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Due Process Requirements for Use of Non-Statutory Inferences in Criminal Cases, Barnes v. United States, 412 U.S. 837 (1973)

DUE PROCESS REQUIREMENTS FOR USE OF NON-STATUTORY INFERENCES IN CRIMINAL CASES

Barnes v. United States, 412 U.S. 837 (1973)

Defendant was convicted on two counts each of knowingly possessing United States Treasury checks stolen from the mail,[1] forging, and uttering the checks knowing them to be forged.[2] The federal district court judge instructed the jury, *inter alia*, that unexplained possession of recently stolen mail justifies an inference that the defendant possessed the mail knowing it to be stolen.[3] The court of appeals affirmed.[4] On writ of certiorari, the Supreme Court affirmed and *held*: The instruction comported with due process.[5]

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1. 18 U.S.C. § 1708 (1970) provides:
Whoever . . . unlawfully has in his possession any . . . mail . . . which has been so stolen . . . knowing the same to have been stolen [shall be fined or imprisoned or both].
2. 18 U.S.C. § 495 (1970) provides:
Whoever . . . forges . . . writing, for the purpose of obtaining or receiving . . . from the United States . . . any sum of money; or
Whoever utters . . . any . . . forged . . . writing, with the intent to defraud the United States, knowing the same to be . . . forged [shall be fined or imprisoned or both].
3. The judge instructed the jury as follows:
Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen . . . .
If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are some way consistent with the defendant's innocence.
Barnes v. United States, 412 U.S. 837, 840 n.3 (1973).
4. Barnes v. United States, 466 F.2d 1361 (9th Cir. 1972).
5. Barnes v. United States, 412 U.S. 837 (1973).
Defendant also contended that the instruction violated his fifth amendment privilege against self-incrimination. The district court judge properly instructed the jury that no inferences could be drawn from defendant's failure to testify. The Court noted that although there may have been pressure upon defendant to testify, the mere massing of evidence against him did not violate his privilege against self-incrimination. *Id.* at 847. *See* Turner v. United States, 396 U.S. 398, 417-18 (1970); Yee Hem v. United

For a criminal conviction due process requires that every element of the crime charged be proved beyond a reasonable doubt.[6] The reasonable doubt standard, however, is subject to rules allocating the burden of going forward with the evidence.[7] One allocation rule involves

States, 268 U.S. 178, 185 (1925). Nor could the instruction be construed as a comment upon defendant's failure to testify. 412 U.S. at 846 n.12. *See* United States v. Gainey, 380 U.S. 63, 70-71 (1965).

The Court also rejected defendant's challenge that the evidence was insufficient to prove that the checks were stolen *from the mail.* 18 U.S.C. § 1708 (1970) does not require that the accused know that the checks were stolen from the mail. The statute was amended in 1939 to delete this element from the Government's burden of proof. Act of Aug. 7, 1939, ch. 557, 53 Stat. 1256; H.R. REP. No. 734, 76th Cong., 1st Sess. 1 (1939); *see* United States v. Gardner, 454 F.2d 534 (9th Cir.), *cert. denied,* 409 U.S. 867 (1972); Smith v. United States, 343 F.2d 539, 543 (5th Cir. 1965); United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958).

6. In *In re* Winship, 397 U.S. 358, 364 (1970), the Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

See also Christoffel v. United States, 338 U.S. 84, 89 (1949).

Although the reasonable doubt standard was first articulated in 1789, the spirit of the rule can be traced as far back as the fourth century. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 341, at 799 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 558, 559 (1898) [hereinafter cited as THAYER]. The purpose of the rule is to prevent the conviction of innocent defendants. MCCORMICK § 341, at 798. *See also* Speiser v. Randall, 357 U.S. 513, 525-26 (1957). *But see* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View,* 1970 DUKE L.J. 919, 929.

