Louisiana Law Review

Volume 37 | Number 5
Summer 1977

The Validity of Criminal Presumptions in Louisiana

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NOTES

THE VALIDITY OF CRIMINAL PRESUMPTIONS IN LOUISIANA

Although the prosecution has a very heavy burden in criminal cases—establishing proof of guilt beyond a reasonable doubt[1]—the use of presumptions[2] often makes that burden easier to discharge. A 1970 United States Supreme Court decision, though not dealing with presumptions, cast serious doubt on their constitutionality. *In re Winship*[3] expressly held that the due process clause of the fifth amendment requires *all* elements of a crime to be proved beyond a reasonable doubt.[4] Applying the *Winship* standard, the Louisiana Supreme Court in *State v. Searle*,[5] in 1976, found a judicially created presumption—that one in the unexplained possession of recently burglarized goods is guilty of burglary[6]—to be unconstitutional. Distinguishing *Searle* on quite narrow grounds,[7] however, the same court in a 1977 decision, *State v. Jamerson*,[8] affirmed a burglary convic-

1. According to the United States Supreme Court, "[w]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt." Speiser v. Randall, 357 U.S. 513, 525-26 (1958); *accord, e.g.*, Christoffel v. United States, 338 U.S. 84 (1949); Coffin v. United States, 156 U.S. 432 (1895); City of Monroe v. High, 254 La. 362, 223 So. 2d 834 (1969); C. MCCORMICK, EVIDENCE § 341 at 798-802 (Cleary ed. 1972) [hereinafter cited as MCCORMICK]; 9 J. WIGMORE, EVIDENCE § 2497 at 316-25 (3d ed. 1940) [hereinafter cited as 9 WIGMORE].

2. A presumption is a legal device allowing the trier of fact to assume the existence of a fact when proof of other facts is shown. By enabling prosecutors to establish elements of a crime, presumptions are a "very potent means of conviction." Chamberlain, *Presumptions as First-Aid to the District Attorney*, 14 A.B.A.J. 287, 288 (1928). Some of the classic works on presumptions and their nature and effects are J. THAYER, PRELIMINARY TREATISE ON THE LAW OF EVIDENCE AT THE COMMON LAW 313-52 (1898) [hereinafter cited as THAYER]; 9 WIGMORE, *supra* note 1, §§ 2490-93 at 286-93; Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 178 (1930) (parts I & II).

3. 397 U.S. 358 (1970).

4. Prior to *Winship*, the Court had never explicitly ruled on the due process requirement relative to the prosecutor's burden of proof in criminal cases because the reasonable doubt standard was recognized in all jurisdictions. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 8 at 44-46 (1972) [hereinafter cited as LAFAVE & SCOTT].

5. 339 So. 2d 1194 (La. 1976). The *Searle* court found constitutional underpinnings for the principle enunciated in *Winship* in the Louisiana Constitution of 1974, Article I, Sections 2, 13, 16, 17. *Id.* at 1202.

6. See the text at notes 47-50, *infra*.

7. See the text at note 68, *infra*.

8. 341 So. 2d 1118 (La. 1977).

tion with language[9] suggesting that it might uphold in similar circumstances the application of the legislative presumption that one in the unexplained possession of recently stolen goods is the thief.[10] This note will discuss these and other developments regarding criminal presumptions and will assess the current validity of such presumptions in Louisiana.

Unfortunately, much confusion exists regarding the effect and application of presumptions, largely due to inconsistent use and consistent misuse of terminology.[11] They are generally classified as either presumptions of law or of fact,[12] the former including both conclusive and rebuttable[13] presumptions, and the latter encompassing those which are merely permissive. A conclusive presumption, such as the exemption of children under ten years of age from criminal responsibility,[14] allows no contrary evidence by the opponent.[15] It is actually a substantive rule of law

9. In response to defendant's assignment of error, Justice Summers, writing for the *Jamerson* court, noted at the outset that no contemporaneous objection was made to the jury instruction utilizing the statutory theft presumption as required by LA. CODE CRIM. P. art. 841. As a result, it is arguable that the court's distinction of the *Searle* holding is dictum.

