

THE PRESUMPTION OF INNOCENCE UNDER ATTACK

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This Article documents the increasing range of instances in which the presumption of innocence has been abrogated by legislation. Legislatures are responding to fears around terrorism and general community anxiety about law and order issues by increasing resort to reverse onus provisions. While the right of the legislature to enact laws thought to further public safety is acknowledged, the presumption of innocence is a long-standing, fundamental due process right. This Article specifically considers the extent to which reverse onus provisions are constitutionally valid in a range of jurisdictions considered comparable. It finds that the approach in use in some jurisdictions studied, testing the constitutionality of reverse onus provisions on the basis of whether they practically permit an accused to be found guilty although there is reasonable doubt about their guilt, has much to commend it. However, this is part-solution only, since legislatures may then be driven to redefine crimes to seek to effectively cast the burden of proof onto an accused by redefining what is in substance an element of a defense. Thus, it favors a substantive approach to determining what the prosecutor must show to obtain a conviction, utilizing concepts such as moral blameworthiness and actus reus/mens rea.

Keywords: *presumption of innocence, reverse onus, burden of proof*

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Ongoing terrorism incidents and threats and general community anxiety about criminal behavior continue to create pressure on due process rights, including the presumption of innocence. Most legal scholars, criminal law attorneys, and others working in the criminal justice system view the presumption of innocence as an axiomatic and indispensable aspect of our legal system. It has a very long tradition in legal systems. On the other hand, people wish to live in a safer society, and it is acknowledged that, sometimes, the practical effect of the presumption is to free guilty parties, because the government is not able to overcome the presumption. Sometimes, it is difficult for prosecutors to prove their suspicions to the required standard. Public safety may thus be compromised by insistence on due process. Although this clash between individual rights and public safety considerations is not new, as the threat of terrorism has become more pervasive, and as generalized anxiety about criminal behavior in our communities has increased, community pressure to “deal with” those suspected of serious crime has also increased. This has caused some legislatures to consider recasting the balance between fundamental human rights like the presumption of innocence and the community desire to prosecute and punish those accused of wrongdoing.

Usually, this recasting has involved abrogating the presumption of innocence. This can occur in different ways. Specifically, on occasion legislatures have attempted to circumvent the presumption by redefining what traditionally might be considered elements of an offense, to be proven by the prosecutor, as defenses to be established by the defense. In addition, legislation may presume or infer that elements of offenses exist, unless the defense can show otherwise. The question of the standard of proof that must be met is important in this conversation.

Part I of this Article will survey developments regarding the presumption of innocence in a range of jurisdictions. Various departures from the presumption will be noted. Part II provides critique, reflecting on the importance and rationale of the presumption of innocence, and considering when, if ever, reverse onus provisions are constitutionally and legally acceptable. It finds that many arguments that seek to rationalize departures from the presumption of innocence are unconvincing. It focuses on whether there are any baseline principles that can be generally applied to consideration of such provisions. It will argue firstly that the baseline position evident in the Canadian, United Kingdom, and some United States case law, considering whether the reverse onus provision allows the

possibility that an accused can be convicted despite the existence of reasonable doubt, provides a sound starting approach. However, in itself it is not the solution, because it does not prevent legislatures simply redefining elements of given crimes.

This problem requires consideration of the second main question, whether a procedural or substantive view should be taken of the presumption of innocence. Should legislatures be entitled to frame elements of offenses as they wish, or should there be limits? And if there should be limits, how should these be articulated? This Article will discuss possible limits that have been articulated in the literature and in the courts. These possible limits are then “road-tested,” applied to factual scenarios from the case law in various jurisdictions, to determine whether they provide workable solutions and lead to clear and defensible outcomes. It is concluded that concepts of “moral blameworthiness” and a requirement that crimes include an *actus reus* and *mens rea* are useful in this context, and that the distinction between what are elements of an offense and what are defenses is often arbitrary and ought not be overemphasized.

I. PRESUMPTION OF INNOCENCE IN SELECTED JURISDICTIONS

The presumption of innocence is seen as a fundamental aspect of criminal procedure, recognized in a range of human rights instruments.¹ For the purposes of this Article, we will focus on interpretation of the presumption in Canada, Australia, the United States, and the United Kingdom. These jurisdictions are chosen because they share a common law tradition and are considered properly “comparable.” This is in the sense that lawmakers and scholars from one country can learn from the experiences, positive and negative, of the legislation, decisions, and methodology adopted by other

1. It is expressly found in Article 11 of the Universal Declaration of Human Rights, Article 14(2) of the International Covenant on Civil and Political Rights, Article 6(2) of the European Convention on Human Rights, § 11(d) of the Canadian Charter of Rights and Freedoms, § 25(c) of the New Zealand Bill of Rights Act 1990 (NZ), Article 8(2) of the American Convention on Human Rights, and Article 7(1) of the African Charter on Human and People’s Rights. It has been interpreted as being implicit in the Fifth and Fourteenth Amendments of the United States Constitution. Australia does not have an express bill of rights, and its Constitution is silent as to the presumption of innocence.

legal systems that share similar broader values. This is considered one of the rationales for a comparative law approach.

The discussion will focus on several themes in the case law, including the suggested jurisprudential basis of the presumption, and the extent to which courts have permitted legislatures to redefine what were traditionally considered elements of an offense as defenses, resulting in a change in the burden of proof (at least, in common law jurisdictions), to create presumptions regarding elements of an offense, subject to the defense proving otherwise. It will also consider the importance of the distinction between legal and evidentiary burdens, and will raise the question of whether there are any limits on what legislatures can classify to be a crime and deserving of punishment. It should be noted at this point that sometimes the presumption of innocence arises indirectly in the case law. The case might concern the privilege against self-incrimination, but in the course of elaborating upon that right, the court might reflect upon the presumption of innocence. Clearly, the idea that an accused is not obliged to assist the accuser links the two concepts. Or it may concern the question of the meaning of the “beyond reasonable doubt” standard, which relates to the level of proof by which the accuser must support their allegations.

A. Canada

The Canadian Charter enshrines the presumption of innocence,² subject to a law providing reasonable limits that can be justified in a free and democratic society.³ In *R v. Oakes* the Canadian Supreme Court struck out a provision in drugs legislation⁴ expressly presuming that a person in possession of drugs had them for the purpose of trafficking. Unless the accused proved otherwise, they would be convicted of the serious charge of trafficking.⁵

2. § 11(d).

3. § 1.

4. § 4(2) of the Narcotic Control Act, R.S.C 1970, c N-1, stated that no one should have in their possession a drug for the purpose of trafficking, and § 8 stated that if the court found the accused was in possession of a drug, if he failed to establish he was not in possession for the purposes of drug possession, he shall be convicted of the offense, which carried a maximum life imprisonment jail term.

5. *Oakes*, [1986] 1 S.C.R. 103.

The Court noted that the presumption of innocence was a hallowed principle lying at the heart of criminal law. It protected the fundamental liberty and dignity of individuals, and reflected the grave social and personal consequences for a person convicted of a crime. It reflected a society's faith in its citizens that it should assume they were decent and law-abiding citizens, unless shown to be otherwise.⁶

It explained different types of presumptions; some were mandatory and had to be made, and some were permissive, where the presumption could be made. Further, some presumptions were rebuttable; others were not rebuttable. And where rebuttable, the accused might be subject to an evidentiary burden, to adduce some evidence against the presumption, or a legal/persuasive burden, requiring them to show that the thing presumed was not true, on the balance of probabilities. Consideration of constitutional validity would depend to some extent on the characterization of the provision along these lines. Statutory interpretation of this provision suggested the provision challenged was a mandatory, rebuttable presumption, imposing a legal burden on the accused.⁷

The majority referred with evident approval to a lecture by leading evidence scholar Sir Rupert Cross, where he objected to departures from the principle of presumption of innocence where the fact finder may have to convict a person although their guilt was unclear. This was particularly important to the question of whether the burden of proof on the accused to rebut the presumption was a legal burden or a mere evidentiary burden. Specifically, the Court held that where the accused had a legal burden of disproving an essential element of the offense, the possibility arose that an accused could be convicted despite the existence of reasonable doubt. This could occur where the accused could show some evidence (i.e., reasonable doubt) that they were not guilty, but could not meet the balance of probabilities hurdle.⁸

The Court rejected use of the “rational connection” principle in relation to § 11(d). Elsewhere, courts had permitted presumptions to be made where there was a rational connection between the thing that had to be shown, and the thing that could be inferred if that thing were shown. Again, the Court was concerned that as a result of the application of this test to

6. *Id.* at 119–20 (Dickson, C.J., Chouinard, Lamer, Wilson, & Le Dain, JJ.).

7. *Id.* at 116.

8. *Id.* at 132–33.

satisfying an element of the offense, an accused could be convicted despite the existence of reasonable doubt. For instance, the court might be satisfied that a rational connection exists, and so presume that an element of the offense is satisfied, although there is reasonable doubt that the thing presumed is in fact established on the facts.⁹

A majority also rejected the suggestion that the challenged provision was saved by § 1. Section 1 of the Charter referred to interferences with Charter rights being justified as reasonable limits, given Canada as a free and democratic society. The Court found a “free and democratic society” embodied respect for the inherent dignity of individuals.¹⁰ Firstly, limits on Charter rights would need to be shown to be in pursuit of a legitimate objective sufficient to override the constitutional right. Secondly, the means chosen would have to be reasonable and demonstrably justified. This proportionality test involved consideration of whether the measures adopted were carefully designed to achieve the objective chosen, not be arbitrary, unfair, or based on irrational considerations, impair the constitutional right as minimally as possible, and there had to be proportionality between the effects of the measures chosen and the identified objective.¹¹

Here, the government could meet the first requirement; suppression of drug offending was a substantial and pressing governmental interest that justified strong government measures to attack it. However, it could not meet the second; the government could not show the means used, the reverse onus provision, was reasonable and demonstrably justified. Here the Supreme Court used the “rational connection” test, concluding that the finding that a person possessed what might be a small quantity of drugs did not rationally support an inference of trafficking.¹²

The Court considered the matter again in *Whyte v. The Queen*.¹³ There the legislation provided for an offense of having the care and control of a motor vehicle while under the influence of alcohol. Where a person was in the driver’s seat of a vehicle, they were deemed to have the care and control of the vehicle, unless they showed they did not enter the vehicle for the purpose of driving it.

9. *Id.* at 134.

10. *Id.* at 136.

11. *Id.* at 138–39.

12. *Id.* at 141–42.

13. *Whyte*, [1988] 2 S.C.R. 3.

The Court rejected suggestions of a distinction between cases where an accused was required to disprove an element of the offense, and cases where the accused had a positive onus in relation to a defense. The test was whether an accused could be convicted while a reasonable doubt existed as to their guilt. Here the provision breached § 11(d); it required the fact finder to presume that the accused had care and control of the vehicle, although reasonable doubt might exist regarding their intention to drive.¹⁴ However, the provision was saved under § 1 analysis. It was conceded that reducing drunk driving offenses was a legitimate governmental objective. Regarding the stage two proportionality analysis undertaken as part of the *Oakes* analysis, there was a rational connection between the thing presumed and the fact relied upon. A person in the driver's seat was likely to be in control of the vehicle. Making such an assumption was not unfair, arbitrary, or based on irrational considerations. The legislature had been responding to past case law, where a person was able to circumvent drunk driving laws requiring intent by showing they were too intoxicated to have formed the requisite intent. As a result, the presumption was an understandable, defensible, and restrained legislative response, justified by § 1.¹⁵

In *Downey v. The Queen*, the Supreme Court considered an offense of living on the proceeds of prostitution.¹⁶ The accused was the co-owner of an escort agency. The legislation provided that evidence that a person lives with or was habitually in the company of prostitutes was prima facie evidence that the person lived on the proceeds of prostitution. All judges were of the view that the provision infringed the § 11(d) presumption of innocence, but a slim majority of one found the provision could be saved under § 1.¹⁷ The majority noted that the presumption breached § 11(d) because it could result in a person being convicted despite the existence of reasonable doubt as to guilt. The fact that someone lived with a prostitute did not necessarily mean they were living from the proceeds of such activity. The majority noted that prostitution activities affected particularly vulnerable members of society, and the legislature was entitled to take a harsh view of those living from its proceeds.

