DePaul University
UNIVERSITY LIBRARIES

DePaul Law Review

Volume 19
Issue 1 *Fall 1969*

Article 10

Constitutional Law - Federal Marijuana Statutes - An Empirical Appraisal of Criminal Statutory Presumptions - Leary v. United States, 395 U.S. 6 (1969)

James Carroll

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation

James Carroll, *Constitutional Law - Federal Marijuana Statutes - An Empirical Appraisal of Criminal Statutory Presumptions - Leary v. United States, 395 U.S. 6 (1969)*, 19 DePaul L. Rev. 184 (1969)
Available at: https://via.library.depaul.edu/law-review/vol19/iss1/10

This Case Notes is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

CONSTITUTIONAL LAW—FEDERAL MARIJUANA STATUTES—AN EMPIRICAL APPRAISAL OF CRIMINAL STATUTORY PRESUMPTIONS

On December 22, 1965, Dr. Timothy Leary of LSD infamy, his son and daughter, and two others travelled by automobile across the International Bridge at Laredo, Texas, enroute to Yucatan, Mexico. Having been denied admission at the Mexican customs station, they drove back across the bridge to the American secondary inspection area where they were detained by a customs inspector. Upon an examination of the interior of the automobile, the inspector discovered what he believed to be marijuana seeds on the floor. A more thorough search of the car and its passengers revealed small amounts of marijuana in the car and about one-half ounce of marijuana in Leary's daughter's possession. Leary was indicted on three counts: (1) knowingly smuggling marijuana into the United States;[1] (2) transporting or concealing marijuana on which a transfer tax had not been paid;[2] and (3) knowingly transporting or facilitating the transportation or concealment of marijuana which had been illegally imported.[3]

At his trial in the Federal District Court for the Southern District of Texas, the defendant was convicted on the "transfer tax" and "transportation" counts, and sentenced to the maximum punishment.[4] The Court of Appeals for the Fifth Circuit affirmed the conviction on both counts,[5] and subsequently denied defendant's petition for a rehearing.[6] The United States Supreme Court granted *certiorari* to consider two constitutional aspects of federal marijuana statutes. First, did the requirement that defendant pay a transfer tax on marijuana violate his fifth amendment privilege against self incrimination?[7] Second, was defendant denied due process of law by operation of the presumption of 21 U.S.C. § 176a which provides that from defendant's unexplained possession of marijuana, illegal importation of the marijuana and defendant's knowlege of such importation may be presumed? Justice Harlan, writing for the Court majority, answered in the affirmative to both questions and reversed both

1. 21 U.S.C. § 176a (1964).

2. 26 U.S.C. § 4744 (1964).

3. 21 U.S.C. § 176a (1964).

4. Leary v. United States, 383 F.2d 851, 854 (5th Cir. 1967). The "smuggling" count was dismissed at the trial.

5. *Id.* at 870.

6. Leary v. United States, 392 F.2d 220 (5th Cir. 1968).

7. For treatment of the expanding fifth amendment privilege foreshadowing *Leary*, *see* Note, 18 DEPAUL L. REV. 296 (1968).

counts of defendant's conviction. *Leary v. United States*, 395 U.S. 6 (1969).

This case note shall be restricted solely to the aspect of criminal statutory presumptions—their nature, purpose, and constitutional requirements. The line of cases leading to the *Leary* decision will also be analyzed, and the impact of this decision on the future will be briefly explored.

An aura of confusion has long surrounded the concept of presumptions, a term for which the courts and legal scholars have had many varied interpretations.[8] The efforts of the courts in administering statutory presumptions are further confounded by the failure of legislatures to specify the procedural effect of a presumption.[9] However, after eliminating any nuances in meaning, it is clear that all definitions of presumptions contain at least two common elements: a fact to be proved and a fact to be presumed. By operation of a rule of law, when a certain fact is proved, the trier of fact is permitted or required to presume the existence of another fact.[10] For example, if a defendant's unexplained presence at a still (fact to be proved) is established, then the jury may infer that he is "carrying on" the business of a distiller (fact to be presumed).[11]

Criminal statutory presumptions are a valuable aid to the prosecution in securing a conviction, particularly when difficult-to-prove facts, such as the mental state of a defendant, may be presumed.[12] Thus, through the benefit of a presumption, a district attorney will be allowed to adduce a smaller quantum of evidence to convict the defendant.[13] Further, when the court's instruction to the jury includes reference to the presumption, the jury will probably be more willing to convict than in the absence of such a presumption.[14] It is well established that the enactment of a statutory presumption is within the general power of a legislature to provide rules of evidence;[15] however, the power to create presumptions is not without limit. A statutory presumption must operate within the bounds of the Constitution or be invalid. An analysis of the chain of cases leading to the

8. *See* MODEL CODE OF EVIDENCE rule 306 (1942); MCCORMICK, EVIDENCE 308 (1954).