10. LA. R.S. 15:432 (1950) provides in part: "A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption . . . that the person in the unexplained possession of property recently stolen is the thief . . . ."

11. *E.g.*, Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953), wherein the author lists and discusses eight senses in which the term had been used by the courts. Professor Edmund Morgan, one of the most noted writers in the field, has stated that "every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair."

12. JONES ON EVIDENCE § 3:3 at 130 (6th ed. 1972) [hereinafter cited as JONES]; Stumbo, *Presumptions—A View at Chaos*, 3 WASHBURN L.J. 182, 192-94 (1964); 9 WIGMORE, *supra* note 1, § 2491 at 288.

13. The rebuttable presumption, otherwise known as the mandatory presumption, has the effect of forcing the jury to find the presumed fact if the proved fact is believed and no evidence to the contrary is produced by the opponent. But because use of a mandatory presumption would infringe the defendant's right to be free from a directed verdict for the prosecution, elements of a crime may only be presumed permissively. Since these presumptions are treated as mere permissive presumptions, the jury is allowed to find the presumed fact, but is not required to make such a finding even in the absence of evidence to the contrary. Note, 22 STAN. L. REV. 341, 343 (1970).

14. LA. R.S. 14:13 (1950).

15. LA. R.S. 15:433 (1950) ("A conclusive presumption is one against which no proof can be admitted, such as the presumption that attaches to res judicata . . . .").

improperly referred to as a presumption.[16] The rebuttable presumption, considered the only true one, has the practical effect of shifting to the defendant the burden of producing evidence during the trial.[17] An example of a rebuttable presumption, the type most often found in criminal statutes, is that, in a prosecution of negligent homicide, the violation of a statute or ordinance is considered "only as presumptive evidence"[18] of criminal negligence. The term "presumption of fact," though often used interchangeably with that of "permissive presumption,"[19] more properly connotes an "inference," a term which itself is often confused with "presumption."[20] An inference is merely a conclusion drawn by the trier of fact from the evidence through use of the reasoning process.[21]

Presumptions are commonly attacked on the grounds that their use violates the criminal defendant's rights to a jury trial[22] and his right not to

16. 9 WIGMORE, *supra* note 1, § 2492 at 292; Brosman, *supra* note 2, at 24.

17. *E.g.*, Barnes v. United States, 412 U.S. 837, 846 n.11 (1973) (practical effect of instructing jury on inference is to shift the burden of going forward with evidence to defendant); Leary v. United States, 395 U.S. 6, 45 (1969) (before burden of production is shifted to defendant, prosecution must show inference is permissible); THAYER, *supra* note 2, at 314 (prima facie presumptions cast upon the party against whom they operate the duty of going forward, in argument or evidence, on the particular point to which they relate); 9 WIGMORE, *supra* note 1, § 2491 at 288 (presumption is rule of law attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent).

18. LA. R.S. 14:32 (1950).

19. JONES, *supra* note 12, § 3:3 at 131: "Since these inferences, sometimes called presumptions of fact, are mere permissible deductions from evidence, it is apparent that they are in fact not presumptions at all. However, they are constantly so called in the decisions although often in a confused and inaccurate manner." MCCORMICK, *supra* note 1, § 342 at 804, n.31 and accompanying text. See cases cited in 29 AM. JUR. 2d § 161 (1967).

20. 1 WHARTON CRIMINAL EVIDENCE § 139 at 234-35 (13th ed. 1972) (If defendant is in possession of recently stolen property, an inference, sometimes called a presumption, arises that he has stolen the property.); 9 WIGMORE, *supra* note 1, § 2491 at 288 ("The employment here of the term 'presumption' is due simply to historical usage, by which 'presumption' was originally a term equivalent, in one sense, to 'inference' . . . . There is in truth but one kind of presumption; and the term 'presumption of fact' should be discarded as useless and confusing.").

