁰⁶ That provision specifies exclusive and stringent

⁹⁷ See MacKay and Cromwell, “*Oakes*: A Bold Initiative Impeded by Old Ghosts” (1983) 32 C.R. (3d) 221 at 223-226.

⁹⁸ *Oakes*, supra n.96 at 212.

⁹⁹ *Ibid.* at 214.

¹⁰⁰ *Supra* n.12

¹⁰¹ *Supra* n.32

¹⁰² *Oakes*, supra n.96 at 217.

¹⁰³ *Ibid.* at 222.

¹⁰⁴ *Supra* p.23.

¹⁰⁵ *Oakes*, supra n.96 at 222-223.

¹⁰⁶ *Ibid.* at 223.

justificatory criteria against which limitations must be measured. Two are of central importance. First, the objective which the limitation is designed to serve must be sufficiently important to warrant overriding a constitutionally protected right or freedom. And, beyond this, the means chosen must be reasonable and demonstrably justified. This involves “a form of proportionality test”¹⁰⁷ which, in turn, comprehends several components including the requirement that the measures adopted must not be “arbitrary, unfair or based on irrational considerations”.¹⁰⁸ They must be rationally related to the legislative objective; and this means that they must be internally rational in the sense that there must be a *rational connection* between the basic and presumed facts.¹⁰⁹

This two-stage analysis seems more consistent with a scheme of constitutional protection that guarantees particular rights and freedoms subject to a general savings clause than the approach followed by Martin J.A. in the court below. It does not minimise the importance of the rational connection test.¹¹⁰ Any attempt to justify a reverse onus provision relating to an important element of an offence must still establish “at a minimum”¹¹¹ that the basic fact rationally tends to prove the presumed fact. If the provision is “overinclusive and could lead to results in certain cases which would defy both rationality and fairness”¹¹² it will not be saved. The Dickson analysis therefore relegates the rational connection test to the second stage of an inquiry that treats statutory reversals of the onus of proof with respect to essential elements of offences as provisionally violative of the presumption of innocence. It also clarifies the respective burdens that operate at each stage of constitutional review. As the Chief Justice explained, there is a “presumption” that the rights and freedoms enshrined in the Charter are guaranteed unless the party invoking section 1 can satisfy a “stringent standard of justification” requiring “cogent and persuasive” evidence to a “very high degree of probability”.¹¹³

IV. THE PROPOSED NEW ZEALAND BILL OF RIGHTS: SYNTHESISING A JURISPRUDENCE OF REVIEW

The draft Bill of Rights “affirms” the presumption of innocence as a “fundamental freedom” and “minimum standard of justice”.¹¹⁴ Under article 17(1)(b) “[e]veryone charged with an offence has the right . . . to be presumed innocent until proved guilty according to law”. This right is guaranteed as part of the supreme law of New Zealand,¹¹⁵ subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.¹¹⁶

The commentary to the draft Bill suggests that “[t]he question most likely to arise under article 17(1)(b) will be the validity of so-called ‘reverse onus’

¹⁰⁷ Ibid. at 227 citing *R v Big M Drug Mart Ltd.*, supra n.31.

¹⁰⁸ *Oakes*, supra n.96 at 227.

¹⁰⁹ Ibid. at 229.

¹¹⁰ Ibid. at 223.

¹¹¹ Ibid. at 229.

¹¹² Id.

¹¹³ Ibid. at 225-227.

¹¹⁴ Draft Bill of Rights 1985, long title and marginal note to art.17.

¹¹⁵ Ibid., long title and art.1.

¹¹⁶ Ibid., art 3.

provisions in existing and future legislation . . . ”¹¹⁷ It refers to Martin J.A.’s rational connection test in *Oakes* and his extension of the test in *Boyle* to mandatory presumptions that do not reverse the onus of proof.¹¹⁸

However, if the Bill is enacted New Zealand courts can expect to encounter a wider range of constitutional argument than is indicated by the White Paper. This argument will draw on a jurisprudential catchment fed not only by Canadian post-Charter decisions but also by American due process authorities. With this in mind, in the next few pages I have attempted to synthesise the most important principles of interpretation and review suggested by these cases.

1. *The Right to be Presumed Innocent Until Proved Guilty “According to Law”*

The phrase “according to law” in article 17(1)(b) ought not to be interpreted in a way that approves existing statutory reversals of the burden of proof.¹¹⁹ To read it to mean “according to whatever the legislature enacts from time to time as law” reduces a fundamental right to a fiction.¹²⁰ Furthermore, it is quite antithetical to a scheme of constitutional protection, which tempers legislative supremacy by entrenching fundamental rights, to introduce into article 17(1)(b) the *Woolmington* “statutory exception” proviso framed at common law more than half a century ago.