Due process also requires that the prosecution's case reach the jury only on the basis of sufficient evidence. Thompson v. City of Louisville, 362 U.S. 199, 204, 206 (1960) (conviction for misdemeanor based on no evidence of guilt); *cf.* United States v. Vuitch, 402 U.S. 62, 72 n.7 (1971) (jury verdict of guilty should be set aside when there is no evidence from which a reasonable jury could find guilt beyond a reasonable doubt). It is clear that the prosecution must at a minimum produce sufficient evidence of guilt in order to withstand a directed verdict of acquittal. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 8, at 45 (1972) [hereinafter cited as LAFAVE & SCOTT]. The proper measure of sufficient evidence varies with jurisdictions. Two of the United States Courts of Appeals have held that this evidence must match the ultimate burden of persuasion. Riggs v. United States, 280 F.2d 949 (5th Cir. 1960); Curley v. United States, 160 F.2d 229 (D.C. Cir.), *cert. denied,* 331 U.S. 837 (1947). *See generally* MCCORMICK § 338, at 790, for a discussion of the various standards used.

7. MODEL PENAL CODE § 1.12, Comment (Tent. Draft No. 4, 1955).

One such allocation rule is to place on a defendant the burden of proving the insanity defense beyond a reasonable doubt. Leland v. Oregon, 343 U.S. 790 (1952). Affirmative defenses generally are qualifications of the reasonable doubt standard. When offering an affirmative defense, the defendant is expected to put forward evidence of that defense. *See, e.g.,* United States v. Fleischman, 339 U.S. 349, 360-63 (1950); Rossi v. United States, 289 U.S. 89 (1933). *See generally* MODEL PENAL CODE § 1.12, Comment (Tent. Draft No. 4, 1955).

the prosecutor's freedom to use inferences[8] to establish elements of the crime. The extent to which this freedom can be exercised is limited by the procedural protections of due process.[9]

An inference allows the jury to infer the existence of a fact based on other facts that have been proven.[10] In a criminal prosecution this finding is a permissible inference,[11] that is, if a crime is composed of

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8. When used in this Comment, "inference" can be equated with what McCormick terms a "presumption," that is, "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." MCCORMICK § 342, at 803. The term "inference" is used to distinguish the situation in which the jury will be *required* to find a certain fact as can be the case in a civil trial when a presumption is operative. *See* note 11 *infra* and accompanying text. With an inference, the jury will be *allowed* to infer the existence of a fact in the absence of countervailing evidence.

The distinction between "presumption" and "inference" is difficult to make given the Supreme Court's inconsistent use of the two terms. In earlier cases, the phrase "statutory presumption" was used. *See, e.g.*, Tot v. United States, 319 U.S. 463, 467 (1943). The Court now uses the phrase "statutory inference" to describe the same concept. Barnes v. United States, 412 U.S. 837, 843 (1973). This confusion is virtually unavoidable. "One ventures the assertion that 'presumption' is the slipperiest [*sic*] member of the family of legal terms, except its first cousin, 'burden of proof.'" MCCORMICK § 342, at 802-03. The classic works on the subject are THAYER 313-52; 9 J. WIGMORE, EVIDENCE §§ 2483-98 (3d ed. 1940); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U.K.C.L. REV. 30 (1963).

9. *See* notes 21-45 *infra* and accompanying text.

10. MCCORMICK § 342, at 803.

Courts and commentators have argued for the practical necessity of using inferences. First, an inference aids the prosecutor in proving elements that are not susceptible of direct proof, such as knowledge and intent. United States v. Mooney, 417 F.2d 936, 938 (8th Cir. 1969); Aron v. United States, 382 F.2d 965, 970 (8th Cir. 1967); Brosman, *The Statutory Presumption* (pts. 1 & 2), 5 TUL. L. REV. 17, 178, 204 (1930); Chamberlin, *Presumptions as First Aid to the District Attorney*, 14 A.B.A.J. 287 (1928). Since the defendant's testimony, which would provide the only direct proof of these elements, is not likely to be forthcoming, the inference is invaluable. Secondly, certain crimes are apt to be committed out of the public eye. Again, direct proof may lie only with the defendant. United States v. Gainey, 380 U.S. 63, 67-68 (1965) (operation of illegal still); United States v. Mooney, 417 F.2d 936, 938 (8th Cir. 1969) (mail theft); United States v. Britton, 24 F. Cas. 1239, 1241 (No. 14,650) (C.C.D. Mass. 1822) (forgery). Thirdly, the use of inferences expedites trials in that the prosecutor will not have to labor over what he cannot establish by direct proof.