9. Note, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

10. *See* United States v. Gainey, 380 U.S. 63, 78 (1965) (Black, J., dissenting).

11. 26 U.S.C. §§ 5601(a)(4), 5601(b)(2) (1964).

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

13. Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 178, 203 (1931).

14. *Id.* at 204.

15. Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 42 (1910).

Leary decision reveals the attempts which the Supreme Court has made to establish criteria by which the constitutionality of various statutory presumptions can be gauged.

One such guideline was advanced by Justice Holmes in *Ferry v. Ramsey*,[16] a civil case in which a bank director was sued for assenting to the receipt of deposits after he had knowledge of the bank's insolvency. A Kansas statute specified that the fact of insolvency shall be prima facie evidence of the director's knowledge of the insolvency and his assent to the deposit.[17] Holmes concluded that this presumption is valid because the Kansas legislature could have passed a law making a bank director personally liable without any knowledge or assent on his part. Thus, the inquiry necessitated by Holmes' formula is whether the proved fact itself could have been made illegal without use of the presumed fact; if so, the presumption is valid.

The Court applied a second test in *Morrison v. California*,[18] a criminal case in which an alien and a citizen had been convicted of conspiring to violate the Alien Land Law of California.[19] This statute included a presumption which provided that if a defendant had been using or occupying real property and was of a race ineligible for citizenship (*e.g.*, Japanese), then he was presumed not to be a citizen; the burden of proving citizenship was on the defendants. In applying the "comparative convenience" test, the Court considered whether the defendant or the prosecution would be better able to present evidence as to the presumed fact. The determination was made that the prosecution would be in a better position to adduce such evidence because the procedural convenience of shifting the burden of proof to the defendants was outweighed by the probability of injustice to them.[20] On this basis the statute was invalidated. Thus, the "comparative convenience" test takes into account the nature of the fact to be proved, the party better able to prove the fact, and whether injustice would result from a shift in the burden of proof.

The third and most significant test was of civil origin in *Mobile, Jackson & Kansas City R. R. v. Turnipseed*,[21] an action by an administrator of an estate for the wrongful death of a servant of the railroad. Through the

16. 277 U.S. 88 (1928).

17. Laws of Kansas of 1879, ch. 48, § 1 (repealed 1947).

18. 291 U.S. 82 (1934).

19. California Statutes of 1927, ch. 528, § 9a. This statute was declared unconstitutional in *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952), and *Haruye Masaoka v. California*, 39 Cal. 2d 883, 245 P.2d 1062 (1952).

20. Morrison v. California, *supra* note 18, at 94.

21. *Supra* note 15.

operation of a Mississippi statute,[22] negligence on the part of a defendant railroad was presumed in all cases in which injury was inflicted by the running of locomotives. In upholding the constitutionality of the presumption, Justice Lurton declared:

> That a legislative presumption of one fact from evidence of another not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that *there shall be some rational connection between the fact proved and the ultimate fact presumed.*[23]

Through subsequent application, the "rational connection" test attained prominence,[24] and in *Tot v. United States*[25] the Court established it as the sole criterion to measure the constitutionality of presumptions. Defendant Tot had been convicted of violating the Federal Firearms Act[26] which prohibited any person who was convicted of a crime of violence or who was a fugitive from justice from obtaining a firearm shipped through interstate commerce. From the mere fact of possession of a firearm, the statute permitted an inference that it was obtained through interstate commerce. The prosecution argued that the presumption was valid because it met the requirements of the "Holmes" test—that is, because Congress could have proscribed possession of *all* firearms by persons previously convicted of crimes of violence. The Court answered by stating that Congress did not choose to make all gun aquisitions by such persons illegal.[27] By discounting the relevance of what Congress could have done, the Court rejected any application of the "Holmes" test. Also dismissed was the government's contention that the "rational connection" and "comparative convenience" tests are alternative means of assaying the validity of criminal presumptions. The Court concluded that "these are not independent tests . . . . [T]he first is controlling and the second but a corollary."[28] The argument for "comparative convenience" is valid only when the requirements of the "rational connection" test have already been met.

---

22. MISS. CODE § 1985 (1906), *as amended* MISS. CODE ANN. § 1741 (1942).

23. *Supra* note 15, at 43.