As Dickson C.J. observed in *Oakes*,¹²¹ the real force of the phrase is to underscore the procedural requirements made explicit under section 11(d) of the Canadian Charter by the concluding words of the expression “according to law *in a fair and public hearing by an independent and impartial tribunal*”. While neither the emphasised nor equivalent words appear in article 17(1)(b) of the draft Bill of Rights, they are necessarily imported into that provision by the terms of the immediately preceding paragraph.¹²²

2. *The Reasonable Doubt Standard and “Elements” of Offences*

Both the American due process cases and the most recent Charter decisions of the Canadian Supreme Court affirm the vital importance of the reasonable doubt standard under the presumption of innocence. This is most forcefully articulated in *Winship* where the Supreme Court saw this standard as the “prime instrument for reducing the risk of convictions resting on factual error”.¹²³ The court considered that a lesser standard of persuasion based on a balance of probabilities or the preponderance of evidence would not impress on the trier of fact the need to reach such a subjective state of certitude that reduces the margin of error against D and preserves community confidence in the integrity of the criminal process.¹²⁴

The further question relates to the elements to which the reasonable doubt standard applies. In the United States *Winship* and its progeny have established that the Fifth and Fourteenth Amendments protect D against conviction except

¹¹⁷ *A Bill of Rights for New Zealand: A White Paper* (1985) 95.

¹¹⁸ *Ibid.* at 95-96.

¹¹⁹ See MacKay and Cromwell, *supra* n.97 at 222 and 226-228.

¹²⁰ See Mandel, “The Presumption of Innocence and the Canadian Bill of Rights: *Regina v Appleby*” (1971) 10 *Osgoode Hall L.J.* 450 at 464-467.

¹²¹ *Supra* n.96 at 214.

¹²² Article 17(1) provides that “[e]veryone charged with an offence has the right . . . to fair and public hearing by a competent, independent, and impartial court.”

¹²³ *Supra* n.85 at 375 per Justice Brennan for the court.

¹²⁴ *Ibid.* at 377.

on proof beyond reasonable doubt of *every* element necessary to constitute the offence with which he is charged. On the other hand, the emphasis in *Oakes* in the Supreme Court of Canada is on the requirement to prove *important* or *essential* elements. However, because all definitional elements of offences must be regarded as important or essential, the difference between the two lines of authority is probably not critical. Given the reasons for the enactment of mandatory presumptions, it is difficult to imagine such a provision compelling a trier of fact to draw anything but an inculpatory inference relevant to a definitional element of an offence.

In addition, *Oakes* must now be read alongside the Canadian Supreme Court's most recent pronouncement on the presumption of innocence in *Vaillancourt v R.*¹²⁵ In this decision the court has transfused its earlier analysis of the presumption under section 11(d) of the Charter with an examination of the "essential elements" of offences under section 7.¹²⁶ In relation to section 7 the court concluded that, while the legislature retains power to define the elements of offences, the courts now have the jurisdiction — indeed the duty — to review those definitions so as to ensure that they accord with "the principles of fundamental justice".¹²⁷ Furthermore, since section 11(d) requires "at least" that D be presumed innocent until his guilt has been proven beyond a reasonable doubt, the trier of fact must be satisfied to that standard of the existence of all the *essential* elements of the offence, including not only those set out in the legislative definition *but also those required by section 7.*¹²⁸ In short, under sections 7 and 11(d) of the Charter P must prove beyond reasonable doubt all the elements of an offence, be they definitional or "Charter" requirements, subject only to the general savings provision of section 1.

In the opinion of the Supreme Court in *Vaillancourt*, this fundamental constitutional dictate would clearly be infringed by a reverse onus clause, such as that in *Oakes*, requiring D to raise more than a reasonable doubt by shifting to him the onus of disproving an essential element of an offence. But the presumption of innocence would also be offended where D can be convicted despite the existence of a reasonable doubt on an essential element not included within the legislative definition but required by section 7.¹²⁹ Similarly, where the legislature has substituted a *different* element for an essential element, the change will be constitutionally invalid if the trier of fact is left with a reasonable doubt as to the essential element, notwithstanding proof beyond reasonable doubt of the substituted element.¹³⁰

It is, I think, a fair conclusion from *Vaillancourt* that the Supreme Court's concern under section 7 of the Charter is with legislative omission, reduction and substitution of essential elements. If this is accepted, then *Vaillancourt* supports my earlier conclusion that all definitional elements of existing offences can properly be said to be "essential".