14. *Id.* at 19 (Dickson, C.J., for Beetz, McIntyre, Lamer, La Forst, & L'Heureux-Dube, JJ.).

15. *Id.* at 24–26.

16. *Downey*, [1992] 2 S.C.R. 10.

17. L'Heureux-Dube, Sopinka, Gonthier, & Cory, JJ.; La Forest, McLachlin, & Iacobucci, JJ., dissenting.

Despite the apparent rejection of the “rational connection” test in *Oakes*, it was utilized by the court in *Downey*. There was a rational connection between living from proceeds of prostitution and being habitually in the presence of prostitutes. The legislature was entitled to respond to the practical difficulties in obtaining evidence against those suspected of living from such proceeds. The interference with the *Charter* right was minimal here, it related to a fundamentally important objective, and the majority interpreted the provision as imposing an evidentiary burden only; it could be rebutted by the accused raising a reasonable doubt.¹⁸

The dissenters interpreted the “rational connection” requirement more robustly than the majority; it was not enough that in some cases, the thing presumed was rationally connected to the fact shown. At minimum, the fact had to make the presumption likely. Here, it could not be shown that the fact a person lived with a prostitute made it likely they were living from the proceeds of prostitution. This rendered the provision irrational and unfair.¹⁹

Most recently in *The Queen and Attorney-General of Quebec v. Lamoureux and Others*,²⁰ the Court considered legislation where, in relation to an alleged drunk driving offense, a breathalyzer instrument had been used. The onus remained on the prosecution to show the accused exceeded the legal limit. Where a reading from such an instrument indicated the accused was over the legal blood alcohol content of 0.08 percent, to escape conviction the accused was required to present some evidence on (all) three matters. In other words, there was a starting legislative presumption against the accused on each of the following matters:

- that the instrument was not functioning or had not been operated properly (first presumption);
- the malfunction or improper operation had caused the reading to exceed 0.08 percent (second presumption); *and*
- that the accused’s blood alcohol reading would not have exceeded 0.08 percent at the time of the alleged offense (third presumption).

18. *Id.* at 38–39 (Cory, J., for L’Heureux-Dube, Sopinka, & Gonthier, JJ.).

19. *Id.* at 44–45 (McLachlin, J., with whom Iacobucci, J., agreed); La Forest, J., agreed with this conclusion.

20. *Lamoureux et al.*, [2012] 3 S.C.R. 187.

The Court reiterated its test to determine whether a *prima facie* breach of the right to presumption of innocence in § 11(d) had occurred, as being whether an accused could be convicted despite the existence of reasonable doubt.²¹ Here the first presumption breached § 11(d) because it required the fact finder to accept the breathalyzer results presented by the prosecutor, even if the fact finder might have some doubt regarding the accuracy of the test. This concern was not idle; significant difficulties with accuracy of readings had been experienced.²² This could create legitimate, reasonable doubt in the mind of the fact finder, yet the presumption required them to accept the results of the test.²³ Regarding the § 1 saving provision, the Court said that relevant factors included the importance of the legislative objective, how difficult it would be for the prosecutor to prove the substituted fact beyond reasonable doubt, how easy it would be for the defendant to rebut the presumption, and any relevant scientific evidence.²⁴ Here, while the objective of the amendments, to give the results of the breathalyzer test appropriate weight, was substantial, and the presumption minimally impaired, it would be difficult for the accused to rebut the presumption. They would need to engage an expert. The instrument was under the prosecution's control.²⁵

Regarding the second presumption, it was not clear how an accused could actually prove that their reading was caused by the malfunction.²⁶ This was a serious infringement of the presumption of innocence, and similarly could not be justified under § 1. It placed a significant burden on the accused, and did not result in any cost saving to the prosecutor.²⁷

Regarding the third presumption, again there was a *prima facie* breach of § 11(d). The fact finder could have had a reasonable doubt that the reading of the machine was the same as what the reading would have been at the time of the alleged offense, because the accused may have consumed alcohol in the time between the alleged offense and the provision of the sample. By overcoming this doubt via a presumption, the legislation was

21. *Id.* at 207 (Deschamps, J., for McLachlin, C.J., Le Bel Fish & Abella, JJ.).

22. *Id.* at 208.

23. *Id.* at 209.

24. *Id.* at 210.

25. *Id.* at 215.

26. *Id.* at 216.

27. *Id.* at 219.

offensive to § 11(d).²⁸ However, it was saved by § 1. The presumption related to a legitimate objective of not requiring the prosecution to prove how the accused's blood alcohol level did not alter significantly between the time of the alleged offense and the time of the test. The presumption did not impose an undue burden on the accused. The accused should know when, what, and how much they drank. The accused could have analysis done on their ability to absorb alcohol.²⁹

B. Australia

It must firstly be borne in mind that Australia lacks a national bill of rights or express provision in its Constitution that would prohibit or regulate removal of the presumption of innocence. As a result, in almost all cases, legislation containing a reverse onus provision has been held constitutionally valid. The most promising means by which a claimant might assert that laws containing reverse onus provisions are unconstitutional is by arguing that such laws are contrary to the separation of powers mandated by the Australian Constitution, because legislation that requires or authorizes a court to act in a way contrary to traditional judicial method risks undermining its institutional integrity. This will be elaborated upon in more detail below.

An early case considered that where legislation provided that in an action over a customs bond, the government would be entitled to judgment, unless the person providing the security could prove one of several facts.³⁰ An argument that the law breached the separation of powers principle was quickly rejected on the basis that "a law does not usurp judicial power because it regulates the method or burden of proving facts."³¹ Judge Isaacs pointed out many cases where legislation imposed a burden of proof on an accused because their knowledge of the facts was necessarily greater than that of others.³²

Soon after, in validating immigration legislation requiring a person suspected of being an immigrant to prove they were not, the first suggestions of possible limits on the legislature's ability to regulate evidence appeared.³³

28. *Id.* at 229.

29. *Id.* at 231.

30. *Commonwealth v. Melbourne Harbour Trust Commissioners*, (1922) 31 CLR 1.

31. *Id.* at 12 (Knox, C.J., Gavan, Duffy, & Starke, JJ.).

32. *Id.* at 18.

33. *Williamson v. Ah On*, (1926) 39 CLR 95.

Though the legislation was declared valid, Judge Isaacs suggested there were limits to the constitutional ability of the legislature to enact evidentiary rules and presumptions.³⁴ He suggested, for instance, that provisions that were “arbitrary and fanciful,” destructive of a chance to place the real facts before the court, would not be permitted.³⁵

Members of the High Court reflected at some length on the beyond reasonable doubt standard (and by implication the presumption of innocence) in a case primarily concerned with the related principle of the privilege against self-incrimination.³⁶ Chief Justice Mason and Judge Toohey referred to the “fundamental principle” that the onus of proof beyond reasonable doubt was on the prosecution.³⁷ This was in the context of validating the legislation abrogating the privilege against self-incrimination, and they contrasted abrogation of the privilege with abrogation of the beyond reasonable doubt standard that, upon one interpretation, suggests they may have found the latter to be constitutionally troublesome.³⁸ They clearly expressed concern with legislative provisions that would “undermine the foundation of our accusatorial system of criminal justice.”³⁹

Members of the Court reflected how the burden of proof was a key feature of the common law system of adversarial, as opposed to inquisitorial, process. Judges Deane, Dawson, and Gaudron said the burden of proof “has its beginnings in . . . an aversion to inquisitorial proceedings.”⁴⁰ Judge McHugh also reflected this sentiment, contrasting the adversarial system involving the Crown against an accused with an inquisitorial system. He said that “it followed” that the Crown must prove its case against the accused.⁴¹ He also noted that placement of the onus of proof on the prosecutor protected the dignity of the accused, and acted as protection against “show trials” of totalitarian states,⁴² and he referred to the fact that

34. *Id.* at 116 (with whom Powers, J., agreed (127)).

35. *Id.* at 117.

36. *Environmental Protection Authority v. Caltex Refining Co. Pty Ltd.*, (1992) 178 CLR 477.

37. *Id.* at 503; see to like effect Deane, Dawson, Gaudron, JJ. (527).

38. *Id.* at 503.

39. *Id.* at 508.

40. *Id.* at 528.

41. *Id.* at 544.

42. *Id.* at 546.

placement of the onus of proof on the accuser maintained the integrity of the adversarial system.⁴³

The High Court considered in *Nicholas v. The Queen*⁴⁴ the legislature's ability to legislate regarding the rules of evidence. It found that the legislature had broad power in this area,⁴⁵ however, there were limits. Chief Justice Brennan suggested that legislative alteration of the onus of proof could be open to constitutional objection if its approach was not reasonable.⁴⁶ Judge Toohey said that alteration of the rules of evidence could be objectionable where it impeded the accused's right to a fair trial.⁴⁷ Judge Gaudron agreed, and found that laws that tended to bring the administration of justice into disrepute would also be objectionable.⁴⁸

The judgment of Judge Gummow in *Nicholas* provides the clearest indication of constitutional limits to the legislature's ability to enact and change rules of evidence, including presumptions. In validating the provision in that case, which stated that the court should disregard the fact that evidence was obtained unlawfully in assessing what weight should be given to it, Judge Gummow noted that the challenged section did not

deem to exist, or to have been proved to the satisfaction of the tribunal of fact, any ultimate fact, being an element of the offences for which the accused is charged. A law of that nature, albeit procedural in form, might well usurp the constitutionally mandated exercise of the judicial power for the determination of criminal guilt.⁴⁹

Judge Hayne confirmed the distinction between legislation dealing with questions of evidence and procedure, on the one hand, and legislation dealing with questions of guilt or innocence, on the other. The former was constitutionally permissible; the latter was not. The distinction was one of substance, not form. He noted that some changes to evidence or procedure were so radical that they could in substance be held to deal with questions of guilt or innocence, and be invalid.⁵⁰

43. *Id.* at 551.

44. *Nicholas*, (1993) 193 CLR 173.

45. Brennan, C.J. (189), Toohey, J. (203), McHugh, J. (225), Kirby, J. (260), & Hayne, J. (273).

46. *Id.* at 190.

47. *Id.* at 202.

48. *Id.* at 208–209.

49. *Id.* at 236.

50. *Id.* at 278.

In a rare case, the court in *International Finance Trust Company Limited and Anor v. New South Wales Crime Commission*⁵¹ found legislation that contained a reverse onus provision to be constitutionally invalid. The legislation had provided for the confiscation of property thought to be crime-derived, unless the owner could prove, on the balance of probabilities, that they had acquired the assets lawfully. The court expressed its reasons in a compendious way, so it is not possible to say what weighting should be given to each individual reason. However, it may fairly be said that one of the reasons given in the course of finding the legislation to be unconstitutional was that it imposed a reverse onus of proof on the person suspected of wrongdoing.⁵² This assisted in the conclusion that the legislation engaged the Court in an activity that was “repugnant in a fundamental degree” to the Australian judicial process.⁵³

The status of the onus and standard of proof was again considered in the privilege against self-incrimination case of *X7 v. Australian Crime Commission*.⁵⁴ A majority of the Court interpreted the challenged provision in this case to not interfere with the privilege against self-incrimination; Australian courts often deal with human rights challenges to legislation through this principle of legality, presuming that statute does not intend to abrogate fundamental common law rights, and where legislation is ambiguous, interpreting it in a manner minimally invasive of such rights.⁵⁵ In the course of so doing, Judges Hayne and Bell stated that a criminal trial in Australia was characterized as “accusatorial” and “adversarial.” They referred to the “axiomatic” nature of the principles around the burden and standard of proof in criminal cases.⁵⁶ Judge Kiefel added that the concept of an “accusatorial trial” had a constitutional dimension.⁵⁷

In a subsequent further case involving compulsory examination of an accused in a pre-trial process,⁵⁸ members of the High Court again

51. *Internat'l Financial Trust*, (2009) 240 CLR 319.

52. *Id.* at 366–67 (Gummow & Bell, JJ.), with whom Heydon, J. (386) agreed.

53. *Id.* at 367.

