PROSECUTION FOR UTILITY METER TAMPERING: CONSTITUTIONAL LIMITATIONS ON STATUTORY PRESUMPTIONS

In recent years, revenue losses incident to utility service thefts have increased as a result of meter tampering.[1] States' attorneys and utility company management have been unable to curb the problem through criminal prosecutions[2] due to *mens rea* requirements. Inclusion of a *mens rea* element makes it more difficult to obtain sufficient evidence of the crime's commission by any particular individual.[3] Attempting to alleviate this problem, some state legislatures have passed laws that use statutory presumptions[4] to infer the criminal in-

1. Utility service thefts refer to crimes involving tampered meters. Meter alterations cause the meter to inaccurately register the consumption rate of utility services. As a result, the dishonest consumer benefits by receiving more utility services than the amount billed. *See* Law & Osterhus, *Are You Getting Mugged at Your Meters?* 101 PUB. UTIL. FORT. 14 (May 11, 1978).

The C.B.S. television program, "60 Minutes," estimated that three billion dollars of electric power has been stolen. Predictions indicate that this figure will increase to four-and-one-half billion dollars by the end of 1979. These figures do not include theft of output from other types of utilities such as gas, water or related services that are also distributed at an unmanned point of sale. *Id.* at 14. "Few crimes . . . are so lucrative in comparison to the potential penalties." *Id.* at 15.

2. It is often impossible to prove a consumer's participation in the crime by direct evidence. Therefore, the prosecutor needs the aid of presumptions. State v. Curtis, 148 N.J. Super. 235, 240, 372 A.2d 612, 615, *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977); People v. McLaughlin, 93 Misc. 2d 980, 402 N.Y.S.2d 137 (1978).

3. Typically, it is difficult to obtain any evidence relating to defendant's subjective mental state. Although defendant is in the best position to have knowledge of his own criminal intent, constitutional protections prohibit the prosecutor from examining the defendant at trial. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. *See* Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A.B.A. J. 287 (1928). *Cf.* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1343 n.41 (1971) (compiling sufficient evidence of intent to prove the intent element of arson is impossible).

4. Presumptions assert the existence of one fact, B, from the existence of another fact, A; they are legislative rules of evidence. Legal scholars disagree on the operation and procedural effects of presumptions. *See* Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J.

tent element,[5] thereby diminishing the prosecutorial burden and facilitating conviction.[6] The U.S. Constitution, however, limits

165 (1969) [hereinafter cited as Ashford & Risinger]. A basic overview of the concept follows.

The commonly recognized forms of presumptions include inferences, prima facie presumptions, mandatory presumptions, and conclusive presumptions. Inferences allow proof of fact A to constitute *some* evidence of B, the presumed fact. Prima facie, or permissive presumptions, permit proof of fact A to constitute sufficient evidence of B, unless defendant can rebut B. Many authorities believe that all criminal presumptions are, or should be, this type. *See* Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277 (1968) [hereinafter cited as Soules]; Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 343 (1970) [hereinafter cited as *Criminal Presumptions*].

Under mandatory presumptions, proof of fact A sufficiently establishes B unless defendant rebuts B. Conclusive presumptions operate similarly but do not permit rebuttal. Several authorities do not consider conclusive presumptions to be true presumptions; rather, they classify them as rules of substantive law. For a general discussion, see Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919 [hereinafter cited as Christie & Pye]; Soules, *supra* at 278; *Criminal Presumptions, Comment, The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

To avoid the obviously prejudicial effects on the jury's determination, the defendant must rebut the presumption. When sufficiently rebutted, the presumption no longer operates. Different theories exist to explain how rebuttal takes place. Rebuttal must convince the jury that either: 1) B's nonexistence is possible; or 2) B's nonexistence is just as likely as that of B; or 3) not-B's existence is more probable than that of B; or 4) not-B's existence constitutes an affirmative defense since the presumption redefines the elements of the crime (formerly A, B, C, and D) to require only the elements A, C, and D. *See* United States v. Romano, 382 U.S. 136 (1965); Ashford & Risinger, *supra* at 194; Note, *Abrogation of Statutory Presumptions*, 5 SUFFOLK L. REV. 161, 166 (1970) [hereinafter cited as *Abrogation of Presumptions*].