In summary, I would argue that the presumption of innocence under article

¹²⁵ Unreported, Supreme Court of Canada, 3 December 1987, File No.18963; [1987] S.C.J. No.83.

¹²⁶ Section 7 states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

¹²⁷ *Vaillancourt*, supra n.125 at 13-14 per Lamer J. for the court. See also *Reference Re Section 94(2) of the Motor Vehicle Act (BC)* (1985) 24 D.L.R. (4th) 536 (S.C.C.).

¹²⁸ *Ibid.* at 17.

¹²⁹ *Id.*

¹³⁰ *Ibid.* at 18.

17(1)(b) of the draft Bill of Rights must be interpreted to require proof beyond reasonable doubt of every fact necessary to establish all the definitional elements of an offence. And, though section 7 of the Canadian Charter does not have an exact counterpart in the draft Bill of Rights, New Zealand courts will nonetheless be constitutionally competent to extend the requirement of proof beyond reasonable doubt to extra-definitional elements required by the principles of fundamental justice.¹³¹

3. *Reviewing Presumptions and Reverse Onus Clauses*

In applying article 17(1)(b) of the proposed Bill of Rights New Zealand courts should be guided by the first principle that any statutory provision which results in conviction despite the existence of a reasonable doubt as to an element of an offence is *prima facie* violative of the presumption of innocence. Presumptions that compel a statutory inference on proof of a basic fact are jeopardised by this principle because they undermine the primary responsibility of the trier of fact to conclude that every issue necessary to establish the elements of liability has been proved beyond reasonable doubt on the evidence adduced by P.

Where a mandatory presumption is coupled with a reverse onus clause, the approach taken by Dickson C.J. in *Oakes* would seem analytically most apposite to the draft Bill's scheme of guaranteeing specific rights subject to a general limitation clause. But the Dickson analysis does not apply to mandatory presumptions that shift an evidential burden to D. The relevant holding in *Oakes* was that a statutory provision which requires D to disprove the existence of the presumed fact on a balance of probabilities constitutes a *prima facie* violation of the presumption of innocence. However, if the burden cast on D is no more than evidential, the presumption can be displaced if D raises a reasonable doubt. Thus the very predicate of the Dickson analysis — the imposition of a reverse onus — would not be present. There would therefore be no need to proceed to the second stage of considering the requirement of rational connection. And this would mean, contrary to *Boyle*,¹³² that an entirely irrational mandatory presumption shifting an evidential burden to D would escape constitutional scrutiny.¹³³

One way of overcoming this difficulty would be to argue that a mandatory presumption which places an evidential burden on D contravenes the protection against self-incrimination (or, more correctly, the right of non-compellability) under article 18(j) of the draft Bill.¹³⁴ The right of non-compellability is intimately related to the right to be presumed innocent. Whereas the

¹³¹ Article 14 of the draft Bill, the equivalent provision to section 7 of the Canadian Charter, provides that "[n]o one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice." Thus, unlike section 7, this provision does not apply *expressis verbis* to "liberty and security of the person". But it is certainly arguable that liberty and security of the person are inferentially and reductively protected by article 14.

¹³² *Supra* n.44.

¹³³ See Sheldrick, *supra* n.13 at 197-199. However, in *Oakes* Dickson C.J. referred to *Boyle* without hint of disapproval in his review of Canadian Charter jurisprudence: *supra* n.96 at 220. It might also be argued that any mandatory presumption that gives P an *initial* short-cut to proof of the presumed fact is *prima facie* violative of the presumption of innocence, thereby engaging the first step in Dickson C.J.'s analysis.

¹³⁴ "Every person charged with an offence has the right . . . not to be compelled to be a witness against that person or to confess guilt."

presumption of innocence gives D the initial benefit of a right to silence and the ultimate benefit of any reasonable doubt,¹³⁵ the right of non-compellability protects D against self-incrimination until there is a “case to meet”. That is to say, “[t]he important protection [under the right of non-compellability] is not that [D] need not testify, but that [P] must prove its case before there can be any expectation that [D] will respond, whether by testifying himself, or by calling other evidence”.¹³⁶ But where P relies on a mandatory presumption the “case to meet” rests in part on some fact or facts which are *not* proved beyond reasonable doubt. The effect of the presumption is to put D in a legislative “squeeze”¹³⁷ which may leave him with no choice but to testify or call other evidence. This squeeze, admittedly more constrictive where D labours under a persuasive rather than an evidential burden, really conscripts D into answering P’s case, thereby depriving him of the right to silence and its corollary, the protection against self-incrimination.¹³⁸