11. A conclusive or mandatory presumption would violate due process. Tot v. United States, 319 U.S. 463, 467 (1943). In a civil case the standard is different; a presumption may force a party to take on the burdens of production and persuasion. An "irrebuttable presumption" forecloses a factual issue in favor of the party for whom the presumption operates. MCCORMICK § 345.

three elements and two have been established, the jury may be allowed, but not required, to infer the third.[12] The practical effect of the inference is to pressure the defendant into going forward with the evidence.[13] A defendant who chooses to go forward need only present enough evidence to raise a doubt in the jury's mind as to the existence of the fact or element to be inferred.[14] A silent defendant assumes the risk that the jury will follow the natural probative force of the proven facts.[15]

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12. In *Barnes*, for example, the Government had to show (1) that the defendant was in possession of the checks, and (2) that the checks were stolen from the mail. The inference allowed the jury to find (3) that the defendant knew the checks were stolen.

In Turner v. United States, 396 U.S. 398 (1970), defendant was convicted of knowing concealment of illegally imported heroin and cocaine. With respect to the heroin, the Government had to show (1) that the defendant possessed heroin, and (2) that the heroin was illegally imported. Proof of these facts allowed the jury to find (3) that the defendant knew the heroin was illegally imported.

13. The government has a heavy burden of proof in a criminal case; the defendant has none. The inferences (they are sometimes called presumptions) arising from the possession relieve the government of much of that burden. As a *practical matter*, they tend to shift the burden to the defendant, however piously we may say and tell juries that they do not.

Rogers v. United States, 402 F.2d 830, 834 (9th Cir. 1968) (emphasis added). An inference can never shift the burden of proof in a criminal case. Tot v. United States, 319 U.S. 463, 469 (1943). The prosecution has the burden of proof throughout the trial. Leland v. Oregon, 343 U.S. 790, 795 (1952) (dictum); Lilienthal's Tobacco v. United States, 97 U.S. 237, 266 (1877) (dictum); United States v. Groessel, 440 F.2d 602, 606 (5th Cir.), *cert. denied*, 403 U.S. 993 (1971); Virgin Islands v. Torres, 161 F. Supp. 699 (D.V.I. 1958); LAFAVE & SCOTT § 8, at 44.

14. Since the prosecution has to persuade the jury beyond a reasonable doubt, the defendant need only present evidence that will raise a reasonable doubt. United States v. Lefkowitz, 284 F.2d 310, 314 (2d Cir. 1960); Regina v. Hepworth, [1955] 2 Q.B. 600, 602; Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 344 (1970). *See generally* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 174-86 (1969).

15. Defendant's contention that his privilege against self-incrimination was violated was rejected by the Court in *Barnes*. *See* note 5 *supra*. A related problem, the "presumption of innocence," was not touched upon. This problem was raised by Justice Black in Turner v. United States, 396 U.S. 398, 432 (1970) (dissenting opinion):

> [T]he Constitution requires that the defendant in a criminal case be presumed innocent and it places the burden of proving guilt squarely on the Government. Statutory presumptions such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving he is not guilty.

The "presumption of innocence" is not a presumption in the legal sense since it is not an inference deduced from a given premise. It is more properly an assumption. *See generally* MODEL PENAL CODE § 1.12 (Proposed Official Draft, 1962); LA-

The Supreme Court's development of the due process limitations on the use of inferences prior to *Barnes* was limited to "statutory inferences."[16] The reasoning of the cases, therefore, was in terms of the restrictions upon the legislature in prescribing the rules of evidence.[17] Although *Barnes* concerns a common law inference,[18] it is agreed that the use of the inference is to be scrutinized in the same manner as a statutory inference.[19] Regardless of the source of the inference, the

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FAVE & SCOTT § 8, at 52-53.