21. JONES, *supra* note 12, § 3:3 at 131: "It is evident that many of the instances commonly cited as examples of presumptions of fact are mere illustrations of circumstantial evidence. They are inferences drawn by the ordinary reasoning powers and without the aid of any artificial rules of law, inferences which, however well founded in some circumstances, are entirely unjustifiable under others."

22. This objection is based on the contention that, by specifying the probative force to be given a proven fact, the legislature infringes on the factfinding function of the jury. *E.g.*, Barnes v. United States, 412 U.S. 837, 852 (1973) (Douglas, J., dissenting); Turner v. United States, 396 U.S. 398, 431 (1970) (Douglas & Black,

be compelled to be a witness against himself,[23] including his right to be free from unfavorable commentary by the court on his election not to testify in rebuttal of the presumption.[24] The adverse effect of presumptions on criminal defendants has caused the United States Supreme Court to review them in light of the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States.[25] In a 1910 civil case, *Mobile, J. & K.C.R.R. v. Turnipseed*,[26] the Supreme Court stated that in order to satisfy due process there must be "some *rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."[27]

In the 1925 case of *Yee Hem v. United States*,[28] the Supreme Court applied the "rational connection" test to a criminal statute providing that possession of illegally imported opium is sufficient to authorize conviction of the crime of possessing such with knowledge of its imported nature. The Court found the connection between possession and knowledge to be rational, thus comporting with due process.[29] Subsequent decisions of the Court formulated two other standards to assess the validity of criminal presumptions, the "greater includes the lesser"[30] test and the "comparative convenience"[31] test. But in 1943, in *Tot v. United States*,[32] the Court

JJ., dissenting); United States v. Gainey, 380 U.S. 63, 77 (1965) (Black, J., dissenting); Comment, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 ST. LOUIS U.L.J. 223, 238 (1974).

23. *E.g.*, Barnes v. United States, 412 U.S. 837, 847 (1973) (rejected); Turner v. United States, 396 U.S. 398, 417-18 (1970) (rejected); Yee Hem v. United States, 268 U.S. 178, 185 (1925) (rejected); State v. Curry, 319 So. 2d 917 (La. 1975) (rejected); State v. McQueen, 278 So. 2d 114 (La. 1973) (rejected).

24. *E.g.*, Barnes v. United States, 412 U.S. 837, 846 n.12 (1973) (rejected); United States v. Gainey, 380 U.S. 63, 70-71 (1965) (rejected); State v. Womack, 283 So. 2d 708 (La. 1973) (rejected); *contra*, French v. State, 256 Ark. 298, 506 S.W. 2d 820 (1974) (trial court's instruction to jury, a verbatim recitation of the statutory presumption, amounted to a prohibited comment on the evidence) *noted in* 29 ARK. L. REV. 247 (1975).

25. MCCORMICK, *supra* note 1, § 344 at 811.

26. 219 U.S. 35 (1910).

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

28. 268 U.S. 178 (1925).

29. *Id.* at 183-185.

30. The "greater includes the lesser" power test was first proposed in *Ferry v. Ramsey*, 277 U.S. 88 (1928). The test maintains that the power of the legislature to prescribe the elements of an offense means that it could have done so without including the presumed element.

31. The test of "comparative convenience" was formulated in *Morrison v. California*, 291 U.S. 82 (1934). This test asks whether it is easier for the defendant to disprove the presumed element than for the prosecution to prove it.

32. 319 U.S. 463 (1943).

expressly rejected the first[33] and reduced the latter to the status of a corollary,[34] leaving the "rational connection" test as the controlling standard of the constitutionality of criminal presumptions.[35]

In the 1969 decision of *Leary v. United States*,[36] the Court modified the "rational connection" standard, elevating the threshold that criminal presumptions must reach in order to satisfy due process requirements. The presumption at issue provided that possession of marijuana was sufficient to authorize conviction of the crime of transporting the prohibited substance with knowledge of its illegal importation.[37] The Court held that a "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."[38] After an extensive examination of the

33. The "greater includes the lesser" test was rejected by the *Tot* Court because even though the legislature could have created the crime without the presumed element, it had not chosen to do so "for whatever reason." *Id.* at 472.