24. *See* Bailey v. Alabama, 219 U.S. 219 (1911), in which the Court mentioned this test but based its decision on the thirteenth amendment; Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911); McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916); Manley v. Georgia, 279 U.S. 1 (1929); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929); Morrison v. California, *supra* note 18, in which the "rational connection" test was mentioned, but the decision was based on "comparative convenience."

25. 319 U.S. 463 (1943).

26. 15 U.S.C. § 902(f) (1964).

27. Tot v. United States, *supra* note 25, at 472.

28. Tot v. United States, *supra* note 25, at 467.

What are the requirements of the "rational connection" test? Until the *Leary* decision the Court spoke in vague and extremely subjective terms of the application of this criterion. The relationship between the fact to be proved and the fact to be presumed must not be "arbitrary,"[29] "unreasonable,"[30] or "strained."[31] There must be a connection "between the two [facts] in common experience."[32] Such connection must not be "too tenuous to permit a reasonable inference of guilt."[33] In examining a presumption "significant weight should be accorded to the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."[34] Couched in these terms the "rational connection" test rests almost entirely on the subjective reasoning process of an individual judge. Moreover, this language fails to take into account the real factor which imparts to a presumption its rationality—*the degree of probability that the fact to be presumed is likely to follow the fact to be proved.*

To illustrate the role that probability plays in determining the validity of criminal presumptions, two recent decisions, *United States v. Gainey*[35] and *United States v. Romano*,[36] will be analyzed. The defendants in both cases were arrested in the presence of stills and charged with violating similar sections of the Internal Revenue Code. Gainey was convicted of "carrying on" the business of a distiller,[37] whereas Romano was convicted of having possession, custody, or control of a still.[38] In noting the stealth employed in the use of an illegal distillery, the Court determined that "anyone present at the site is probably connected with the illegal enterprise,"[39] and affirmed the conviction of Romano. The presumption that Gainey was "carrying on" the business of a still was valid because it "did no more than 'accord to the evidence, if unexplained, its natural probative force.' "[40] The Court distinguished its decision in *Gainey* from that in *Romano* in that the crime of "carrying on" the business of a still is much

29. *Supra* note 15, at 43.

30. *Supra* note 15, at 43.

31. Tot v. United States, *supra* note 25, at 468; United States v. Romano, 382 U.S. 136, 139 (1965).

32. Tot v. United States, *supra* note 25, at 468.

33. United States v. Romano, *supra* note 31, at 141.

34. *Supra* note 10, at 67.

35. *Supra* note 10, at 67.

36. United States v. Romano, *supra* note 31.

37. 26 U.S.C. §§ 5601(a)(4), 5601(b)(2) (1964).

38. 26 U.S.C. §§ 5601(a)(1), 5601(b)(1) (1964).

39. United States v. Romano, *supra* note 31, at 141.

40. *Supra* note 10, at 71.

broader than the crime of having possession of a still.[41] The Gainey conviction was reversed, and the presumption was found invalid because the relationship between presence (the fact to be proved) and possession (the fact to be presumed) "is too tenuous to permit a reasonable inference of guilt . . . ."[42] Romano could well have been involved in a function such as supply or delivery, which is in no way related to the possession of a still. The differing results in these two cases is founded solely on probability—the likelihood that the presumed fact will exist if the proved fact exists. It is "very probable" that anyone present at a still is "carrying on" the business of a still; on the other hand, it is not as likely that one present will have possession of the still. Thus, the "rational connection" test and its language of "arbitrary," "unreasonable," and "tenuous" may be reduced to one underlying factor—probability.

The question which naturally arises is: What is the requisite degree of probability for a valid presumption? The Court in *Leary* for the first time took cognizance of this problem and in so doing added a new objectivity to the "rational connection" test.

Leary had been charged with receiving, concealing, buying, selling, or in any manner facilitating "the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to be imported or brought into the United States contrary to law . . . ."[43] The presumption on which this case centers provided:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.[44]

The Court construed this presumption as authorizing the jury to infer from the defendant's possession two necessary elements of the offense: (1) the illegal importation of the marijuana, and (2) defendant's knowledge of such importation.[45] An examination of this presumption was made within the framework of a refined "rational connection" criterion, as enunciated by Justice Harlan:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that *the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.*[46]

41. United States v. Romano, *supra* note 31, at 140.
42. United States v. Romano, *supra* note 31, at 141.
43. 21 U.S.C. § 176a (1964).
44. 21 U.S.C. § 176a (1964).
45. Leary v. United States, 395 U.S. 6, 37 (1969).
46. *Id.* at 36.

Applying this test, the Court concluded that the inference as to Leary's knowledge of the illegal importation impinged upon his constitutional rights; the question raised by the inference of illegal importation was not reached by the Court.