The assumption of innocence has long been accorded constitutional stature. *See, e.g.*, Deutch v. United States, 367 U.S. 456, 471 (1961); United States v. Fleischman, 339 U.S. 349 (1950); Coffin v. United States, 156 U.S. 432, 453 (1894); Lilienthal's Tobacco v. United States, 97 U.S. 237, 266 (1877) (dictum). Arguably, the assumption of innocence is undercut by the jury instruction in *Barnes*. If the burden of proof beyond a reasonable doubt applies to each element of the crime, the submission of an inferred element—not proven beyond a reasonable doubt—becomes logically inconsistent with assumed innocence. Justice Black summarized this contradiction:

> It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from governmental abuses if the Government could by some sleight-of-hand trick with presumptions make nullities of those precautions.

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

16. Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).

17. The legislature has the power to prescribe the evidence which shall be received in the courts. Tot v. United States, 319 U.S. 463, 467 (1943); Yee Hem v. United States, 268 U.S. 178, 185 (1925); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 349 (1827). However, it is within the province of the courts to pass upon the sufficiency of the evidence to convict. United States v. Gainey, 380 U.S. 63, 86 (1965) (Black, J., dissenting); Holland v. United States, 348 U.S. 121, 135 (1959).

18. The inference used in *Barnes* was first stated by the Supreme Court in Wilson v. United States, 162 U.S. 613, 619 (1896):

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence.

The inference of knowing possession evolved from the conclusive presumption that the possessor of stolen goods was the thief. 1 J. WIGMORE, *supra* note 8, at 598; *see* 2 E. EAST, PLEAS OF THE CROWN 656 (1803); THAYER 328. *See generally* United States v. Jones, 418 F.2d 818 (8th Cir. 1969); Commonwealth v. Millard, 1 Mass. 6 (1804); Regina v. Exall, 176 Eng. Rep. 850, 852 (N.P. 1866); Regina v. Cockin, 168 Eng. Rep. 1139 (C.C. 1836). The inference is one "running through a dozen centuries." THAYER 327.

19. United States v. Gainey, 380 U.S. 63, 70 (1965); United States v. Johnson, 433 F.2d 1160, 1168 n.55 (D.C. Cir. 1970).

The Supreme Court has never explicitly held that statutory and common law inferences are to be treated similarly; this has simply been assumed. In the principal case, the Court did not discuss this issue at length. 412 U.S. at 845 n.8.

question presented concerns the sufficiency of the evidence for conviction.[20]

The Court's initial standard for examining inferences was developed in a civil case.[21] The Court stated that an inference satisfies due process if there is a "rational connection" between the fact proved and the ultimate fact inferred. Stated negatively, the connection can be neither unreasonable nor arbitrary.[22] In the first instance, determining rationality is a legislative function since this determination may concern matters not within judicial competence.[23] A judge is to review the determination in the light of "common sense and human experience."[24] If

20. *See* Turner v. United States, 396 U.S. 398, 407 (1970) ("the question on review is the sufficiency of the evidence"); Leary v. United States, 395 U.S. 6, 37 (1969) (issue is whether the statute "permits conviction upon insufficient proof"); Dunlop v. United States, 165 U.S. 486, 502 (1897) (non-statutory inference from unexplained possession of recently stolen property "is sufficient to authorize the jury to convict").

21. Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910). Mississippi statutes abolished the fellow-servant rule and made injury to railroad employees on the job prima facie evidence of the railroad's negligence. The railroad challenged the statutes under the due process and equal protection clauses of the fourteenth amendment, but the Supreme Court affirmed a judgment against the railroad for wrongful death of an employee. *Id.*

22. *Id.* at 43:

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of equal protection of the law, it is only essential that there 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.

The first criminal case to use the rational connection standard was Tot v. United States, 319 U.S. 463 (1943). Petitioner, a felon, was convicted under the Federal Firearms Act, ch. 850, § 2, 52 Stat. 1250 (1938), which prohibited the receipt by a felon of a firearm in interstate commerce. Possession of a firearm by a felon raised the inference that it had been shipped in interstate commerce and received after June 30, 1938. The Court, using the standard developed in Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910), held that the inference violated due process:

> Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed . . . .

319 U.S. at 467.

23. In using the rational connection standard, the Supreme Court deferred to legislative judgment with regard to the facts underlying inferences. United States v. Gainey, 380 U.S. 63, 67 (1965):

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

24. *See* Greer v. United States, 245 U.S. 559, 561 (1918); United States v. Gardner, 454 F.2d 534, 537 (9th Cir.), *cert. denied*, 409 U.S. 867 (1972); McAbee v.

the connection between facts is "strained" beyond common sense it is rejected.[25] The rational connection standard was superseded in later cases.[26]

Two variations of the rational connection standard have been used. The first, "greater includes lesser," recognizes that the greater power of the legislature to prohibit certain conduct includes the lesser power to create inferences as the means of proof.[27] This standard was rejected soon after its conception on the ground that the Court's role is to view all the elements of the crime as defined by Congress.[28] The second variation, "comparative convenience," allows the legislature to create inferences that will elicit evidence more convenient for the defendant to produce than for the prosecution to discover.[29] This standard was rejected because it would allow the legislature to define a crime in a way that would shift the burden of persuasion, which would be impermissible in a criminal trial.[30]

United States, 434 F.2d 361, 363 (9th Cir. 1970); United States v. Hines, 256 F.2d 561 (2d Cir. 1958).

25. United States v. Romano, 382 U.S. 136, 139 (1965); Tot v. United States, 319 U.S. 463, 467-68 (1943).

26. *See* note 33 *infra* and accompanying text.

27. Ferry v. Ramsey, 277 U.S. 88 (1928). A Kansas statute made bank directors personally liable for accepting deposits with knowledge of the bank's insolvency. Proof of the bank's insolvency was considered prima facie evidence of a director's knowledge. The Court, per Justice Holmes, upheld the presumption, noting that the liability was less than what might have been imposed. He concluded, "[T]he thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.* at 94.

28. Tot v. United States, 319 U.S. 463, 472 (1943). In United States v. Romano, 382 U.S. 136 (1965), petitioner was convicted of possessing an illegal still. The inference involved allowed the jury to infer possession from presence at the still. The inference was struck down using the rational connection standard. In reference to the "greater includes lesser" standard, the Court stated:

> It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to exercise this power. The crime remains possession, not presence . . . .

Id. at 144. *See generally* McCORMICK § 344, at 812-13; Ashford & Risinger, *supra* note 14, at 177-79.

29. Morrison v. California, 291 U.S. 82, 88-89 (1934) (dictum):

> [W]ithin limits of reason and fairness the burden of proof may be lifted from the state . . . and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression . . . .

30. Tot v. United States, 319 U.S. 463, 469 (1943). Although the Court rejected the comparative convenience standard as controlling, the standard was recognized as

The Court articulated a new standard in *Leary v. United States*.[31] Defendant was convicted of possessing marijuana with the knowledge that the marijuana was illegally imported.[32] The Court maintained that in order to comport with due process, there must be "substantial assurance" that the inferred fact "more likely than not" flows from the proven fact.[33] Moreover, the Court examined at length the legislative facts that led Congress to conclude that the inference was rational.[34] The Court held that the link between possession of marijuana and knowledge that the marijuana was illegally imported was irrational and constitutionally untenable.[35] Having disposed of the inference on the more-likely-than-not standard, the Court declined to consider whether the reasonable doubt standard should also regulate inferences.[36]

In *Turner v. United States*[37] the Court was confronted with an inference, similar to that in *Leary*, dealing with possession of heroin and

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a corollary to the rational connection standard. *Id.* at 467. The rationale behind the comparative convenience standard represents an argument for using inferences in proving facts on which defendant's testimony will not be forthcoming. *See* note 10 *supra* and accompanying text.

31. 395 U.S. 6 (1969).