54. *X7*, (2013) 248 CLR 92.

55. *Id.* at 141 (Hayne & Bell, JJ.); 153 (Kiefel, J.).

56. *Id.* at 134–35 (Hayne & Bell, JJ.); Kiefel, J., agreed (153). Only five judges heard the case.

57. *Id.* at 153.

58. *Lee v. New South Wales Crime Commission*, (2013) 251 CLR 196.

reiterated the accusatorial nature of criminal process in Australia,⁵⁹ including the onus of proof being on the prosecution.⁶⁰ Judge Hayne was most emphatic of all, referring to the burden and standard of proof that must be applied in adjudging guilt, and stating that if the prosecution cannot prove guilt beyond reasonable doubt, the accused must be acquitted.⁶¹

Despite these noble sentiments, there exist in Australian statutes numerous provisions that apparently depart from the presumption of innocence. The most egregious are those that presume that an express element of an offense has been satisfied, unless the defense shows otherwise.⁶² These are common in state drugs legislation. Examples are provisions addressing serious drug offenses like trafficking, which requires an intention to sell. These provisions sometimes expressly allow a presumption of such an intention to sell where the accused has a sufficient quantity of the drug.⁶³ There are numerous rebuttable presumptions found in the Criminal Code 1995 (Cth) in relation to many different offenses.⁶⁴ Apart from the drug offenses explained above, they include presuming that a plastic explosive breaches a marking requirement (an element of the offense), unless the accused proves otherwise,⁶⁵ or using a carriage service to buy a ticket using false identification, where the fact the accused used a carriage service (an element of the offense) is presumed to exist, unless the accused proves

59. *Id.* at 229 (French, C.J.), 236 (Hayne, J.), 249 (Crennan, J.), 266 (Kiefel, J.), 293 (Bell, J.), 313 (Gageler & Keane, JJ.).

60. *Id.* at 249 (Crennan, J.), 266 (Kiefel, J.), 293 (Bell, J.), 313 (Gageler & Keane, JJ.).

61. *Id.* at 235.

62. There are also provisions that create defenses which cast the onus of proof onto the accused on the balance of probabilities, but which are not expressly elements of the offense. While these could also be challenged, the discussion focusses on the provisions that expressly presume actual elements of the offense, on the basis that these are the most egregious examples, and most likely to be found to be constitutionally invalid as interfering with the presumption of innocence principle.

63. For instance, the offense of trafficking in § 32 of the *Controlled Substances Act 1984* (SA), including an intention element, but facilitated by § 32(5), which creates a rebuttable presumption of such intent if the accused has a certain quantity of drug; see similarly *Misuse of Drugs Act 1981* (WA) § 6(1)(a) and § 7(1)(a), facilitated by the presumption provision § 11 and § 6(2), § 7(2), and § 12(2) of the *Misuse of Drugs Act 2001* (Tas). The Tasmanian presumption must be overcome by the accused on the balance of probabilities.

64. For example, drug offenses (§§ 302.5, 303.7, 305.6, 306.6–8, 307.3–10, 308.2, 308.4, 309.5, 309.12–15), plastic explosive offenses (§§ 72.12–14, 72.35), false identification (§ 376.3).

65. § 72.35 Criminal Code 1995 (Cth).

otherwise.⁶⁶ Some offenses include a requirement that a drug be “reasonably suspected of having been unlawfully imported,” and place the onus on the accused, on the balance of probabilities, to prove they did not unlawfully import the drug.⁶⁷

The question of the extent of the onus of proof on the accused, and whether it is an evidentiary or legal onus, is an important one. Although the general rule is that such presumptions prescribe a mere evidentiary onus,⁶⁸ this is a starting point only and subject to evidence of a contrary intention.⁶⁹ Sometimes, the legislature’s intention to prescribe a legal onus on the accused is clear.⁷⁰

C. United States

The United States Constitution does not specifically refer to the presumption of innocence. However, it has long been determined that the presumption is an aspect of due process enshrined by the Fifth and Fourteenth Amendments. The Court referred to it in the early case of *Coffin v. United States* as “axiomatic and elementary . . . [laying] at the foundation of the administration of our criminal law.”⁷¹ The Court there traced the presumption to Biblical times. The Court noted the link between the presumption and the beyond reasonable doubt standard, the latter being the “resultant” of the former.⁷²

Attempts by legislatures to introduce presumptions to ease prosecutions commenced relatively early. In 1943, the Supreme Court considered the validity of legislation making it an offense for a person convicted of a violent crime, or a fugitive, to receive any firearm or ammunition transported via interstate or foreign commerce. The legislation contained a presumption that possession by such a person had been transported via interstate or foreign commerce.⁷³ The Court confirmed that although legislatures had

66. § 376.3 Criminal Code 1995 (Cth).

67. §§ 307.8(4), 307.9(4), and 307.10(4).

68. § 13.3 Criminal Code 1995 (Cth).

69. § 13.4 Criminal Code 1995 (Cth).

70. Examples include § 72.35 (plastic explosive offenses), § 376.3 (false identification regarding an airline ticket), and § 400.9 (dealing with property reasonably suspected of being the proceeds of crime).

71. *Coffin*, 156 U.S. 432, 453 (1895) (White, J., for the Court).

72. *Id.* at 460.

73. *Tot v. United States*, 319 U.S. 463 (1943).

power to prescribe rules of evidence, they were subject to the Constitution.⁷⁴ Specifically, legislatures could create presumptions to assist in proving elements of an offense, but only where there was a rational connection between the fact proved and the ultimate thing presumed, based on general life experiences. Here, it could not be presumed from possession that a firearm or ammunition had come from another state or overseas.⁷⁵ The fact of possession was not rationally connected with such an inference. It was not a sufficient warrant for making such a presumption that the accused had the better means of knowing the truth about the thing presumed.⁷⁶

The Court found the “rational connection” test satisfied in the case of legislation prohibiting the participating in illegal distillation. The legislation permitted a court to infer the guilt of the accused from their mere presence at the site where the alleged illegal activity took place.⁷⁷ The accused could present evidence to counter that inference to the satisfaction of the jury. The majority validated the provision because there was a rational connection between presence and unlawful activity, given the high secrecy typically attached to such operations.⁷⁸ This made it unlikely that the defendant would have innocently stumbled upon such an operation.⁷⁹

The dissenters noted that although legislatures had power to enact legislation regarding evidence, the power could not be used to deprive an individual of a constitutional right.⁸⁰ Here, the legislation abridged both the presumption of innocence and the fact that an accused had a right to silence, and to not have adverse inferences made against them if they did not testify.⁸¹ The legislature did not have power to determine what facts sufficed to prove guilt beyond reasonable doubt, and Congress had

74. *Id.* at 467 (Roberts, J., for the Court).

75. *Id.* at 468.

76. *Id.* at 469.

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

78. *Id.* at 67 (Stewart, J., for Warren, C.J., Clark, Harlan, Brennan, White, & Goldberg, JJ.).

79. In contrast, where an accused was convicted of the offense of “possession, custody and control” of an illegal still, the legislation permitting an inference authorizing conviction of a person based on presence at the illegal still, the Court found the provision unconstitutional due to the lack of rational connection between the thing proven and the thing presumed. Mere presence did not rationally imply anything regarding the defendant’s specific role in any illegal activity: *United States v. Romano*, 382 U.S. 136 (1965).

80. *Id.* at 80 (Black, J.).

81. *Id.* at 72–73 (Douglas, J.).

overstepped constitutional boundaries by interfering with the court's role in deciding cases.⁸²

The court has found that for the “rational connection” test to be satisfied, the presumed fact must at least be more likely than not to flow from the proven fact.⁸³ The court has validated a presumption in relation to an offense of drug importation involving elements of (a) knowingly receiving, concealing, and transporting the drug, (b) the drug was illegally imported, and (c) the accused knew the drug was illegally imported. Although the onus of proof to show these elements of the offense would ordinarily be on the prosecutor, the legislation contained a presumption that the accused knew the drugs were illegally imported, and that they were illegally imported, from the fact of possession. The presumption was valid, at least in a case where a significant majority (or all) of that drug was produced outside of the United States, and conversely, that the same presumption as applied to another drug was not valid, where it was clear a significant quantity of that drug was produced locally. Further, trafficking activity could be presumed from possession of a significant quantity if accompanied by other evidence, such as packaging, suggesting the accused was involved in drug transportation and sale.⁸⁴

Again, these findings in *Turner* were subject to a strong dissent by Judges Black and Douglas, who found that the legislature could not be relieved of the constitutional burden of proving the essential elements of its case by mere declaration or presumption.⁸⁵ They noted that it would be

82. *Id.* at 85–88 (Black, J.); this strand of reasoning also appears in the judgments of Black and Stewart, JJ., in *Leary v. United States*, 395 U.S. 6, 93 (1969).

83. *Leary*, 395 U.S.; the context was an offense of transporting drugs where the person knew the drugs had been unlawfully imported into the United States. The legislation permitted an inference to be drawn from the fact that a person had possession of the drugs that they knew had been unlawfully imported into the United States, unless the person proved otherwise. Invalidating the legislation, the Court found no rational connection between the thing proven and the thing assumed. A large percentage of marijuana circulating in the United States was locally grown, and it was not clear that a significant number of marijuana possessors were aware of the source of their product. In *Barnes v. United States*, the Court validated a presumption from the unexplained possession of checks addressed to others that the accused possessed the checks knowing they were stolen. The Court found that “common sense and experience” suggested the accused would have known the checks were stolen: 412 U.S. 837, 845 (1973).

84. *Turner v. United States*, 396 U.S. 398 (1970).

85. *Id.* at 429.

“senseless and stupid” for the constitutional design of protecting an accused’s right to due process, including the presumption of innocence, and other rights like the right to silence,⁸⁶ if legislatures could, by “sleight of hand,” obviate these protections through the surreptitious use of presumptions.⁸⁷ Within limits, legislatures were free to cast the elements of particular offenses as they saw fit. But once they had, the constitutional design required the prosecutor to prove beyond reasonable doubt each of the designated elements of the offense. This is mirrored in strong dissents in other cases.⁸⁸

The presumption of innocence was strongly re-asserted by the Supreme Court in *In re Winship*.⁸⁹ They stated strongly that the due process clause protected the accused against conviction except on proof beyond reasonable doubt of every fact necessary to constitute the crime with which the accused had been charged.⁹⁰ The Court justified this on the basis of the stigma that a convicted person faced, the fact that a person’s liberty was at stake, and the fact that the public must retain respect for and confidence in the criminal justice system. The moral force of the criminal law ought not be diluted by a standard of proof that left people in doubt regarding whether innocent people were being convicted.⁹¹

The court subsequently emphasized that its holding in *In re Winship* was concerned with substance, and in particular the degree of criminal culpability, rather than form. Specifically, it would not be possible for a legislature to redefine elements of crimes as factors relating only to punishment.⁹²

86. *Id.* at 430.

87. *Id.*

88. For example, in *Barnes*, 412 U.S., Douglas, J., said the use of presumptions and inferences to prove an element of crime was “treacherous” because it allowed the accused to be jailed although an element of the offense had not been proven, undermining the integrity of the judicial system (850); Brennan, J., (with whom Marshall, J., agreed) also found use of the presumption presented the possibility that an accused could be convicted although an element of the offense had not been proven beyond reasonable doubt (853), violating the Fifth Amendment.

89. *In re Winship*, 397 U.S. 358 (1970).

90. *Id.* at 364 (Brennan, J., for five members of the Court).

91. *Id.* at 363–64 (Brennan, J., for five members of the Court). It was described as a “basic component of a fair trial” in *Estelle, Corrections Director v. Williams*, 425 U.S. 501, 502 (1976) (Burger, C.J., for Stewart, White, Blackmun, Powell, & Rehnquist, JJ.).

92. “The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged”: *Patterson v. New York*, 432 U.S. 197, 210 (1977) (White, J., for Burger, C.J., Stewart, Blackmun, & Stevens, JJ.).