5. *See, e.g.*, FLA. STAT. § 812.14 (Supp. 1979) (declared unconstitutional in MacMillan v. State, 358 So. 2d 547 (Fla. 1978)); N.J. STAT. ANN. § 2A-170-64 (West 1971); N.Y. PENAL LAW § 165.15(5) (McKinney 1978-79 Supplementary Practice Commentaries). *Contra*, Soules, *supra* note 4, at 282 (Texas law forbids the use of mandatory presumptions).

Even without the presumption, some states have allowed circumstantial evidence to constitute a sufficient case against the defendant for meter tampering. *See* State v. Rousten, 84 N.H. 140, 146 A. 870 (1929) (conviction for meter tampering may be sustained upon circumstantial proof that defendant tampered with his meter on prior occasions, benefited from the tampering, and controlled the premises on which the tampering occurred). *Contra*, Rugg v. State 141 Tenn. 362, 371, 210 S.W. 630, 633 (1919) (proof that defendant's meter had been tampered insufficient for conviction; actual tampering by the defendant must be shown). Most states still include "intent to tamper" as an element of the crime. *E.g.*, ILL. ANN. STAT. ch. 111 2/3, § 381 (Smith-Hurd 1966); MO. REV. STAT. 97 § 3 (1969); N.C. GEN. STAT. § 14-151.1 (1969).

6. *See* United States v. Gainey, 380 U.S. 63, 65 (1965); Comment, *The Constitutionality of Statutory Presumptions*, 34 U. CHI. L. REV. 141, 142 (1966). When it is

legislative authority to create such presumptions[7] despite the benefi-

difficult to produce sufficient evidence, the need for presumptions is particularly great. Soules, *supra* note 4, at 278.

The defendant's need to rebut the presumption shifts prosecutorial procedural burdens of going forward with evidence to defendant. The procedure may even affect the burden of persuasion. *See* Ashford & Risinger, *supra* note 4, at 171. Procedural shifts such as these have profound effects on the trial. They increase the probative weight of the state's case and thus influence the jury's decision. It is likely that a jury will assume the validity of a presumption, even though not mandatory, where there are no additional indicators of the presumed fact's existence or nonexistence. Not surprisingly, indicators of intent are rarely available. *See* Soules, *supra* note 4, at 285-86; Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 157, 160 (1970) [hereinafter cited as *Statutory Presumptions*]

Other rationales for employing legislative presumptions include: judicial economy, since the state will not have to prove the existence of the presumed fact; comparative convenience, since defendant may be in a better position to produce relevant evidence, and consistent results, since presumptions ensure that, given similar fact patterns, B is not inferred by one jury and denied by another. *Statutory Presumptions, supra*, at 179.

7. To protect defendants from unwarranted punishment, the Fourteenth Amendment guarantees procedural safeguards. *See* Leary v. United States, 395 U.S. 6, 55 (1969) (Black, J., concurring) (defendant can only be convicted by a jury having sufficient evidence to infer guilt). *Cf.* Chambers v. Florida, 309 U.S. 227, 236 (1940) (Fourteenth Amendment protects accused from abuse by those holding positions of power and authority).

Five additional constitutional safeguards relate to this problem: 1) due process rights require sufficient connection between the proved and presumed facts; 2) Sixth Amendment rights to trial by jury may preclude a legislature from dictating the weight certain evidence receives (not applied to states through Fourteenth Amendment); 3) Fifth Amendment rights against self-incrimination may be infringed upon when defendant shoulders the burden of going forward and must give up the right to remain silent or face conviction; 4) the proscription against making any comment on defendant's failure to testify may be undercut; and 5) the right to confront witnesses may be violated since the state is not required to present any witnesses or evidence to prove the sufficiency of a presumption. *See* Barnes v. United States, 412 U.S. 837, 850 (1973) (Douglas, J., dissenting); United States v. Gainey, 380 U.S. 63, 72-74 (1965) (Douglas, J., dissenting). For a general discussion of the constitutional limitations of criminal presumptions, see Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955).