As a natural consequence of this holding, the constitutionality of criminal presumptions must henceforth be determined by a more scientific, empirical approach. The emphasis of the "rational connection" test has shifted from the subjective opinion of a judge to the objectivity of external reality. Deference must of course be accorded to the ability of Congress to perceive reality; however, in *Leary* the Court found the legislative history of §176a "inadequate," and ignored it.[47] Thus, in viewing the presumptions for the first time from an empirical standpoint,[48] the Court undertook the incongruous task of determining the proclivities of "pot" smokers by "canvass[ing] the available, pertinent data."[49] Research into House and Senate committee hearings, government reports, books, and periodicals indicated to the Court that most marijuana is of foreign origin.[50] However, that information does not necessarily lead to the conclusion that a majority of marijuana users *know* that their marijuana was imported. The Court hypothesized that there are five ways in which a smoker might know of its foreign origin: (1) by his knowledge of the proportion of marijuana smuggled into the country; (2) by his actions if he is the smuggler; (3) by his indirect knowledge of the source of his supply; (4) by his specification to his supplier that the marijuana be imported; or (5) by his ability to detect imported marijuana by its characteristics.[51] In considering each of these possibilities, the Court found itself unable to conclude that the majority of marijuana smokers know that their marijuana was imported. The presumption as to the knowledge of importation was, therefore, constitutionally infirm since it could not be established that possessors of marijuana are "more likely than not" to know of its origin.

Justice Black concurred in the opinion of the Court on the basis of what may be called a fourth criterion for presumptions. The "Black" test, first elucidated in *Gainey*, regards a "rational connection" as "only the first hurdle" for a criminal presumption.[52] Even if a presumption is reasonable, it must not operate to deprive a defendant of any constitu-

47. *Id.* at 38.

48. Although an empirical approach was first suggested in *United States v. Gainey, supra* note 10, at 67, the *Gainey* Court failed to follow through on its suggestion.

49. *Supra* note 45, at 38.

50. *Supra* note 45, at 41.

51. *Supra* note 45, at 47.

52. *Supra* note 10, at 80 (dissenting opinion).

tional right. Thus, in the eyes of Justice Black, a "rational connection" is not conclusive of constitutionality; a legislatively created presumption is valid only if it does not encroach upon a defendant's constitutional rights. Via this approach, the determination was made that the defendant Leary had been denied his rights under the fifth, sixth, and fourteenth amendments as well as Article III of the Constitution.[53] Justice Black's constitutional objections may be reduced to three basic arguments: (1) Congress has no power to instruct a jury as to what amount of evidence is sufficient to convict beyond a reasonable doubt, and any such attempt by Congress in the form of a statutory presumption is a violation of the separation of the powers of government;[54] (2) a criminal statutory presumption deprives a defendant of his right to trial by jury;[55] (3) a criminal presumption compels a defendant to be a witness against himself in violation of his fifth amendment privilege.[56]

These same three constitutional objections may be raised against all criminal statutory presumptions which exist for the benefit of the prosecution. Hence, the "Black" test may be translated into this simplistic formula: "If it's a criminal statutory presumption, it's unconstitutional." The ineluctable result of the "Black" test would be that in all criminal proceedings the only permissible presumption would be of innocence until proven guilty.[57]

Besides failing to answer Justice Black's challenges, the *Leary* Court did not reach the significant question of whether a criminal presumption must satisfy the "reasonable doubt" standard.[58] Instead the Court adopted the less restrictive "more likely than not" standard, and invalidated the marijuana presumption on that basis. In accordance with this standard, a criminal presumption is valid if the statistical chance of the presumed fact following the proved fact is greater than fifty per cent ("more likely than not"). Situations may be visualized in which this standard clearly conflicts with the principle that a defendant must be found guilty beyond a reasonable doubt and that each and every element of his crime must be so proved.[59] For example, assume the existence of a criminal presump-

53. *Supra* note 45, at 56 (concurring opinion).

54. *Supra* note 10, at 88 (dissenting opinion); *supra* note 45, at 55 (concurring opinion).

55. Tot v. United States, *supra* note 25, at 473 (concurring opinion); *supra* note 10, at 87 (dissenting opinion); *supra* note 45, at 55, 56 (concurring opinion).

56. *Supra* note 10, at 87 (dissenting opinion); *supra* note 45, at 56 (concurring opinion).

57. *Supra* note 10, at 85 (dissenting opinion).

58. *Supra* note 45, at 36 n.64.