32. Act of July 18, 1956, ch. 629, § 106, 70 Stat. 570, provided:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

33. Leary v. United States, 395 U.S. 6, 36 (1969):

> The upshot of *Tot, Gainey,* and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

The use of the word "upshot" is unclear. The Court seems to be saying that the more-likely-than-not standard is the *conclusion* of *Tot, Gainey,* and *Romano* taken as a developing whole. The *Leary* standard, at root, is a standard of rationality, but the qualification, "substantial assurance," appears to add an element of scrutiny that "rational connection" lacks. *See* note 23 *supra* and accompanying text. This scrutiny is reflected in the Court's consideration of the legislative record in *Leary*. *See* text accompanying note 34 *infra*.

34. Leary v. United States, 395 U.S. 6, 39-52 (1969).

35. *Id.* at 52-53.

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

The reasonable doubt standard means that the evidence is sufficient for the rational juror to find the inferred fact beyond a reasonable doubt. Barnes v. United States, 412 U.S. 837, 843 (1973). This standard would compel the jury to treat the inferred fact or element in the same manner as it is to treat all other facts or elements to be proved.

37. 396 U.S. 398 (1970).

cocaine.[38] Once again the legislative record was closely scrutinized. Applying the more-likely-than-not standard to possession of cocaine, the Court concluded that it could not be "sufficiently sure" the cocaine was illegally imported.[39] However, because domestic heroin is virtually nonexistent, the Court concluded that it is "common sense" to know that heroin is illegally imported.[40] The due process standard for heroin was stated in the conjunctive: The inference satisfied both the more-likely-than-not and the reasonable doubt standards.[41]

The Court in *Barnes* followed the conjunctive standards approach of *Turner* without specifying whether the more-likely-than-not *or* the reasonable doubt standard was controlling. The Court's reasoning, however, diverged from prior cases. The Court failed to examine the possible reasons for using the inference and relied primarily on the criterion of common sense.[42] The statute in *Barnes* does not mention

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38. Act of Nov. 2, 1951, ch. 666, § 1, 65 Stat. 768:

> Whenever on trial for a violation of this subdivision the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

39. 396 U.S. at 419.

The use of "sufficiently sure" echoes the "substantial assurance" that the *Leary* Court felt was necessary with the more-likely-than-not standard. *See* note 33 *supra.*

40. 396 U.S. at 417.

41. *Id.* at 416:

> Whether judged by the more-likely-than-not standard applied in *Leary v. U.S., supra,* or by the more exacting reasonable-doubt standard normally applicable in criminal cases, § 174 is valid insofar as it permits the jury to infer that heroin possessed in this country is a smuggled drug.

The majority of commentators feel that this statement of alternatives does not *explicitly* establish the reasonable doubt standard for purposes of evaluating inferences. *See, e.g.,* McCormick § 344, at 816; Fuller & Ulrich, *An Analysis of the Constitutionality of Statutory Presumptions That Lessen the Burden of the Prosecution,* 25 U. Miami L. Rev. 420 (1971); 4 Suffolk L. Rev. 929 (1970). *But see* Christie & Pye, *supra* note 6, at 923 n.24, in which the authors note that Justice White's opinion is unclear, but conclude that the reasonable doubt standard was established. It is difficult to reconcile this conclusion with Justice White's statement.

42. 412 U.S. at 845:

> On the basis of the evidence alone, common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen.

Justices Douglas and Brennan, dissenting, did not agree with the majority's "common sense and experience" standard. Both dissenters felt there were equally plausible reasons to believe that petitioner did not know that the checks were stolen. *Id.* at 851, 854. This method of inquiry seems to be more consistent with the approach taken in *Turner* and *Leary.* The majority's position is a return to the approach taken in the "rational connection" cases of deferring to the legislature. *See* note 23 *supra* and accompanying text.

any inferences,[43] but the case law interpreting the statute has uniformly implemented the common law inference as the means of proof for the element of knowledge.[44] Noting the long judicial acceptance of the inference and its common sense quality, the Court held that both the more-likely-than-not and the reasonable doubt standards were met.[45]

Barnes, more so than *Turner*, fails to articulate a due process standard beyond the particular facts of the case. The development of the Court's treatment of inferences prior to *Turner* indicated a rising threshold which inferences had to meet. The cases through *Turner* demonstrated a searching for facts that would sustain or defeat inferences. *Barnes* yields no new standards and pays little attention to the facts underlying the inference. It is now difficult to determine the exact relationship between inferences and due process. Despite vigorous dissents[46] and legislative activity,[47] the Court has declined to extend the

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Given the Court's treatment of the distinction between statutory and common law inferences, *see* note 19 *supra*, the majority's reasoning cannot be explained on the basis of the type of inferences involved.