Traditionally, the legislature has evoked the authority to create presumptions. The legislature, positioned as the fact-finding branch of government, is well suited for this task due to its representative views and investigatory powers. *See* Soules, *supra* note 4, at 295. *Cf.* Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893) (rules of evidence confer legislative authority to create presumptions). *Contra*, United States v. Gainey, 380 U.S. 63, 82 (Black, J., dissenting) (constitutional requirements do not permit the legislature to create presumptions in violation of due process; the authority to establish presumptions is not absolute).

cial functions they serve in controlling crime. In *MacMillan v. State*,[8] the Florida Supreme Court declared a meter-tampering statute based on a prima facie presumption of intent unconstitutional as violative of due process.[9]

In recognition of the foregoing prosecutorial needs, Florida enacted a statutory presumption to control meter-tampering crimes.[10] The presumption of intent to steal operated whenever the prosecution showed that the accused benefited from diverted utility services.[11] Although the defendant in *MacMillan* possessed a tampered meter and benefited from free utility services, the Florida Supreme Court reversed his conviction.[12] According to the court, reliance on the presumption violated defendant's rights since it failed to meet the "rational connection" or "more likely than not" standards of due process.[13] Without use of the presumption, the prosecution was unable to prove the essential elements of the crime, such as actual tam-

8. 358 So. 2d 547 (Fla. 1978).

9. *Id.* at 549-50.

10. FLA. STAT. § 812.14 (Supp. 1979). This statute has also been applied to civil cases for meter tampering. *Id.* § 812.14(5).

11. The Florida statute provided:

> The existence, on property in the actual possession of the accused, of any . . . meter alteration, . . . which effects the diversion or use of the service of a utility or a cable television service or community antenna line service or the use of electricity, gas, or water without the same being reported for payment as to service or measured or registered by or on a meter installed or provided by the utility *shall be prima facie evidence of intent to violate, and of the violation of, this section by such accused.* The use or receipt of the direct benefits from the use of electricity, . . . derived from any tampering, . . . shall be prima facie evidence of intent to violate, and of the violation. . . .

Id. § 812.14(3) (emphasis added).

12. Evidence at trial established defendant's history of meter tampering. In July 1975, a utility company employee found a tampered meter on defendant's property. Again on September 26, 1976, the employee discovered another tampered meter. On November 9, 1976, the employee noted a third episode of altering the meter. Brief for Appellant at 3-4, MacMillan v. State, 358 So. 2d 547 (Fla. 1978). Judge Rubiera of Dade County Court convicted defendant of tampering with his utility meter. MacMillan received a sentence of 30 days in the county jail. The defendant obtained a direct appeal to the state supreme court from the circuit court because of the constitutional question. *Id.*

13. 358 So. 2d at 549. These tests are discussed at notes 16 and 23 and accompanying text *infra*.

Although the court declared the presumption contained in § 812.14(3) unconstitutional, the rest of the statute remains intact after *MacMillan*. *Id.* at 550. For subsequent legislative amendments, see note 69.

pering or intent to tamper.[14]

In *Tot v. United States*,[15] the United States Supreme Court discussed the relationship between proved and presumed facts. Under the *Tot* test, due process demands a "rational connection" between the proved fact and the presumed fact.[16] Acknowledging the empirical nature of this determination[17] and the legislature's authority as the fact-finding branch of government,[18] the Court used reason and

14. 358 So. 2d at 549 (cause was remanded for a new trial, however).

15. 319 U.S. 463 (1943).

16 *Id.* at 467. The rational connection test originally applied only to civil suits. *See* McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86 (1916) (in civil cases, presumptions are constitutional when rational connection test met); Mobile, J. & K.C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910) (in dicta, the Court acknowledged application of the rational connection standard in criminal proceedings if defendant received a reasonable opportunity to submit his defense to the jury).