For instance, it could not impose a life sentence on any homicide, including one that might be traditionally characterized as manslaughter rather than murder, unless the defendant could show their acts were neither intentional nor criminally negligent.⁹³ This would be an example of transferring something that historically went to an element of a crime (murder, as opposed to manslaughter) to something relevant only to the sentencing stage. It has never been the case that the prosecution must negate the existence of all affirmative defenses in order to meet Fifth Amendment requirements.⁹⁴

A debate occurred in *Patterson v. New York* regarding the possibility that, in order to circumvent the presumption of innocence protection, the legislature might redefine elements of the crime as defenses. Whereas some had read *Mullaney* to preclude this, in *Patterson* (shortly after *Mullaney*) the majority took a formalistic approach, requiring that the prosecution prove each of the elements of the offense as described by statute. The majority acknowledged the possible difficulty that a canny legislature might respond by simply redefining what traditionally have been elements of a crime as defenses, or as aspects relating to punishment, in order to circumvent the presumption of innocence requirement. They indicated there were “obviously constitutional limits” to the ability of the legislature to do so. It was not precisely clear what these were, but the example they provided was that the legislature could not presume all facts essential to guilt upon proof of the identity of the accused.⁹⁵

93. *Mullaney v. Wilbur*, 421 U.S. 684, 698–99 (1975) (Powell, J., for Douglas, Brennan, Stewart, White, Marshall, & Blackmun, JJ.) (court striking down an attempt to impose a legal burden on the accused to make out a defense of provocation on this basis. The law’s position had developed to a point where now it was generally accepted that the prosecution was required to prove the absence of (legal) provocation) (696). Rehnquist, J., (with whom Burger, C.J., agreed) concurred, noting that the prosecution was required to prove beyond a reasonable doubt every element of the crime charged against a defendant (705), but the prosecutor was not required to prove the sanity of the accused. Somewhat equivalently, the Court found that a requirement that a defendant prove the defense of severe emotional disturbance on the balance of probabilities was not a breach of due process: *Patterson*, 432 U.S.

94. *Patterson*, 432 U.S. at 210.

95. *Id.* at 210 (White, J., for Burger, C.J., Stewart, Blackmun, & Stevens, JJ.). Another example of a highly formal approach is *Martin v. Ohio*, 480 U.S. 228 (1987), where the Supreme Court validated provisions casting the persuasive burden of proof on the accused to prove self-defense. The Court found the legislature could define the elements of a particular crime as it wished.

This was over a powerful dissent by Judges Powell, Brennan, and Marshall. Judge Powell, with whom the others agreed, claimed the approach of the majority was too formalistic, effectively permitting a legislature to shift the burden of proof onto the defense, provided it did not mention the issue in the definition of the offense.⁹⁶ Responding to the vexed question of how to determine which, if any, elements can effectively be transferred to the defense via careful drafting of the definition of the offense, the dissenters determined that the prosecution was required to prove beyond reasonable doubt anything that made a substantial difference in punishment and stigma.⁹⁷ Certainly, that applied to something that made the difference between guilt and innocence. However, a simple difference in punishment was not enough; it would also need to be shown that according to common law tradition, the thing was historically associated with distinguishing guilt from innocence. Applying their tests, the dissenters found the provision infringed the due process requirement of the Fifth Amendment, because the existence or non-existence of extreme emotional disturbance did critically affect punishment and stigma. Historically in the criminal law, murder was treated as critically different to manslaughter, in terms of punishment. This meant that the prosecution needed to prove the absence of extreme emotional disturbance.⁹⁸

The Supreme Court has also distinguished between mandatory presumptions, requiring that the fact finder presume a given fact from other facts, unless the defendant presents evidence to the contrary (either a legal burden [of persuasion] or evidentiary burden [of production]).⁹⁹ This compared with a system that permitted, but did not require, the fact finder to make the inference (a permissive inference). The latter was only invalid where there was no rational way the fact finder could make that connection. It did not shift the burden of proof. In contrast, the former is more troublesome, in that it does shift the burden. In such cases, there must be other evidence of the fact presumed other than the presumption, unless the

96. *Patterson*, 432 U.S. at 223–24.

97. *Id.* at 226.

98. *Id.* at 227.

99. *County Court of Ulster County, New York et al. v. Allen*, 442 U.S. 140 (1979); see Shari Jacobson, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by Allen*, 42 U. MIAMI L. REV. 1009 (1988).

fact proved can support the inference of guilty beyond reasonable doubt. A majority in that case validated a permissive presumption that occupants of a vehicle in which a gun was found were in possession of the gun, on the basis that it was more likely than not.¹⁰⁰

Later, the Court considered a court's direction to a jury, in relation to the commission of an alleged offense where intent was an element. The direction was to the effect that an individual was presumed to have intended the ordinary consequences of their actions. The Court found the jury might have interpreted this to mean either that (a) they were to apply a conclusive presumption that the element of intent was satisfied if they believed the accused's actions were voluntary; or (b) they were to assume that the accused had the required intent, unless the accused could meet the burden of *persuasion* (rather than a mere burden of *production*) otherwise. The Supreme Court found that, either way, it was unconstitutional.¹⁰¹ While the Court's position was clear that a transfer of the burden of persuasion would be unconstitutional, it did not clarify whether a transfer of the burden of production would suffer the same fate.

The Court has also been wary of legislative attempts to redefine elements of offenses as "sentence enhancing factors," in an effort to avoid having to prove the fact/s upon which critical consequences depend. So, for example, it struck out legislation that provided for an enhanced penalty if a judge was satisfied on the balance of probabilities that the accused committed the crime for reasons of race, which finding increased the permissible range of penalties to which the accused was subject. The Court found that anything that increased the penalty for a crime beyond the maximum for a category of offense had to be proven beyond a reasonable doubt.¹⁰²

100. *Allen*, 442 U.S. at 167 (Stevens, J., for Burger, C.J., White, Blackmun, & Rehnquist, JJ.).

101. *Sandstrom v. Montana*, 442 U.S. 510 (1979). The unconstitutionality of any presumption that relieved the State of its burden of persuasion in relation to any elements of the offense charged was also emphasized in *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (Brennan, J., for White, Marshall, Blackmun, & Stevens, JJ.).

102. *Apprendi v. United States*, 530 U.S. 466, 490 (2000) (Stevens, J., for Scalia, Souter, Thomas, & Ginsburg, JJ.).

D. United Kingdom/Europe¹⁰³

The presumption of innocence appears in several 18th century English cases,¹⁰⁴ and in 1935, it was referred to as the “golden thread” running through criminal law, though not absolute.¹⁰⁵ It is now enshrined in Article 6(2) of the European Convention on Human Rights, incorporated into United Kingdom law by the Human Rights Act 1998 (UK). Note also that § 4(1) of the Human Rights Act 1998 (UK) requires a court to interpret legislation so that it is compatible with Convention rights. The court has found that presumptions of fact or law operate in a range of legal systems, and their presence per se does not offend the Convention. Further, contracting states can sometimes penalize a simple objective fact; intention or criminal recklessness was not always essential.¹⁰⁶ However, there are limits, and presumptions must be kept within reasonable limits, bearing in mind the important interests involved and the rights of the defendant.¹⁰⁷ Specifically, the presumption of innocence may not be an absolute requirement, but the requirement of a fair trial, of which the presumption of innocence is typically a part, is absolute.¹⁰⁸

Note that a majority of the countries subject to the European Convention have a tradition of an inquisitorial, rather than adversarial, system of justice. There might be a tendency to equate the presumption of innocence requirement with a beyond reasonable doubt requirement, which is a feature of a common law, adversarial system; whereas typically an inquisitorial system is focussed on the determination of truth, and whether the truth is that the accused is guilty. Further, although it will be seen that sometimes courts have responded to the fact that a provision casts an onus on the

103. Despite the Brexit vote on 23 June, it remains correct to discuss these together because the United Kingdom remains part of Europe, and at the time of writing, there is no current suggestion that it will repeal its Human Rights Act 1998 (U.K.) implementing the European Convention on Human Rights.

104. *Regina v. Best*, (1705) 87 Eng. Rep. 941, 942: “every man is presumed innocent until the contrary appears” (Holt, C.J.) (Q.B.); *Bird v. Bird*, (1753) 161 Eng. Rep. 78, 79 (wife accused of bigamy presumed innocent).

105. *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, 481 (Viscount Sankey, for the Court) (excepting the defense of insanity and statutes to the contrary).

106. *Salabiaku v. France*, (1988) 13 EHRR 379, [27].

107. *Id.* at 379, [28].

108. *Brown v. Scott*, [2003] 1 A.C. 681, 693 (Lord Bingham), 719 (Lord Hope), 727 (Lord Clyde) and 730 (Rt. Hon. Kirkwood) (five Lords heard the case).

accused by reading it down to a mere evidentiary (some evidence) standard rather than the legal onus of balance of probabilities, there is no counterpart to this in the inquisitorial system, and the distinction is not expressly recognized in the European Convention.¹⁰⁹ There is a long history of the presumption of innocence in the civil law tradition, given its recognition in Roman law, canon law, and the *ius commune*,¹¹⁰ including both in both criminal and civil proceedings,¹¹¹ and it typically extends beyond the trial to include pre-trial procedures.

The British courts considered terrorism legislation, which created an offense of having any article in one's possession in circumstances giving rise to a reasonable suspicion that they have it for a purpose connected with terrorism.¹¹² A person present in premises could be charged if the article was found on the premises. A defense applied if the person could show the article was not in their possession for such a purpose, or that they did not know that the item was on the premises, or if they did know, that they had no control over it. The Court found that the section was contrary to Article 6(2) of the Convention. This finding was strictly *obiter dicta*, since the Convention was not yet operative in the United Kingdom at the relevant time.

Lord Bingham (then in the Queen's Bench division, later appointed to the Supreme Court) found the provision undermined the presumption of innocence in a "blatant and obvious way."¹¹³ He stated the "gravamen" of the offense charged was possession (*actus reus*) and a terrorist purpose (*mens rea*).¹¹⁴ However, the prosecution need not prove either; in both cases, they could rely on a presumption in their favor. This raised the unwelcome spectre of an accused being found guilty of an offense, although there was reasonable doubt whether the accused was aware of the items on the premises, or whether they had them for a purpose of terrorism. Citing the

109. This was noted in *Sheldrake v. DPP*, [2005] 1 A.C. 264, 320 (Lord Rodger).

110. Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 THE JURIST 106, 116 (2003).

111. Carl-Friedrich Stuckenberg, *Who is Presumed Innocent of What by Whom?*, 8 CRIM. L. & PHIL. 301, 303 (2014).

112. *R v. Director of Public Prosecutions, Ex Parte Kebilene and Others*, [2000] 2 A.C. 326.

113. *Id.* at 344.

114. *Id.*; the concept of "gravamen" was also referred to in *Sheldrake*, 1 A.C. at 324 (Lord Carswell).

judgment of the Canadian Supreme Court in *Whyte*, he found that this position was untenable.¹¹⁵

Lord Hope distinguished between presumptions that imposed a mere evidentiary burden on an accused, requiring them to raise some evidence (a reasonable doubt) as to a particular issue, and legal burdens, requiring the accused to prove something on the balance of probabilities. The former did not raise any Convention issues since it did not raise the possibility that an accused could be convicted despite the existence of reasonable doubt as to their guilt.¹¹⁶ The latter warranted further consideration. Three types were identified:

- (a) a mandatory presumption of guilt as to an essential element of the offense;
- (b) a discretionary presumption of guilt as to an essential element; and
- (c) provisions relating to an exemption or proviso that the accused must establish to avoid conviction, but not an essential element of the offense.

Provisions of type (a) were inconsistent with the presumption of innocence in Article 6(2); provisions of type (b) or (c) warranted further investigation, and no definite answer was possible in the abstract.¹¹⁷

Even if a provision was inconsistent with the presumption of innocence, it did not automatically mean the Convention had been breached. The Convention included a “margin of appreciation” for legislatures in relation to laws that arguably breached Convention rights. A proportionality analysis would then be appropriate. Various factors have been articulated as being relevant to such an analysis, similar to the Canadian proportionality analysis articulated in *Oakes* above. They include the legitimate objective sought to be achieved by the provision,¹¹⁸ how appropriate the method/s used are to achievement of that objective,¹¹⁹ what the prosecution must prove before the onus shifts,¹²⁰ practical difficulties for the prosecution in proving particulate

115. *Kebilene*, 1 A.C. at 345.