34. The "compartive convenience" test was recognized only as a "corollary" to the "rational connection" standard by the *Tot* Court because of its impermissible effect of shifting the burden of persuasion to the defendant. *Id.* at 469. See the discussion in *Leary v. United States*, 395 U.S. 6, 32-33, & nn.56-61 (1969). A statute may not shift the burden of ultimate persuasion of an essential element of the crime charged to the defendant in a criminal case. Mullaney v. Wilbur, 421 U.S. 684 (1975).

35. Two later decisions considering the question of the constitutionality of the presumptions at issue served to demonstrate the application of the "rational connection" test. In *United States v. Gainey*, 380 U.S. 63 (1965), a case involving a prosecution for carrying on the business of an unbonded distiller, the government was aided by a presumption making presence at the site of an illegal still sufficient evidence to convict. The Court found that since few people unconnected with the bootlegging would be found at the hidden still, there was a sufficient rational connection between presence and "carrying on" the illegal activity to uphold the presumption. *Id.* at 67-68. But in *United States v. Romano*, 382 U.S. 136 (1965), the Court considered a similar presumption dealing with the crime of possession of an illegal still and decided that, absent some showing of defendant's function, the inference of possession from presence at the still was too tenuous and arbitrary to merit upholding the presumption. *See generally* MCCORMICK, *supra* note 1, § 344 at 813-14.

36. 395 U.S. 6 (1969).

37. Narcotic Drugs Import and Export Act, 70 Stat. 570, 21 U.S.C. § 176a (1964), *repealed by* 84 Stat. 1291, 1292 (1970).

38. 395 U.S. at 36 (emphasis added). The words "substantial assurance" probably reflect the fact that the Court examined at length the legislative record leading to the presumption, thereby adding a degree of scrutiny which the "rational connection" standard lacked. Note, 1973 WASH. U.L.Q. 897, 904 n.33 (1973). It is significant that, in a footnote, the Court stated that because of its finding that the presumption was unconstitutional under the "more likely than not" standard, it

legislative record leading to the statute, the Court found the presumption constitutionally infirm because of the speculative nature of assuming that possessors knew the source of their marijuana.[39]

The *Leary* Court, in its apparent adoption of a "more likely that not" standard, failed to recognize an important difference between the standard of proof required in civil and criminal litigation: a plaintiff in civil litigation need prove his case only by a preponderance of evidence (more likely than not), while a criminal prosecutor must prove his case beyond a reasonable doubt.[40] A year later in a landmark decision, *In re Winship*,[41] the Supreme Court expressly held that due process "protects the accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[42] Although the facts of the case did not involve presumptions,[43] the holding of *Winship* raises doubts regarding the propriety of using presumptions which satisfy only a "more likely than not" standard.[44] Stated differently, a presumed element of a crime should have to be proved beyond a reasonable doubt, as should any other element of a crime, rather than by a mere preponderance of the evidence.[45]

Until recently, the Louisiana Supreme Court failed to apply constitutional scrutiny to the use of criminal presumptions; rather, the court

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would "not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." 395 U.S. at 36 n.64.

39. 395 U.S. at 52, 53.

40. MCCORMICK, *supra* note 1, §§ 339, 341 at 793, 798; 9 WIGMORE, *supra* note 1, §§ 2497-98 at 316-25. *See* Note, 22 STAN. L. REV. 341 (1970), for a very cogent and forceful argument against using a civil litigation standard of proof in criminal trials.

41. 397 U.S. 358 (1970).

42. *Id.* at 364. The Court quoted Professor McCormick: "The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula *beyond a reasonable doubt* seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'" *Id.* at 361.