But for all that, the more direct and preferred approach to constitutional assessment of presumptions is to be found in the American post-*Winship* cases. If indeed the presumption of innocence is to be constitutionally regarded as a fundamental value, then mandatory presumptions in tandem with reverse onus clauses should be struck down as irretrievably infirm under article 17(1)(b) — and this notwithstanding the savings provision in article 3.¹³⁹ Moreover, where the case against D rests *entirely* on a mandatory presumption, the test of constitutional validity should be nothing less than the requirement that the basic fact must establish the existence of the presumed fact beyond reasonable doubt. Finally, permissive presumptions, such as those that treat proof of fact A as “prima facie evidence” of fact B, should be subject to a qualification of rational connection based on the *Oakes* “probability” or *Leary/Allen* “more likely than not” standards.

4. Other Statutory Provisions Imposing a Persuasive Onus on D

Many other provisions require D to prove the existence of some “lawful justification or excuse” or the affirmative of some negative averment in the nature of an exception or proviso.¹⁴⁰ Most are relics of confused judicial attitudes to the burden of proof in criminal proceedings. Accustomed to the rules of pleading and proof in the civil courts, many judges in the 18th and 19th centuries intuitively assimilated criminal adjudication to the model of private litigation and allocated the burden of persuasion of any exception to liability to D.¹⁴¹

Some of these provisions have much the same effect as presumptions. Yet

¹³⁵ See *R v Appleby*, supra n.32 at 336-337 per Laskin J.

¹³⁶ Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979) 179.

¹³⁷ See *United States v Gainey*, supra n.82 at 672 per Justice Black dissenting.

¹³⁸ See *Dubois v R* (1985) 23 D.L.R. (4th) 503 (SCC) at 522 per Lamer J.

¹³⁹ See Elkind and Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (1986) 105 where the authors argue that, in terms of the 1966 International Covenant on Civil and Political Rights, the presumption of innocence cannot be “clawed back” under the general limitation provision of article 3.

¹⁴⁰ For example, Crimes Act 1961, ss.244(1)(c), 271, 274, 275(c) and (h), 283(1) and (2), 288, 291 and 292; Summary Proceedings Act 1957, s.67(8). See generally Adams, *Criminal Onus and Exculpations* (1968); “Onus of Proof in Criminal Cases” in Clark (ed.), *Essays on Criminal Law in New Zealand* (1971) 67 at 76-79.

¹⁴¹ See Fletcher, *Rethinking Criminal Law* (1978) 519-532; Zuckerman, “The Third Exception to the Woolmington Rule” (1976) 92 L.Q.R. 402-410.

because they do not incorporate a presumptive element triggered by a basic fact they fall outside the analyses discussed in this paper. Nonetheless, the approach taken by the Supreme Court of Canada in *Vaillancourt*¹⁴² would implicate the constitutionality of many such provisions under the proposed Bill of Rights. If New Zealand courts are prepared to review the “essential elements” of existing offences and lift the veil of legislative definition, what now appear as exceptions, provisos and negative averments may well be held to be elements of offences that must be proved by P beyond reasonable doubt. What is more, constitutionally infirm presumptions would not be redeemed by legislative reformulation and substitution that still relieves P of the burden of establishing the essential elements of offences beyond reasonable doubt.

V. SUMMARY

We have allowed statutory exceptions to grow on the back of the presumption of innocence for too long. Many of them are unsubtle devices that promote prosecutorial convenience and procedural economy at the expense of the fundamental principle that P must prove D's guilt beyond reasonable doubt. Mandatory presumptions and reverse onus clauses are especially unpalatable. They give P an unwarranted short-cut to proof and rob D of the benefit of reasonable doubt.

In this paper I have proposed the rational connection test as a qualification on the operation of presumptions and reverse onus clauses. I do not pretend that it answers all the objections. Nor would I say that the arguments I have presented exhaust the subject. But they may convince some that we need to moderate our tolerance of statutory provisions which exempt P from shouldering the full load of proof of criminal allegation. In time they might also persuade those who make our statutes of the need to ensure a “fair contest” in criminal proceedings not only by withholding presumptive first-aid from P but also by relieving D of any burden of disproving presumed inculpatory facts.

Lastly, with an eye to the enactment of the Bill of Rights, I have attempted a modest *tour d'horizon* of the kinds of constitutional argument that promise a revival of fundamental principle. In the final analysis we may have to await that development before the presumption of innocence is reinstated as the core value of our adversarial system.

¹⁴² *Supra* n.125.