116. *Id.* at 379.

117. *Id.* at 379.

118. *Id.* at 387 (Lord Hope); *McIntosh v. Lord Advocate*, [2003] 1 A.C. 1078, 1094 (Lord Bingham, with whom all other Lords agreed).

119. *Brown v. Scott*, [2003] 1 A.C. 681, 720 (Lord Hope).

120. *McIntosh*, 1 A.C. at 1094.

aspects,¹²¹ reasonableness,¹²² whether the presumption is rebuttable or non-rebuttable,¹²³ the ease with which the accused could present evidence as to the matters in dispute,¹²⁴ the seriousness of the likely penalty,¹²⁵ and whether measures less invasive of the presumption were reasonably available.

A presumption that only applied following the conviction of an accused would not breach Article 6(2) of the Convention, because the ambit of Article 6(2) was limited to a person *charged* with a criminal offense, and a person who had been convicted of an offense was not within this category.¹²⁶ The Court is more likely to validate presumptions in the context of “regulatory schemes.” So, for instance, a requirement of a person keeping a vehicle that they provide details of the driver of a vehicle, and the creation of an offense if a person fails to provide such information when asked (subject to a defense if they do not know who the driver is), was not a breach of the requirement of a fair trial, including presumption of innocence and the privilege against self-incrimination.¹²⁷

The existence of § 4(1) of the Human Rights Act 1998 (UK), permitting a court to interpret legislation in a way that does not undermine the rights enshrined in the European Convention, has been important. On occasion, courts have used this provision to read down what might otherwise have been a legal onus on the accused, to a mere evidentiary onus only. This occurred, for example, in *R v. Lambert*.¹²⁸ There the appellant was charged

121. *Id.* at 1098.

122. *Id.* at 1096.

123. *R v. Lambert*, [2002] 2 A.C. 545, 620 (Lord Hutton).

124. *McIntosh*, 1 A.C. at 1094; *R v. Director of Public Prosecutions, Ex Parte Kebilene and Others*, [2000] 2 A.C. 326, 387 (Lord Hope); *R v. Johnstone*, [2003] 1 W.L.R. 1736 (Lord Nicholls) (with whom all other Lords agreed).

125. *Kebilene*, 2 A.C. at 346 (Lord Bingham); *Lambert*, 2 A.C. at 609 (Lord Clyde).

126. *McIntosh*, 1 A.C. The presumptions applied to a person convicted of drug offenses and related to confiscation of property. The court was permitted to make presumptions that property transferred to the convicted person within six years prior to their conviction was drug-related (and liable to confiscation), as well as in relation to currently held property. The court found the presumptions were not inconsistent with Article 6(2).

127. *Brown v. Scott*, [2003] 1 A.C. 681; because the requirement was minimally invasive of the privilege against self-incrimination and related only to driving, and it was not, in itself, an offense to drive a vehicle (705 (Lord Bingham), 710 (Lord Steyn), 723 (Lord Hope), 728 (Lord Clyde), and 733 (Rt. Hon. Kirkwood)), and was a proportionate response to the pressing public safety issue of drink driving (706 (Lord Bingham) and 711 (Lord Steyn), 722 (Lord Hope), Lord Clyde (728), and Rt. Hon. Kirkwood (731)).

128. *Lambert*, 2 A.C.

with possession of an illegal drug with intent to supply. The Act provided a defense in § 28 if the accused showed that they were not aware of the nature of what they possessed, nor had reason to suspect what it was.

A majority found that the offense as interpreted did not require the prosecution to prove that the accused knew or reasonably suspected that the substance they had in their possession was an unlawful substance.¹²⁹ However, they were concerned that § 28 could be read as imposing a legal (evidentiary) burden on the accused. If it were read in this way, an accused could be convicted despite the existence of reasonable doubt about whether the accused was aware (or ought reasonably to have been aware) of the nature of what they possessed.¹³⁰ Given the possible consequences of conviction, including life imprisonment, the majority judges were greatly concerned with that possibility, and its compatibility with the European Convention. As a result, they used the § 4(1) procedure to “read down” what otherwise appeared to be a legal onus on the accused, to be merely an evidentiary onus, requiring the accused merely to raise *some* evidence as to that fact.¹³¹ Two of the judges in the case appeared to take a substantive, rather than purely textual, view of what was an element of an offense. Lord Steyn found that despite the way in which the offense was worded, in effect the provision cast the onus on the defense to disprove something that was in substance an ingredient of the offense committed.¹³²

129. Lord Slynn (563), Lord Hope (580), Lord Clyde (601).

130. This concern was articulated by Lord Steyn (571–572), Lord Hope (587), and Lord Clyde (609).

131. Lords Slynn, Steyn, Hope, and Clyde. Lord Hutton maintained the onus of proof in § 28 was a legal onus, but was not incompatible with the European Convention as it was directed toward an important objective, the presumption was tailored to that objective, the presumption was narrow and rebuttable, and it was on a matter that would otherwise be difficult for the prosecution to practically prove (622–25).

132. *Lambert*, 2 A.C. at 571: “the distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue . . . it is necessary to concentrate on substance.” He said there were cases where the defense was “so closely linked with mens rea and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the accused”; likewise Lord Clyde (607) (“one must look not only at the form of the legislation but its substance and effect”); this view was also taken by the Privy Council in *Attorney-General of Hong Kong v. Lee Kwong-kut*, [1993] A.C. 951, 969–70, stating that what is decisive is the “substance and reality of the language creating the

In the conjoined appeals decision in *Sheldrake*,¹³³ the Court heard an appeal against a motor vehicle conviction and a terrorism conviction. The motor vehicle provision made it an offense to be in charge of a motor vehicle whilst under the influence of alcohol, subject to a defense where the burden was on the accused to show there was no likelihood of them driving the vehicle. The terrorism offense made it an offense to belong to, or to profess to belong to, a proscribed organization. It was an offense for the accused to show both that the organization had not been proscribed at the time they joined the organization, and that they had not taken part in the activities of the organization at any time whilst it was proscribed. The government conceded this provision contained merely an evidentiary, rather than legal, onus on the accused.

A majority held the motor vehicle provision was valid. Even assuming the provision infringed the presumption of innocence, it was directed at a legitimate objective, namely public safety. Placement of the onus on the accused here was not unreasonable or arbitrary. The defendant had full opportunity to show they did not intend to drive, and it was a matter virtually entirely within their knowledge. It was not necessary to show that the presumption made flowed “inexorably” from the fact proven; however it was true that the more far-fetched a presumption was, the more suspect it was likely to be.¹³⁴

The majority expressed concern with the terrorism offense. It could include a person who joined an organization when it was not a terrorist organization, or when it was, but the accused was not aware of this. It could include a person who joined an organization when it was not proscribed, or when it was, but the person was not aware of this. It could lead to the punishment of an individual who was guilty of “no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.”¹³⁵ A person could be convicted of conduct that was not criminal at the time of commission.

offence rather than its form.” This may be similar to the use of the concept “gravamen” in this context by Lord Bingham in *Kebilene* and Lord Carswell in *Sheldrake*.

133. *Sheldrake v. Director of Public Prosecutions Attorney General’s Reference* (No. 4 of 2002), [2005] 1 A.C. 264.

134. *Id.* at 309 (Lord Bingham, with whom Lords Steyn and Phillips agreed) (five Lords heard the case).

135. *Id.* at 311–12.

While the legislation was directed to a legitimate objective, that of deterring membership of terrorist organizations, it had also to be proportionate and justifiable in relation to that objective. Here it attached possibly serious criminal sanctions (10 years' jail) to conduct that was not, in substance, blameworthy or *properly* described as criminal.¹³⁶ It might be all but impossible for an accused to show they did not play a role in the organization's affairs—it was unlikely a terrorist organization would have minutes or records to facilitate this. Others were unlikely to come forward to testify on behalf of the accused. As a result, the majority read the defense as containing merely an evidentiary, rather than legal, onus, to make it compatible with Article 6(2).¹³⁷

Having considered the case law in a range of jurisdictions, this Article will now make some observations of the existing jurisprudence on the presumption as the case law currently stands. These observations are made in the context of the historical importance of the presumption and its rationale, and whether and to what extent departures from the presumption can be justified. It will consider limits on reverse onus provisions identified in some of the above cases, and the question of limits to the ability of legislatures to define crimes in the manner they may wish.

II. ISSUES REGARDING THE PRESUMPTION

A. Prime Importance of the Presumption of Innocence and its Rationale

The presumption is of ancient vintage. There are references to it in the Code of Hammurabi (1792–1750 BC).¹³⁸ Roman law placed the burden of

¹³⁶ *Id.* at 313.

¹³⁷ *Id.* at 314.

¹³⁸ “It is a fundamental principle of the code of Hammurabi that the presumption is always in favour of the innocence of the accused: the burden of proof is thrown upon the accuser . . . Not merely is the burden of proof upon the accuser, but in all primitive society [*sic*] the entire burden of accusation or indictment falls upon him. In this respect, the legal procedure of Babylonia seems to have been that of all early nations”: Allen Godbey, *The Place of the Code of Hammurabi*, 15 THE MONIST 199, 210 (1905); Stuckenberg, *supra* note III, at 311: “the burden of proof always rested on the prosecution since antiquity.”

proof on the plaintiff,¹³⁹ and it was a serious offense to accuse another without proof. A Constitution of Emperors Gratian, Valentinian, and Theodose (AD 382) stated that accusations brought had to be supported by evidence that was “clearer than light,” as did a Constitution of Emperors Honorius and Theodose in AD 423. The defendant received the benefit of the doubt.¹⁴⁰ Greek orator Demosthenes stated in 352 BC that “no man comes under that designation [criminal] until he has been convicted and found guilty.” This related to conscience, Demosthenes articulating that only upon conviction would “conscience permit us to inflict punishment according to knowledge, but not before.”¹⁴¹

There are numerous references to the presumption of innocence in English law. It is not surprising that the common law had no need for such a doctrine when it was believed that guilt or innocence would be indicate supernaturally, through trial by oath or compurgation, or trial by ordeal.¹⁴² Discontinuation of such practices by the early 13th century prefaced a serious conversation about how a legal system would determine the guilt or innocence of an accused. At this time, decision makers were extremely anxious about the consequences for them in the afterlife if they made an incorrect decision that a person was guilty of an offense.¹⁴³ This fed into a wariness about finding a person guilty of wrongdoing, on the basis of a “safer path” doctrine.¹⁴⁴ It is sometimes sourced to Bracton,¹⁴⁵ and was referred to by William of Ockham (1285–1349).¹⁴⁶ References

139. Code Just. 2.1.4 (Antonin, 212): “he who wishes to bring an accusation must have the evidence, likewise”; Code Just. 4.19.23 (Diocletian & Maximian 304); Dig. 22.3.2 (Paul, Ad Edictum 69).

140. Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, III–12 (2010); some of the Roman history is discussed in *Coffin v. United States*, 156 U.S. 432, 453–56 (1895) (White, J., for the Court).

141. DEMOSTHENES AGAINST MEIDIAS, ANDROTIION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 229 (J.H. Vince trans., 1935); appreciation is expressed to Quintard-Morenas, *supra* note 140, at III–14, for these references.

142. William Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 330–32 (1995).

143. JAMES WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008).

144. For example, Pope Gregory: “it is a grave and unseemly business to give a judgment that purports to be certain when the matter is doubtful”; Pope Innocent III: “when there are doubts, one must choose the safer path”: WHITMAN, *supra* note 143, at 116–17.