43. *Winship* concerned a juvenile proceeding in New York Family Court in which a twelve-year old boy was found guilty of theft. The judge, pursuant to statute, based his determination on a preponderance of evidence and placed the juvenile in a training school for no less than six years.

44. Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. CIV. RTS-CIV. LIB. L. REV. 390, 421 (1976).

45. *Accord*, MCCORMICK, *supra* note 1, § 346 at 832.

assumed their validity by relying on precedent.[46] An example of this attitude is found in the court's treatment of the presumption contained in Louisiana Revised Statutes 15:432 that "the person in the unexplained possession of property recently stolen is the thief . . . ."[47] In 1949, *State v. Shelby*[48] extended the presumption to include the offense of burglary and was relied on consistently for the questionable [49] proposition that the state need only prove the possession of the property in order to secure a conviction of burglary unless the defendant explains his possession to the satisfaction of the jury.[50] In 1973, the Louisiana Supreme Court in *State v. McQueen*[51] rejected a constitutional challenge to the presumption based on infringement of the defendant's presumption of innocence and his right against self-incrimination. The court applied the *Leary* formulation and concluded that "'more likely than not' a person in the unexplained possession of stolen property is the thief,"[52] ignoring the fact that the defendant was charged with burglary, a crime composed of completely different elements.

In the 1976 decision of *State v. Searle*,[53] the Louisiana Supreme Court considered the application of the same presumption to another case in which the record was devoid of evidence linking the defendant to the burglary.[54] In *Searle*, however, the court chose to apply the stricter "reasonable doubt" standard to judge the validity of the presumption. The court referred to various possible methods of acquiring the property other than guilty participation in the act proscribed by the burglary statute and emphasized that the presumption improperly relieved the prosecution of proving the elements of the crime beyond a reasonable doubt. Although the *Searle* holding is limited to finding the presumption of burglary invalid for failing to meet the "reasonable doubt" standard,[55] the court implied that other judicial extensions of the section 432 presumption were unconstitutional[56] and suggested that the legislature re-examine all criminal

46. *E.g.*, State v. White, 247 La. 19, 169 So. 2d 894 (1964).

47. See note 10, *supra*.

48. 215 La. 637, 41 So. 2d 458 (1949).

49. State v. Searle, 339 So. 2d 1194 (La. 1976) (original hearing) (Tate, J., dissenting); State v. Curry, 319 So. 2d 917 (La. 1975) (Barham, J., dissenting).

50. *But see* State v. Searle, 339 So. 2d 1194, 1202 (La. 1976) (rehearing, overruling *State v. Shelby*).

51. 278 So. 2d 114 (La. 1973).

52. *Id.* at 120.

53. 339 So. 2d 1194 (La. 1976).

54. *Id.* at 1201.

55. *Id.* at 1206.

56. In *State v. Kaufman*, 278 So. 2d 86 (La. 1973), the Louisiana Supreme Court expressly refused to extend the section 432 theft presumption to include a

presumptions in light of newly emphasized constitutional rights.[57]

The majority in *Searle* relied on two United States Supreme Court decisions subsequent to *Leary, Turner v. United States*[58] and *Barnes v. United States*,[59] in its decision to apply the reasonable doubt standard to criminal presumptions. In *Turner*, the Court considered a statute prohibiting the possession of heroin and cocaine with knowledge of its imported nature.[60] The statute further provided that knowledge of illegal importation could be presumed from the fact of possession. The Court, employing the *Leary* method of analysis, investigated the legislative record and found strong evidence that at least ninety-eight percent of all heroin in the United States is imported, while less than fifty percent of the illegal cocaine is imported. The Court concluded that the presumption of guilty knowledge of illegal importation from possession of heroin satisfied both the more stringent "reasonable doubt" standard and the "more likely than not" standard,[61] but invalidated the same presumption relative to cocaine for failing to meet even the "more likely than not" standard.[62] In *Barnes*, the Court followed a similar rationale in upholding a trial court's instruction using an inference that one in possession of recently stolen treasury checks had knowledge that the property was stolen.