43. *See* note 1 *supra*.

44. *See, e.g.*, United States v. Gardner, 454 F.2d 534 (9th Cir.), *cert. denied*, 409 U.S. 867 (1972); United States v. Halprin, 450 F.2d 322 (9th Cir.), *cert. denied*, 406 U.S. 994 (1971); United States v. Birnstihl, 441 F.2d 368 (9th Cir. 1971); United States v. Hines, 256 F.2d 561 (2d Cir. 1958); Brandenburg v. United States, 78 F.2d 811 (3d Cir. 1935).

45. The Court's holding is extremely narrow: "We do not decide today whether a judge-formulated inference of lesser age or less widely accepted may properly be emphasized by means of a jury instruction." 412 U.S. at 846 n.11.

46. *Id.* at 848 (Douglas & Brennan, JJ., dissenting); Turner v. United States, 396 U.S. 398, 425 (1970) (Black, J., dissenting); United States v. Gainey, 380 U.S. 63, 84-85 (1965) (Black, J., dissenting).

47. *See* FINAL REPORT OF THE NATIONAL COMMISSION ON THE REFORM OF FEDERAL CRIMINAL LAWS (1971); S. 1, 93d Cong., 1st Sess. (1972); *Proposed Federal Rules of Evidence*, 56 F.R.D. 183 (1973). Both the FINAL REPORT, *supra* at § 103(4)(b), and S. 1 *supra* at 244, contain the following statutory language (emphasis added):

> [I]n submitting the issue of the existence of the presumed fact to a jury, the court shall charge that, although the evidence *must establish the presumed fact beyond a reasonable doubt*, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed.

It would seem that the revisers of the Criminal Code have gone further than the Court. It is arguable that *Turner* has been the impetus here. *See* note 41 *supra* and accompanying text. The narrow holding in *Barnes*, therefore, seems to be anachronistic.

The *Proposed Rules* adopt a similar standard:

> When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, *if, but only if*, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, *could find guilt or the presumed fact beyond a reasonable doubt.*

protection that the beyond-a-reasonable-doubt standard would guarantee.

Proposed Federal Rules of Evidence, supra at § 303(b) (emphasis added). It should be noted, however, that § 303 has been deleted from the rules because the matter was dealt with in the proposals of the FINAL REPORT and S. 1., HOUSE SUBCOMM. ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., REPORT ON H.R. 5436, at 8-9 (Comm. Print 1973). The hearings on the *Proposed Rules* reveal that the witnesses were dissatisfied with the Advisory Committee's Note, 56 F.R.D. 212-14 (1973). Witnesses pointed out that the narcotics statutes cited in the Note had been repealed. *Hearings on the Proposed Rules of Evidence Before the Special Subcomm. on Reform of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 221-23, 236 (1973). The Advisory Committee's Note relies on *Gainey* as its sole Supreme Court authority. This is anomalous since both *Leary* and *Turner* advanced beyond the "rational connection" standard used in *Gainey*. *See* note 33 *supra*. The Advisory Committee on the Rules of Evidence has since abandoned its controversial § 303 in deference to the House Subcommittee's determination. COMMENTS OF STANDING COMM. ON RULES OF PRACTICE AND PROCEDURE AND ADVISORY COMM. ON RULES OF EVIDENCE ON AMENDMENTS PROPOSED BY HOUSE SUBCOMM. ON CRIMINAL JUSTICE, 93D CONG., 1ST SESS. 4 (Comm. Print 1973).