145. James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 190 (1897).

146. Quintard-Morenas, *supra* note 140, at 124.

include a 1293 Court of Common Pleas decision,¹⁴⁷ the existence of legislation providing for bail (on the basis that a person detained was entitled to be presumed innocent and thus entitled to freedom),¹⁴⁸ a House of Commons speech of 1624,¹⁴⁹ an English case in the 1750s,¹⁵⁰ treatises of the law at the time,¹⁵¹ and a report of a trial in 1790.¹⁵²

Many rationales have been presented to defend the presumption of innocence. They include the “safer path” doctrine alluded to above, that when in doubt, no action should be taken in relation to allegations, reflecting the moral gravity involved in exacting punishment, and at least historically, fears for the fate of the mistaken decision maker in the afterlife. It recognizes the reality that mistakes are sometimes made in the adjudication process, and seeks to allocate the risk of wrong decision.¹⁵³ Other rationales reflect that the punishment for a person convicted of a crime is sometimes extremely severe, involving jail time, which is an extremely significant restriction on the liberty of an individual in the context of liberal legal order,¹⁵⁴ or in some cases, death. Given the high stakes involved and the damage done to the person convicted, it is appropriate to take care to

147. “Felony is never fastened on any person before he is by judgment convicted as guilty of the deed”: 2 YEARBOOKS OF THE REIGN OF KING EDWARD THE FIRST: YEARS XXI AND XXII 56–57 (Alfred Horwood ed., 1873) (citing a 1293 Common Pleas decision).

148. 3 Edw. I, c.15 (1275) (Eng.).

149. Sir Edwyn Sandys reminded fellow parliamentarians of the “ancient Rule, every Man is presumed to be innocent, till he be proved otherwise”: HOUSE OF COMMONS JOURNAL, Vol. 1, 1547–1629 (1802).

150. *Bird v. Bird*, (1753) 161 Eng. Rep. 78, 79.

151. “A man . . . shall be suppos’d innocent till found otherwise by his Peers, (on lawful testimony) who pass Judgment on his Trial”: *A New Year’s Gift for Mr Pope Being a Concise Treatment of all the Laws, Statutes and Ordinances, Made for the Benefit and Protection of the Subjects of England* 84 (1736); “in some cases, the man (who is always supposed innocent till there is sufficient proof of his guilt) is allowed a copy of his indictment, in order to help him to make his defence”: *An Account of the Constitution and Present State of Great Britain* 104 (1759).

152. “[T]he law of my country, which presumes every man to be innocent till proved guilty”: 1 THE LAWYER’S AND MAGISTRATE’S MAGAZINE. IN WHICH IS INCLUDED AN ACCOUNT OF EVERY IMPORTANT PROCEEDINGS IN THE COURTS AT WESTMINSTER 405–406 (1792).

153. Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 10 INT’L J. EVIDENCE & PROOF 241, 248 (2006).

154. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 237–38 (1996); Hamish Stewart, *The Right to be Presumed Innocent*, 8 CRIM. L. & PHIL. 407, 408–409 (2014); Ashworth, *supra* note 153, at 247.

ensure the decision is correct;¹⁵⁵ as such, every reasonable doubt should be resolved in favor of the accused. This is connected with oft-stated principle that it is better that (a variable number of) guilty people go free than that one innocent person is condemned.¹⁵⁶

Some scholars focus on the stigma associated with a criminal conviction as justifying a starting position of presumed innocence.¹⁵⁷ The life of a person with a criminal record can be permanently affected by the fact of their conviction, in terms of employment prospects, voting rights, and their ability to socialize with others and live a “normal” life in society once they have served their punishment.¹⁵⁸ Somewhat related are notions of “respect”—that society respects an individual by presuming they behave well, in the absence of compelling evidence to the contrary, and any doubt is to be resolved in the individual’s favor.¹⁵⁹

Others focus on the fact that the state has a sizeable resources advantage over an individual, substantial investigatory powers, and having repeat players in court process, has further advantages over an accused in terms of familiarity with the rules and processes.¹⁶⁰ Given these strong natural advantages for the prosecutor, presuming that an accused is innocent of the allegations goes some way to counteracting these in-built advantages. Some point to the fact that public confidence in the judicial system is essential for its continued ability to function. One sure way of undermining such confidence would be if the court system regularly made mistakes by convicting the innocent.¹⁶¹ We know that fact finding is not a perfect science,

155. *In re Winship* 397 U.S. 358, 363 (1970) (Brennan, J., for the Court); Paul Roberts, *Taking the Burden of Proof Seriously*, CRIM. L. REV. 783, 785 [1995].

156. Traianus, Dig. 48, 19, 5. PR., MATTHEW HALE, PLEAS OF THE CROWN 289 (1678); FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE c.27 (1545); SIR WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND c.27 (1765–1769), margin p. 358.

157. *In re Winship*, 397 U.S. at 363 (Brennan, J., for the Court); *R v. Oakes*, [1986] 1 S.C. R. 103, 120 (Dickson, C.J., for Chouinard, Lamer, Wilson, & Le Dain, JJ.).

158. RICHARD LIPPKE, TAMING THE PRESUMPTION OF INNOCENCE 22 (2016).

159. Victor Tadros, *The Ideal of the Presumption of Innocence*, 8 CRIM. L. & PHIL. 449, 458 (2014); Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions*, 2 CRIM. L. & PHIL. 21, 22 (2008); Ian Dennis, *The Human Rights Act and the Law of Criminal Evidence: Ten Years On*, 33 SYDNEY L. REV. 333, 354 (2011).

160. Ashworth, *supra* note 153, at 249–50.

161. *In re Winship*, 397 U.S. at 364 (Brennan, J., for the Court).

and mistaken judgments will sometimes be made.¹⁶² By seeking to minimize such risks through use of the presumption of innocence and the connected principle of beyond reasonable doubt, we seek to ensure that the public can continue to have faith in our system of criminal justice. Some argue it reflects who we are as a society.¹⁶³

On the other hand, it must be acknowledged that governments have a responsibility to their citizens to provide as safe a society as possible, and this clearly includes prosecuting those accused of wrongdoing. No doubt, the effect of the presumption of innocence doctrine is that, in practice, some individuals who are in fact guilty go free, because the government cannot prove allegations against them beyond reasonable doubt. All of us suffer the cost of this, in that this person may re-offend against us or our family or friends, or our communities.

Further, it should also be acknowledged that on many occasions, it will be easier for an accused person to prove their innocence than for a prosecutor to prove guilt. In some cases, the accused may be the only one who was present, or the only one who was present who is alive or otherwise able to testify. Issues such as intention or knowledge are notoriously difficult for a prosecutor to prove. In such a climate, it is understandable that there should be clamor for laws that make it easier to successfully prosecute those accused of wrongdoing, by altering the presumption of innocence, and/or by creating reverse onus provisions that cast the obligation onto the accused to prove something, particularly where it is something that would be a relatively easy matter upon which the accused could present evidence, and/or relatively difficult for the prosecutor to obtain appropriate evidence. Some may argue that the seriousness of the offense, such as terrorist offenses, justifies a relaxation of the presumption of innocence requirement, on the utilitarian basis that it is better to forego one person's civil rights to save the lives of potentially many others.

162. Liz Campbell, *Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence*, 76(4) MOD. L. REV. 681, 683 (2013).

163. Sherman Clark, *The Juror, the Citizen and the Human Being: The Presumption of Innocence and the Burden of Judgment*, 8 CRIM. L. & PHIL. 421, 429 (2014), noting that "how we judge is recognised as saying something important about who we are. And it does"; Ashworth, *supra* note 153, at 249: "the presumption of innocence is a moral and political principle, based on a widely shared conception of how a free society (as distinct from an authoritarian society) should exercise the power to punish."

It has been a recognition of both of these arguments as valid that has led generally to courts' acceptance of the fact that the requirement of presumption of innocence is not a principle to be applied in an absolute manner, and that some departures may be consistent with constitutional and human rights norms, on a proportionality analysis. As ever, the devil has been in being able to articulate the detail—the circumstances in which departures from the presumption should be permitted, or whether this goal is too ambitious, and the best we can do is to come up with a list of considerations guiding a proportionality analysis in this respect, or to abandon the search for general principle altogether, and resolve to decide such cases on a case-by-case basis. However, the rationale and purpose of the presumption must be borne in mind in assessing when, if ever, a reverse onus provision is constitutionally/legally permissible. It is to that issue that our discussion now turns.

B. When Should a Reverse Onus Provision be Objectionable?

There is intuitive appeal in the approach adopted by the Canadian Supreme Court, and some members of the United Kingdom House of Lords/Supreme Court, that a law infringing the presumption of innocence is vulnerable to challenge when it effectively creates the possibility that a person can be convicted despite the existence of a reasonable doubt as to their guilt.¹⁶⁴ This could arise if the accused could raise some evidence consistent with their innocence (reasonable doubt), but not such as to meet the balance of probabilities standard. The idea that a person could be subject to criminal sanction and punishment although there is reasonable doubt as to their guilt would instinctively cause discomfort to most lawyers.

The possibility of this unwelcome outcome is seen most obviously on the facts of *Oakes* itself, where the offense was having in one's possession a narcotic for the purposes of trafficking. Thus, the offense expressly comprised two elements: (a) the accused having a narcotic in their possession,

¹⁶⁴ This position is supported by Glanville Williams: "if the legislator decrees that the persuasive burden in respect of a defence . . . rests on the defendant, he is decreeing that, failing proof of the defence, the defendant can be convicted without proof of the offence package. The defendant can be convicted without proof of the offence package. The defendant can be convicted notwithstanding that there is evidence in favour of the defence and the defence has not been disproved . . . (no) considerations of policy can justify it": *The Logic of Exceptions*, 47(2) CAMBRIDGE L.J. 261, 280 (1988).

and (b) having it for the proscribed purpose. Although normally one would expect the prosecution to have to prove both of these elements at the beyond reasonable doubt level, the legislation stated that element (b) would be presumed against the accused, unless they proved to the contrary. Thus, in effect, the accused was required to disprove the existence of an express element of a proscribed offense, and the Court understandably found it was a breach of the presumption of innocence principle that could not be justified under § 1. Of course, the Court was correct in its concern with an innocent individual being convicted because they could not disprove element (b) of the offense on the balance of probabilities. With respect, this was a relatively easy case.

More difficulty arises when the thing that is being presumed is *not* an express element of the offense with which the offender has been charged. Here, the courts have been tested, with a range of approaches. Does the court simply accept the power of the legislature to define crimes in whatever manner it wishes? Can the legislature legislate to drain an offense of all moral blameworthiness? Can it criminalize in the absence of *mens rea*? Does it matter that the definition of that offense in the past typically did require moral blameworthiness and/or *mens rea*? Or should the court take a substantive view of what is an element of an offense (typically to be proven by the prosecution beyond a reasonable doubt) and what is a defense or excuse? And if so, how does it do so? What principle should it apply in making such an assessment?

An example may be useful for purposes of discussion. Take for example a traditional offense of armed robbery. In simple terms, such an offense has involved elements of (a) stealing the property of another, together with (b) violence or threatened violence. Assume the legislature takes the view that such a definition is overly prescriptive, and decides to redefine the offense so that it is only necessary, in order that the offense be substantiated, that the prosecutor prove that the accused is in possession of the property of another. Thereafter, the legislation contemplates that an armed robbery offense has been committed, unless the accused can prove that (a) they have the other's permission to possess the property, and (b) they did not use or threaten violence to obtain possession of the property.

It will be clear that the principle derived in *Oakes*—that a departure from presumption of innocence will not be permitted where it is such that a person can be convicted despite the existence of reasonable doubt that they committed the offense—does not assist. Literally, the person in possession of

another's property has committed the offense, at least in the terms in which it was legislated. Thus, this example shows that, although laudable, the *Oakes* principle is arguably not sufficient to protect against the type of law that instinctively most of us would find to be objectionable.

Approaches to this question in the literature and in the courts have differed. At one extreme is the literalist approach favored by scholars such as Roberts.¹⁶⁵ His position is that human rights instruments are concerned with fairness in procedure, as opposed to substance. He argues that the presumption of innocence simply means that the prosecution must prove each element of the offense, “whatever those elements may be—however many or few in number, and however exacting or undemanding the associated probative labour.”¹⁶⁶ In other words, he views it as a matter entirely for the legislature to nominate what are or are not elements of particular crimes, and claims that court review of the substance of the criminal law would be an abuse of the court's power.¹⁶⁷

Roberts' view has some attractions. It is a relatively simple approach: the role of the court is to simply interpret the legislation at face value, and determine the elements of the offense as defined by the legislature. If the prosecution is required to prove each of them beyond a reasonable doubt, the presumption of innocence is not offended. It might be thought to pay proper deference to the legislature as the democratically elected body, which has the power to determine the substance of its own criminal law. There might be legitimate concern raised with courts having an apparently open-ended commission to review the construction of every offense in the criminal law statute to determine its “fairness,” the lack of acceptable criteria and the inevitable uncertainty that such an approach would create in the criminal justice system. Legislatures would be unsure of the extent to which they had the power to articulate elements of crimes as they saw fit.¹⁶⁸ In contrast, Robert's approach provides certainty.