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presumption that the unexplained possessor of property stolen during a homicide is guilty of the homicide. *State v. Braxton*, 257 La. 183, 241 So. 2d 763 (1970), extended the presumption to include the crime of armed robbery and is overruled by the *Searle* decision. *But see* State v. Montoya, 340 So. 2d 557 (La. 1976) (court allowed the use of the section 432 theft presumption in an armed robbery prosecution, but remanded for a new trial because the trial court's instruction and the district attorney's argument improperly referred to defendant's post-arrest silence in an attempt to prove that the possession was "unexplained").

57. The court asked: "[I]s it as rational to presume in 1976 that a person in the recent and unexplained possession of stolen goods is the thief as it was in 1928 when La. R.S. 15:432 was enacted? Since then society has changed and constitutional rights have evolved, particularly the right to remain silent under police questioning as well as in court. The constitutionality of a presumption should be judged at the time it is applied and not as of the time it was enacted." 339 So. 2d 1194, 1203 (La. 1976).

58. 396 U.S. 398 (1970).

59. 412 U.S. 837 (1973).

60. 21 U.S.C. § 174 (1909), *repealed by* 84 Stat. 1291 (1970).

61. 396 U.S. at 416: "Whether judged by the more-likely-than-not standard applied in Leary v. U.S. . . . or by the more exacting reasonable-doubt standard normally applicable in criminal cases, § 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug." Once the absence of domestic heroin is proved beyond a reasonable doubt, defendant's knowledge becomes a natural inference from the facts. MCCORMICK, *supra* note 1, § 344 at 816.

62. 396 U.S. at 418-20.

Although the United States Supreme Court did not expressly establish the "reasonable doubt" standard as the controlling determinant of the constitutionality of criminal presumptions, many lower courts and legal commentators feel the decisions implied as much.[63] The *Searle* court, following this line of authority, stated in dictum that it is incumbent upon the prosecution to demonstrate before using a presumption that the presumed fact follows beyond a reasonable doubt from the proven fact on which it is made to depend.[64] While the theoretical justification for such a requirement is easily discernible,[65] the burden placed upon the prosecution may be so cumbersome as to render application of the requirement unlikely. Without the aid of empirical data justifying the presumption, a state prosecutor would be unable to convince a court in any given case that the presumed fact follows beyond a reasonable doubt from the proven fact.

In the 1977 case of *State v. Jamerson*,[66] a prosecution for aggravated burglary, the Louisiana Supreme Court did not resolve the problem of whether the prosecution should be required to fulfill a preliminary burden of proof before using a presumption. In *Jamerson*, the court sustained a trial court's instruction using Louisiana Revised Statutes 15:432 and rejected the defendant's claim that *Searle* prohibited such an instruction. The *Jamerson* court, in language which was arguably dictum,[67] reasoned that though *Searle* forbade a jury instruction that one in the unexplained possession of recently burglarized property is presumed to be the *burglar*, "the case did not hold that . . . [the possessor] . . . could not be presumed to be the *thief* . . . ."[68] Because the defendant's argument was not directed to the issue, the court did not discuss whether the section 432 presumption of theft satisfied the *Searle* reasonable doubt standard.[69]

63. *E.g.*, United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975); United States v. Black, 512 F.2d 864 (9th Cir. 1975); United States v. Johnson, 433 F.2d 1160 (D.C. Cir. 1970); Dinkins v. State, 29 Md. App. 577, 349 A.2d 676 (1976); State v. Williams, 288 N.C. 680, 220 S.E. 2d 558 (1975); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 923 n.24 (1970); *Cf.* MCCORMICK, *supra* note 1, § 344 at 816 ("[t]he Court's frequent reference to that standard in *Turner*, coupled with its decision in *In re Winship* recognizing that such a measure of proof is constitutionally required in criminal cases, makes it likely that the reasonable doubt standard will be applied to test the validity of presumptions in the future.").