59. McCormick, *supra* note 8, at § 321.

tion for which the presumed fact follows the proved fact fifty-one per cent of the time, and which, therefore, is valid under the "rational connection" test. Assume also that the accused is in fact innocent but remains silent in exercise of his fifth amendment privilege. Under these circumstances, the jury, acting in accordance with the criminal presumption, would be authorized to find the defendant guilty beyond a reasonable doubt. Yet, is not forty-nine per cent more than a reasonable doubt?

Although the *Leary* Court did not deal with this problem, the *Gainey* Court attempted to reconcile "reasonable doubt" with criminal presumptions. The presumption in *Gainey* as construed by Justice Stewart and the majority does not require the jury to convict the defendant in all cases; it merely authorizes such conviction if the jury finds the defendant guilty beyond a reasonable doubt.[60] Nor does the presumption require the judge to submit the case to the jury in all cases; it merely permits him to do so if he finds the evidence sufficient.[61] Thus, the construction given to the presumption in *Gainey* indicates that criminal statutory presumptions should be "permissive" rather than "mandatory."[62] With a "permissive" type of presumption, the Court in *Gainey* felt that a jury may be satisfactorily instructed as to "reasonable doubt."[63] In his dissent in *Gainey*, Justice Black regarded this interpretation as "almost self-contradictory"[64] —that is, to hold that although a statute is valid, both judge and jury may ignore it if they choose.

Dr. Timothy Leary's case, though causing more than a minor change in federal mairjuana laws, will probably be neither a boon to the drug culture nor an impediment to effective drug control. The presumption of 21 U.S.C. § 176a was invalidated only to the extent of the inference of defendant's *knowledge* of illegal importation of marijuana; the inference of illegal importation remains intact.[65] Thus, the government will still prosecute under this statute if there exists "sufficient direct or circumstantial evidence that defendant knew of the importation."[66] If evidence of such knowledge is lacking, the charge will be dismissed, and the case will be referred to local authorities for prosecution.[67] Through this procedure the Department of Justice can effectively adapt its manpower to

60. *Supra* note 10, at 70.

61. *Supra* note 10, at 68.

62. The distinction between "mandatory" and "permissive" presumptions is drawn by McCORMICK, *supra* note 8, at § 308.

63. *Supra* note 10.

64. *Supra* note 10, at 76 (dissenting opinion).

65. *Supra* note 45, at 37.

66. Dept. of Justice, Memorandum 630, at 6 (1969).

67. *Id.* at 7.

the new marijuana statutory scheme.[68] Moreover, the Court explicitly stated that the *Leary* decision is no bar to the enactment of future marijuana laws by Congress.[69]

As a result of the *Leary* case, other criminal statutory presumptions will no doubt come under the scrutiny of the courts. The presumption, for example, of federal narcotics statute 21 U.S.C. § 174, identical almost word for word with the *Leary* presumption, will probably be reexamined in the light of the new "rational connection" test. Merely because it could not be established that the majority of marijuana smokers know the origin of their marijuana, it does not necessarily follow that the majority of "hard" narcotics users do not know the origin of their drug. In surveying data relevant to narcotic drugs, the courts may well conclude that drug users are "more likely than not" to have knowledge of its importation, and uphold the validity of that presumption.

In judging the constitutionality of criminal statutory presumptions in the future, the following salient points, extracted from *Leary* and other decisions, should be considered: (1) There must be a rational connection between the fact presumed and the fact proved; (2) The connection is rational if the presumed fact follows the proved fact more than fifty per cent of the time; (3) An empirical approach must be taken to determine whether this relationship exists in fact; (4) Some deference should be paid to the capacity of Congress to judge the rationality of the connection; and (5) The presumption should be "permissive" rather than "mandatory" so that a jury may be satisfactorily instructed as to "reasonable doubt."

James Carroll

CONSTITUTIONAL LAW—INVOLUNTARY EXPATRIATION —SPECIFIC INTENT TO RELINQUISH CITIZENSHIP REQUIRED

Morris Louis Baker, born in 1905 in North Dakota and therefore an American citizen,[1] was taken to Canada as an infant in 1906. He re-

68. The Court's ruling as to the fifth amendment privilege not discussed in this case note, will probably have a more devastating effect on federal marijuana control than will its ruling as to the presumption. Although only subsection 26 U.S.C. § 4744 (a)(2) (1964) of the Marijuana Tax Act was invalidated, there is a strong likelihood that the entire Act is unconstitutional because it conflicts with the fifth amendment. *See, e.g.*, Santos v. United States, 417 F.2d 340 (7th Cir. 1969); *contra*, Buie v. United States, — F.2d — (2d Cir. 1969).

69. *Supra* note 45, at 54.

1. "All persons born or naturalized in the United States, and subject to the juris-