165. Paul Roberts, *The Presumption of Innocence Brought Home? Kebilene Deconstructed*, 118 LAW Q. REV. 41 (2002); see also PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 286–88 (2010).

166. Roberts, *supra* note 165, at 49.

167. *Id.* at 69.

168. Paul Roberts, *Drug Dealing and the Presumption of Innocence: The Human Rights Act (Almost) Bites*, 6 INT'L J. EVIDENCE & PROOF 17, 36 (2002): “once the presumption of innocence is given substantive content, there are not obvious conceptual limits on the scope for judicial reworking of the elements of criminal law offences.”

On the other hand, it may be criticized as being artificial, permitting principles that form the bedrock of our system of criminal justice to be effectively gutted by crafty legislative drafting. The argument is that if courts permit legislatures to effectively transfer the onus of proof by re-defining offenses to have very little content that must be proven by the prosecutor, legislating defenses that effectively place most of what used to have to be proven by the prosecutor into what is labelled a “defense” or “excuse” to be proven by the defense, that this would effectively neuter the presumption of innocence.¹⁶⁹ The argument would be that courts cannot and should not permit fundamental constitutional and human rights principles to be effectively gutted through legislative sleight of hand.¹⁷⁰ Jeffries and Stephan point out

Guilt and innocence are substantive concepts. Their content depends on the choice of facts determinative of liability. If this choice is remitted to unconstrained legislative discretion, no rule of constitutional procedure can restrain the potential for injustice. A normative principle for protecting the “innocent” must take into account not only the certainty with which facts are established but also the selection of facts to be proved. A constitutional policy to minimise the risk of convicting the “innocent” must be grounded in a constitutional conception of what may constitute “guilt”. Otherwise “guilt” would have to be proved with certainty, but the legislature could define “guilt” as it pleased, and the grand ideal of individual liberty would be reduced to an empty promise.¹⁷¹

It is these concerns that have led other scholars to attempt the construction of principle to try to prevent them from occurring. Glanville Williams stated that an exception “merely state[d] the limits of an offence,” and the

169. Victor Tadros, *Rethinking the Presumption of Innocence*, 1 CRIM. L. & PHIL. 193, 194 (2007): “there is little point in protecting procedural rights of defendants in the absence of fair substantive criminal law”; JOHN JACKSON & SARAH SUMMERS, *THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS* 209 (2012): “from the point of view of the defendant, it can be argued that there is little point in protecting the procedural rights of defendants in the absence of fair substantive criminal law.”

170. Tadros, *supra* note 159, at 459: “if the presumption of innocence is to be understood as a meaningful human right, and human rights should always be interpreted in a way that renders them meaningful, it is essential that the surface of legislation does not determine when the presumption of innocence is engaged.”

171. John Calvin Jeffries Jr. & Paul Stephan III, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1347 (1979).

prosecution has not discharged its burden unless they prove the exception is not applicable.¹⁷² He stated the distinction between offenses and defenses were often “matters of convenience of expression,”¹⁷³ and that it was ultimately the single issue of culpability that the prosecution must prove. A similar view was taken by Fletcher, whose research found that the division between things that one side must prove and things that the other side must prove was inherited in the criminal law from the non-criminal law, without much thought as to the appropriateness of doing so.¹⁷⁴ Jeffries and Stephan called the distinction between facts necessary to prove a crime and those needed to establish a defense “essentially arbitrary.”¹⁷⁵

This issue has been considered by many scholars. A substantive, rather than formalistic/literal, approach to what the presumption of innocence requires is also favored by Victor Tadros,¹⁷⁶ Stephen Tierney,¹⁷⁷ Antony Duff,¹⁷⁸ Andrew Stumer,¹⁷⁹ and Jeffries and Stephan.¹⁸⁰ Sundby favors an approach of “expansive proceduralism” whereby the prosecutor should be required to prove beyond reasonable doubt “every fact that bears on the individual’s guilt and punishment.”¹⁸¹ As indicated above, numerous British judges have articulated the importance of substance over form in this context.¹⁸²

172. Williams, *supra* note 164, at 262.

173. Glanville Williams, *Offences and Defences*, 2 LEGAL STUD. 233, 234 (1982); similarly Ashworth, *supra* note 153, at 259: “there has never been a firm legislative convention about the division of crimes into offence elements and defence elements, and it should therefore not be regarded as a sound basis for allocating the burden of proof.”

174. George Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968).

175. Jeffries & Stephan, *supra* note 171, at 1331–32.

176. Tadros, *supra* notes 159, 169.

177. Victor Tadros & Stephen Tierney, *The Presumption of Innocence and the Human Rights Act*, 67(3) MOD. L. REV. 402, 415 (2004).

178. Duff, *Strict Liability, Legal Presumptions and the Presumption of Innocence*, in APPRAISING STRICT LIABILITY 134 (A.P. Simester ed., 2005): “the presumption of innocence requires that defendants be convicted only on proof beyond reasonable doubt of what the law legitimately defines as culpable wrongdoing.”

179. STUMER, *THE PRESUMPTION OF INNOCENCE: EVIDENTIAL AND HUMAN RIGHTS PERSPECTIVES* (2010).

180. Jeffries & Stephan, *supra* note 171, at 1347.

181. Scott Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 488 (1989).

182. R v. Director of Public Prosecutions, Ex Parte Kebilene and Others, [2000] 2 A.C. 326, 344 (Lord Bingham); Sheldrake v. DPP, [2005] 1 A.C. 264, 324 (Lord Carswell); R v.

To like effect, some judges have expressed strong concern, in terms of the presumption of innocence, with criminal statute provisions that prescribe an offense in circumstances where the accused “may be guilty of no conduct which could reasonably be regarded as blameworthy, or such as should properly attract criminal sanctions.”¹⁸³ This ties in with conceptions of the liberal state and of the rationale of the presumption of innocence—that if the state wishes to interfere with an individual’s liberty, for instance by imprisoning them, there must be very good reason—that the person has done something that is morally blameworthy.¹⁸⁴

If it is accepted that a substantive approach, at least to some extent, should be applied to the issue, the next question is what principles should guide the court’s consideration in such matters. Possible principles here include, as Lord Bingham in *Sheldrake* suggested, considering whether conduct can “reasonably be regarded as blameworthy.”¹⁸⁵ This is also a position taken by Lippke. Rejecting the procedural approach, he writes:

Guilt cannot simply mean conduct in violation of the criminal law, no matter what the content of its provisions. If it meant that, then persons could be punished for conduct that was completely harmless or non-blameworthy or both . . . that would render the principle toothless. Instead, what we want to do is punish conduct that deserves censure and hard treatment because it is significantly blameworthy and harmful to others . . . conduct that does not satisfy these two conditions is innocent in the sense of undeserving of the censure of the criminal law.¹⁸⁶

Lambert, [2002] 2 A.C. 545, 571 (Lord Steyn) and 607 (Lord Clyde); and by members of the Privy Council in *Attorney-General (Hong Kong) v. Lee Kwong-kut*, [1993] A.C. 951, 969–70.

183. *Sheldrake*, 1 A.C. at 311–12 (Lord Bingham) (with whom Lords Steyn and Phillips agreed) (five Lords heard the case).

184. Fletcher, *supra* note 174, at 888.

185. *Sheldrake*, 1 A.C. at 313 (Lord Bingham) (with whom Lords Steyn and Phillips agreed); to like effect *Lambert*, 2 A.C. at 571 (Lord Steyn).

186. LIPPKE, *supra* note 158, at 73; Fletcher, *supra* note 174, at 915, notes that German law considers three questions in terms of criminal responsibility: (a) whether the defendant brought about a result proscribed by the legislation; (b) whether the act was socially unacceptable (unjustified); and (c) whether the actor was personally blameworthy. A finding of guilt requires a yes answer to each of the questions. Each of them must be proven by the prosecutor beyond reasonable doubt. He explains the German model as one where “all the substantive issues of liability are on an equal footing for purposes of determining liability; there is no significant difference between causing harm, intending it, intending it in self-defense, and intending it under duress. That some of these issues may appear in the affirmative and some in the negative is irrelevant. The decisive point is that all bear on the

There is some sense in this, although it can be criticized as being subjective and uncertain. Views will reasonably differ as to what conduct meets the description of “morally blameworthy” and whether judges are in an appropriate position to make such a judgment. And how can offenses of strict liability be justified under this theory, if at all?

Let us consider how this test might apply to some of the factual scenarios in the case law. Status offenses, such as mere membership in an organization, might be prohibited on the basis that mere membership, without proof of active participation in dangerous activity, for example, may be seen as not morally blameworthy. A person who is reasonably suspected of doing wrong should not be punished for that reason—for instance, the offenses around having something in one’s possession where there is a reasonable suspicion it was unlawfully imported (*Leary*), or to be used for terrorist activity (*Kebilene*). So too the offense of “living on the proceeds of prostitution” where the evidence of this is merely being in the presence of prostitutes (*Downey*). Some might also question creation of the offense of being in control of a motor vehicle whilst the person is under the influence of alcohol (*Whyte, Sheldrake*), in the absence of proof that the person intended to, attempted to, or did actually drive the vehicle.

Alternatives that have been suggested include that, in substance, an offense relates to behavior “against which the law takes there to be a prima facie reason,” while a defense relates to “exonerating conditions.”¹⁸⁷ Tadros and Tierney’s solution is to consider the (true) purpose of the challenged section.¹⁸⁸ For example, take the legislation in *Kebilene*, which created an offense comprised of (a) having an article in one’s possession (b) giving rise to a reasonable suspicion it was to be used in connection with terrorism. It was a defense for the accused to show they did not have a terrorism purpose. They argue the true purpose of the section, despite its wording, was to prevent actual terrorism. The provision would be contrary to the presumption “if the technical definition of the offense fails properly to recognize that the defendant is to be presumed innocent

defendant’s guilt or innocence” (916–17); Barbara Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1346 (1977): “the wisdom of imposing criminal punishment for conduct that lacks any significant component of personal culpability is subject to serious question.”

187. Kenneth Campbell, *Offence and Defence*, in CRIMINAL LAW AND JUSTICE: ESSAYS FROM THE W.G. HART WORKSHOP 73 (Ian Dennis ed., 1987).

188. Tadros & Tierney, *supra* note 177.

until proven guilty of conduct which the creation of the offense was intended to deter or control.”¹⁸⁹ On their test, the impugned legislation was contrary to the presumption of innocence, because the legislation was designed to deter terrorism, yet as constructed, the provision permitted a conviction in the absence of evidence that the accused in fact had the item for a terrorism purpose.

For similar reasons, the offense of being in control of a motor vehicle whilst under the influence of alcohol (*Whyte, Sheldrake*) is questionable, in the absence of any actual evidence that the person created public danger by attempting to put the vehicle into operation. Merely controlling a vehicle, without actually causing or threatening danger to the public, may be thought to be outside the purpose of the challenged section.

Some argue that the power of the legislature to define crimes is limited by the fact that a given crime must contain, at minimum, an *actus reus* and *mens rea*.¹⁹⁰ Or alternatively, it must do so for crimes punishable by a given level of punishment, for instance any incarceration, or incarceration of six months or more, to facilitate the continued use of strict liability offenses, typically for less serious crimes.¹⁹¹ Such a requirement might, for example, assist when considering the type of legislation at issue in both *Kebilene* and *Sheldrake*, discussed above. So in *Kebilene*, when the offense concerned being in possession of something that gave rise to a reasonable suspicion it was held for a purpose of terrorism, the argument would be that the legislature could not constitutionally craft such an offense, because it lacks any *mens rea* requirement. Similarly, the Australian drugs legislation criminalizing the possession of substances “reasonably suspected of having been unlawfully imported.” And in *Sheldrake*, which criminalized the act of belonging to a proscribed organization, it might be argued that the legislature could again not constitutionally craft such an offense, because it lacks any *actus reus* requirement, and seems analogous to the kind of status offense the court deemed constitutionally objectionable in *Robinson v. California*.¹⁹²

Another suggestion worthy of consideration is the comment by Judge Powell (dissenting) in *Patterson v. New York* that the beyond reasonable

189. *Id.* at 413.