64. 339 So. 2d at 1205.

65. The reasonable doubt standard as applied to presumptions would require the jury to treat the presumed fact in the same manner as all other facts to be proved. *See* MCCORMICK, *supra* note 1, § 346 at 832.

66. 341 So. 2d 1118 (La. 1977).

67. See note 9, *supra*.

68. 341 So. 2d at 1120 (emphasis by the court).

69. Similarly, in *State v. Montoya*, 340 So. 2d 557 (La. 1976), the court did not

The reasoning employed by the *Jamerson* court is objectionable on several grounds. Theft is the taking of anything of value without the consent of the owner.[70] The crime of burglary does not consist of taking of property; rather, it is the *unauthorized entering* of a structure with intent to commit a felony or theft.[71] Allowing use of the statutory theft presumption in a burglary prosecution effectively nullifies the logical result reached by the *Searle* court. By using the theft presumption, the prosecution is still relieved of the burden of proving the elements of the crime of burglary beyond a reasonable doubt. In addition, the *Jamerson* court did not require the prosecution to demonstrate that the presumption of complicity in burglary follows beyond a reasonable doubt from proof of possession of the recently stolen goods. As earlier stated, such a requirement would seem to follow logically from the powerful language used in the *Searle* opinion.[72]

While the result reached by the court in *Searle* is meritorious, it is submitted that the analysis of the issues involved is faulty. In deciding to apply the reasonable doubt standard to a state presumption, the *Searle* court relied primarily upon the United States Supreme Court decisions construing and applying federal statutes. The court, however, failed to recognize a substantial difference between state and federal legislation which proscribes criminal conduct. Congress derives its jurisdiction from the Constitution. The commerce clause,[73] for example, provides Congress with the authority to regulate the importation of drugs. In order to ensure federal participation in punishing the basic fact of possessing heroin, and at the same time comply with constitutional restrictions, the importation element must be included in the definition of the offense. To facilitate the prosecutor's burden of proof, the law presumes that the heroin was imported, a presumption adequately supported by statistical data compiled during congressional hearings on the matter.[74] The state legislature, on the other hand, need not include, for jurisdictional purposes, presumed elements in defining a crime. Even though it chose to do so, the state

feel "compelled to decide . . . whether the (section 432) presumption is unconstitutional on its face under the test . . . announced in *State v. Searle*," because other facts in the trial constituted error sufficient to warrant a new trial. *Id.* at 561.

70. LA. R.S. 14:67 (1950), *as amended by* La. Acts 1972, No. 653, § 1.

71. *Id.* § 60 (1950); *id.* § 62 (1950), *as amended by* La. Acts 1972, No. 649, § 1.

72. See the text at note 64, *supra*.

73. U.S. CONST. art. I, § 3.

74. Of course, the courts must decide whether the presumption satisfies the appropriate standard of proof and comports with due process, as demonstrated by *Leary v. United States*, 395 U.S. 6 (1969), and *Turner v. United States*, 396 U.S. 398 (1970). See the text at notes 38, 39, 61, & 62, *supra*.

legislature would not have the ability to conduct the extensive hearings and investigation needed to substantiate the presumption. The state legislature simply does not have similar resources available to compile the requisite empirical evidence on the subject.

It should be apparent that many state legislative presumptions are not actually presumptions in the proper sense primarily because of an absence of supporting evidence. This is especially true of Louisiana's statutory "legal presumption" of theft from proof of unexplained possession of stolen goods. The Louisiana Supreme Court has described this concept as a presumption of fact[75] which is tantamount to stating that there exists no presumption at all.[76] As aforementioned,[77] a presumption of fact is not actually a presumption; rather, it is a logical *inference* drawn from the circumstances of the evidence presented without the aid of any artificial rules of law.