190. Jeffries & Stephan, *supra* note 171, at 1370–76.

191. Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 BOSTON U. L. REV. 775, 800 (1975).

192. *Robinson*, 370 U.S. 660 (1962).

doubt standard applied to things that made a substantial difference to the stigma and punishment. History would be of use in the application of that test. The view of Judge Powell was that the onus of proving such matters would be constitutionally required to remain on the prosecution.¹⁹³ For example, there is a large difference in stigma and punishment between the offense of drug possession and that of drug trafficking. The test of Judge Powell might suggest the illegitimacy of legislation presuming trafficking from the fact of mere possession of a sufficient quantity, as appears in Australian drugs legislation referred to above. The argument would be that the prosecution would have to prove that the accused was involved in drug trafficking beyond reasonable doubt, unaided by reverse presumptions on issues material to the offense.

C. Other Suggested Justifications for Departures from the Presumption of Innocence

The case law discussed above contains some statements by judges seeking to justify the departure by legislatures from the presumption of innocence norms. Objections to some of these rationales expressed by courts for permitting departures from the presumption of innocence will now be briefly noted. It will be seen that these rationales are not new.

1. Gravity of the Offense

Some courts apparently accept that the gravity of the offense with which the accused has been charged can justify departures from the presumption of innocence, or at least are accorded substantial weight at the proportionality stage. An example of this utilitarian approach appears in *Kebilene*, where Lord Hope at that stage referred to the

nature of the threat which terrorism posed to a free and democratic society . . . it seeks to achieve its ends by violence and intimidation. It is often indiscriminate in its effects, and sophisticated methods are used to avoid detection . . . society has a strong interest in preventing acts of terrorism before they are perpetrated . . . (the reverse onus provision there) is designed to achieve that end.¹⁹⁴

193. *Patterson*, 432 U.S. 197, 226–27 (1977) (Powell, J., for Brennan & Marshall, JJ.).

194. *R v. Director of Public Prosecutions, Ex Parte Kebilene and Others*, [2000] 2 A.C. 326, 387.

On the other hand, other decisions seem to suggest that the more serious the crime, the greater the justification that would be required to justify a departure from the presumption of innocence.¹⁹⁵ Clearly, a person who is convicted of a serious offense suffers to a greater extent than those convicted of lesser offenses all of the consequences of conviction referred to earlier. In terms of grades of injustice, it is clearly worse to wrongfully imprison a person for 10 years than for one year.¹⁹⁶ One would have thought then the position in *R v. Johnstone*, that the presumption of innocence was even more important in serious criminal cases than less serious ones, was logically unassailable.

Judge Sachs of the South African Constitutional Court was correct, responding:

The starting point of any balancing inquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subject to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book . . . hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of our legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, carjacking, housebreaking, drug smuggling, corruption . . . the list is unfortunately endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.¹⁹⁷

These comments are correct. We ought be wary of the slippery slope of surrendering the presumption in some cases, only to find it removed in others, and there is an argument that given what is at stake in serious

195. *R v. Johnstone*, [2003] 1 A.C. 1736, 1750 (Lord Nicholls, with whom all other Lords agreed).

196. “The seriousness of the offence has a clear impact on the injustice of an incorrect conviction”: David Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Act*, 66 CAMBRIDGE L.J. 142, 149 (2007).

197. *State v. Coetzee*, [1997] 2 LRC 593, 677–78.

offense, typically attracting more serious penalties, the need for the presumption is all the more pressing.

2. Fact: Defendant could easily present evidence as to disputed matter and/or evidence that was within the defendant's own knowledge

Some judgments indicate that the fact that the defendant could easily present evidence as to the matter in dispute about which the presumption is being made is relevant in the proportionality analysis. So in *Kebilene*, Lord Hope indicated that one factor he would take into account in determining whether a reverse onus provision was valid was the ease, or lack thereof, by which the accused could present evidence on the matter/s in dispute.¹⁹⁸ In *R v. Johnstone*, a unanimous House of Lords indicated that “the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access” would also be relevant to proportionality analysis.¹⁹⁹

This is hardly a new argument. From ancient times, when the presumption of innocence was crafted, it was known that it could be applied in situations where it would be relatively easy for the defendant to present evidence disproving their guilt. However, we never insisted that they do so. We also recognized that an accused had a right to silence, and this right would also be effectively gutted by requiring a person to respond to allegations when it is “easy” for them to do so (and however “easy” would be

198. “It is not immediately obvious that it would be imposing an unreasonable burden on an accused (in the current case) . . . to provide an explanation for his possession of them which would displace that inference. Account would need to be taken of the nature of the incriminating circumstances and the facilities which were available to the accused to obtain the necessary evidence. It would be one thing if there was good reason to think that the accused had easy access to the facts, quite another if access to them was very difficult.”: *Kebilene*, 2 A.C. at 387 (Lord Hope); to like effect *R v. Lambert*, [2002] 2 A.C. 545, 608 (Lord Clyde).

199. *Johnstone*, 1 W.L.R. at 1750 (Lord Nicholls, with whom all other Lords agreed); see to like effect David Hamer, *A Dynamic Reconstruction of the Presumption of Innocence*, 31(2) OXFORD J. LEGAL STUD. 417, 427 (2011): “in some cases the prosecution may face extraordinary difficulties in proving the guilt of a guilty defendant, while an innocent defendant could easily prove his innocence. In such cases a reverse burden would reduce the risk of mistaken acquittal without unduly increasing the risk of a wrongful conviction.”

defined). None of the rationales for the presumption of innocence articulated above suddenly disappear just because it is relatively easy for the accused to rebut a presumption of guilt.

3. Fact: Defendant is the only person who knows about a particular issue

This justification for a relaxation of the presumption of innocence appears in an early judgment of the High Court of Australia.²⁰⁰ It also appears in the judgment of Lord Bingham in *Sheldrake* who, in validating a reverse onus provision, noted that the relevant matter “was so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove . . . than for the prosecutor to prove beyond reasonable doubt that he would.”²⁰¹

On the other hand, again this is hardly a new phenomenon. Those who crafted the presumption were surely fully aware that, on many occasions, the accused was the only one with information about the matter in issue. It did not convince them to adopt a presumption of guilt, nor for that matter, to effectively require an accused to abandon another fundamental human right, that of silence in the face of accusation. All of the rationales for the presumption of innocence articulated above remain applicable, even in cases where the defendant has the sole knowledge of a particular issue. The United States Supreme Court was right to reject this as a justification for abandoning the presumption of innocence.²⁰²

4. Rational Connection

There remains concern with the aspect of the United States jurisprudence that permits the doctrine of “rational connection” to support findings against an accused on matters pertaining to guilt. So, for example, in *United States v. Gainey*,²⁰³ an inference of guilt of the offense of “carrying

200. *Williamson v. Ah On*, (1926) 39 CLR 95, 113 (Isaacs, J.: “the primary rule (casting the onus of proof onto the accuser) should be relaxed when the subject matter of the allegation lies peculiarly within the knowledge of one of the parties” (with whom Powers, J., agreed (127))).

201. *Sheldrake*, [2005] 1 A.C. 264, 309.

202. *Tot v. United States* 319 U.S. 463, 469 (1943): “nor can the fact that the defendant has the better means of information . . . justify creation of such a presumption (against the accused)” (Roberts, J., for the Court).

203. *Gainey*, 380 U.S. 63 (1965).

on” illegal distillation was drawn from mere presence at the site; and in *Leary v. United States*,²⁰⁴ of an offense that contained elements requiring that drugs be illegally imported, and that the accused knew this, presumptions that both of these elements were satisfied were based on the fact of possession, and an asserted “rational connection” between that and the elements, and the fact the thing presumed was “more likely than not” to be the case.

The concern is that, though the argument that one fact might be inferred from the other/s may be rational enough, it permits the prosecutor to obtain a conviction when there is reasonable doubt about the defendant’s guilt. In other words, it crosses one of the red lines that were noted above, as lines any legislated inference or presumption must not cross. So, for example, in *Leary*, the possibility existed that the defendant could be convicted of the crime, although there was reasonable doubt about whether the drug was illegally imported, and/or whether the accused was aware of this fact. And the accused could be convicted in *Gainey*, despite the existence of reasonable doubt about whether they were in fact “carrying on” the unlawful enterprise.

Others have made this point. The joint judgment did so in *R v. Oakes*:

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could therefore be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.²⁰⁵

Criticism of use of the “rational connection” test and its effective undermining of the presumption of innocence and beyond reasonable doubt standard has also appeared in the academic literature.²⁰⁶ The Court should

204. *Leary*, 395 U.S. 6 (1969).

205. *Oakes*, [1986] 1 S.C.R. 103, 134 (Dickson, C.J., Chouinard, Lamer, Wilson, & Le Dain, JJ.).

206. Harold Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 *YALE L.J.* 165, 185 (1969): “our courts cannot properly perform their function of safeguarding criminal defendants from the operation of presumptions which violate due process by relying upon a rational connection test alone”; Jeffries & Stephan, *supra* note 171, who, reflecting upon the fact that the accused in *Gainey* was convicted of carrying on illegal distillation based on mere presence, concluded that while the accused had the right to mount a defense, “if *Winship* means anything, it surely must stand for the inadequacy of such an opportunity. Criminal conviction must be based on proof beyond a reasonable doubt. The only fact proved beyond a reasonable doubt was

abandon its use of the “rational connection” test or require that the thing presumed must flow from the fact proven at the level of beyond reasonable doubt, though concededly this may defeat the purpose of the test.

CONCLUSION

This Article has documented that despite the universally acknowledged importance of the presumption of innocence in criminal cases, in practice legislatures have sought to abrogate the presumption to some extent through the use of reverse onus provisions. This is understandable at a pragmatic level, where there is community pressure to protect society from violent crime, and that it is often for the prosecutor to summon sufficient proof to prove its allegations at the beyond reasonable doubt level. On the other hand, there are very significant interests at stake in the criminal trial, and a high standard of proof is needed to ensure these interests are protected. Any suggested departure from the standard approach must be carefully justified and shown to be consistent with the rationale for the presumption of innocence.

This Article has suggested that, at a first step, the Canadian approach should be followed, and no reverse onus provision should be accepted where it effectively permits the accused to be convicted despite the existence of reasonable doubt as to whether they committed the crime with which they have been charged. This is a good starting point, if not a sufficient one, to weed out some reverse onus provisions. It is not sufficient, in itself, because some legislatures may seek to redefine crimes, reducing the elements that the prosecutor must prove to show that a crime has been committed, and increasing defenses that an accused might be expected to substantiate, including a burden of persuasion in some cases. As a result, this Article has suggested that a substantive view of the criminal law ought to be taken, at least to some extent. This substantive view must be cautiously framed, showing deference to democratically elected legislatures in the

presence at a still. The constitutionality of the authorized punishment must be judged on that basis . . . the search for a rational connection implies that the important issue is formal conformity between proved and presumed facts rather than substantive adequacy of an established basis for punishment . . . the result . . . is a focus on formality rather than on substance and a corresponding failure to honor the promise of *In re Winship*.”

choices that they make about what to criminalize and how to define particular crimes.

Various approaches have been suggested here. They include a test to ensure that the legislature has criminalized only behavior that is sufficiently blameworthy, that the true purpose of the legislation at issue be borne in mind when considering its application, that a clear *actus reus* and *mens rea* must be proven, and/or that a focus on whether the prosecutor must prove beyond reasonable doubt all things that bear on the stigma and punishment likely to apply to particular wrongdoing. It is accepted that none of these approaches is perfect, and it is not sought to give judges unbridled discretion to discard criminal laws that they personally do not favor. However, the examples contained in this Article show that these tests can be applied to reverse onus provisions, to provide clear and defensible outcomes.