The above distinction between an inference and a true presumption is important in light of the effect the label "presumption" has upon a jury,[78] which is sworn to accept the law as provided by the court.[79] The term carries a technical, artificial weight, suggesting that the jury, although ultimate trier of fact, is obligated to find the existence of the presumed fact if it believes the proven fact.[80] True presumptions of law serve an important function in the administration of criminal justice and should not be dispensed with, provided they are amply supported by empirical evidence. Possession of recently stolen property, however, is actually no more than

75. State v. Searle, 339 So. 2d 1194 (La. 1976) (original hearing); State v. Pace, 183 La. 838, 165 So. 6 (1935).

76. 9 WIGMORE, *supra* note 1, § 2491 at 288.

77. See the text and accompanying notes at notes 19-21, *supra*.

78. Judge Learned Hand once stated: "In discussions among lawyers and judges of the difference between a permissible inference and a presumption, the terminology may be unimportant. But the jury may be misled by the word 'presumption'; and here it may have interpreted that word as far stronger than a permissible inference." United States v. Sherman, 171 F.2d 619, 624 (2d Cir. 1948), *cert. den. sub. nom.* Grimaldi v. United States, 337 U.S. 931 (1949); *accord*, United States v. Lefkowitz, 284 F.2d 310, 313 (5th Cir. 1960); Barfield v. United States, 229 F.2d 936, 939 (5th Cir. 1956).

79. LA. CODE CRIM. P. art. 802.

80. LAFAVE & SCOTT, *supra* note 4, § 21 at 147-48 (presumption that permits jury to find guilt from proof of basic fact tends to encourage jury to draw conclusions it might otherwise not draw); Comment, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 ST. LOUIS U.L.J. 223, 231-33 (1974) (presumptions have undue influence on jurors in creating a tendency to favor presumed fact and ignore prosecutor's burden of proving it beyond a reasonable doubt); Note, 22 STAN. L. REV. 341, 351-52 (1970) (jury will exercise the authority given it by statute to find the presumed fact).

circumstantial evidence that the posssessor is the culprit.[81] The fact of possession is of course relevant and admissible evidence during the trial, but the jury alone should have the power to determine what weight the fact should be given in view of the entire evidence presented. There is no legislative empirical evidence which supports the so-called legal presumption contained in Louisiana Revised Statutes section 432. The legislature should amend section 432 to describe the possessory concept correctly as an inference, rather than a legal presumption. Under such an amendment, the prosecutor would not be required to satisfy the "reasonable doubt" standard relative to presumed elements, and would still be able to bring the inference to the attention of the jury, without the benefit of misapplied terminology to the prejudice of the defendant.

Timothy Jonathan Bradley

CHARACTER AND PRIOR CONDUCT OF THE VICTIM IN SUPPORT OF A PLEA OF SELF-DEFENSE

Charged with murder, the defendant claimed that he shot the deceased in self-defense. Although the defendant introduced evidence indicating that the deceased had attacked him with a knife, the trial court excluded testimony of prior acts of violence committed by the deceased against others. The Louisiana Supreme Court reversed and *held* that, in a homicide case, when there is "appreciable evidence" of an overt act or hostile demonstration on the part of the victim, prior acts of violence by the victim against others, of which the defendant had knowledge, are admissible as tending to show the defendant's state of mind. *State v. Lee,* 331 So. 2d 455 (La. 1976).

When the defendant in a homicide case claims he acted in self-defense, evidence of the character and background of the victim may be relevant to two distinct issues: (1) who was the aggressor in the encounter, and (2) whether the defendant's apprehension of serious bodily harm was reasonable. Admission of this evidence, however, creates a danger that the

81. *E.g.*, People v. Grimes, 113 Cal. App. 2d 365, 248 P.2d 130 (1952) (unexplained possession of recently stolen property is a circumstance tending to show guilt when coupled with other suspicious circumstances); Drew v. State, 61 Okla. Crim. 48, 65 P.2d 549 (1937); *see* Comment, *Presumptions and Burdens of Proof*, 21 LOY. L. REV. 377, 399-400 (1975).