In 1925, the Supreme Court first applied the rational connection test to affirm a criminal conviction. Yee Hem v. United States, 268 U.S. 178, 184 (1925). Borrowing the civil standard "without an adequate sensitivity to the fundamental differences between civil and criminal cases" accounts for the inadequacy of the "rational connection" test in criminal cases. *Statutory Presumptions, supra* note 6, at 161. *Cf.* Tot v. United States, 319 U.S. 463, 473 (1943) (Black and Douglas, J.J., concurring) (in addition to a "rational connection," due process requires proof of all elements of the crime for conviction).

The procedural changes accompanying use of presumptions affect many of defendant's rights in criminal cases which have no counterpart in civil litigation. *See* note 7 *supra* for a list of the constitutional rights involved. Defendant's right to have his guilt proven beyond a reasonable doubt as to each element of the crime presents the greatest problems. *See* In re Winship, 397 U.S. 358 (1970); notes 31-32 and accompanying text *infra*. Juries may treat permissive presumptions as if they were mandatory because they lack contradictory evidence. Ashford & Risinger, *supra* note 4, at 204.

The "more likely than not" test deals with only a minor aspect of defendant's constitutional rights. The Supreme Court has never clearly indicated the extent to which presumptions will be allowed to affect the relative positions of the parties. *Statutory Presumptions, supra* note 6, at 167. The Court consistently considers several different constitutional rights under the due process label. *See* note 7 and accompanying text *supra*. Limited to due process analyses, the Court has adopted the "more likely than not" standard to satisfy these diverse rights. Ignoring the variant nature of these constitutional rights, the Supreme Court has failed to consider other tests which would more adequately protect these rights. United States v. Gainey, 380 U.S. 63, 79 (1965) (Black, J., dissenting) (rationality is only the first "constitutional hurdle;" additional standards are necessary); Barnes v. United States, 412 U.S. 837, 843 (1973). *See also Statutory Presumptions, supra* note 6, at 167.

17. Leary v. United States, 395 U.S. 6, 38 (1969).

18. *See* United States v. Gainey, 380 U.S. 63, 67 (1965). The presumption of illegal activity derived from the accused's presence at a still reflected the legislative determination that the "implications of seclusion [only] confirm[s] what the folklore teaches—that strangers to the illegal business [liquor manufacture] rarely penetrate the curtain of secrecy." *Id.* at 67-68.

common experience to determine whether the connection was rational.[19] Ultimately, the Court deferred to the legislature's superior capacity "to amass the stuff of actual experience and cull conclusions from it."[20]

A subsequent test of due process, the "more likely than not" test, emerged in *Leary v. United States*[21] to clarify application of the ra-

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19. Tot v. United States, 319 U.S. 463, 467 (1943).

A corollary to the "rational connection" requirement is the "comparative convenience" test. When first adopted, the convenience test justified statutory presumptions by allowing the burden of going forward to shift whenever the defendant had better access to the evidence than the prosecutor. *See* Yee Hem v. United States, 268 U.S. 178 (1925). *Cf.* United States v. Gainey, 380 U.S. 63, 65 (1965) (if the legislative record indicates that Congress enacted legislation because of the "practical impossibility" of proving actual participation absent an inference, then the inference is rational). *See generally Criminal Presumptions, supra* note 4, at 344.

Convenience may influence the constitutionality of a presumption. This occurs, however, only when the presumption is permissive and defendant's convenient access to the proof does not subject him to unfairness or hardship when required to go forward with the evidence. Tot v. United States, 319 U.S. 463, 468-70 (1943).

Convenience alone does not justify the prejudicial effect of presumptions in criminal proceedings. In a civil tort suit, shifting the burden of going forward to the party best able to produce the necessary facts protects injured victims who do not have access to the required evidence. *See* Morrison v. California, 291 U.S. 82, 84 (1934). For example, the doctrine of *res ipsa loquitur* shifts the burden to the defendant and thus allows innocent plaintiffs the chance to recover damages by preventing a directed verdict in favor of the defendant. *See, e.g.*, Ristau v. E. Frank Coe Co., 120 App. Div. 478, 104 N.Y.S. 1059 (1907). In *Ristau*, plaintiff presented evidence of a collapsed trestle that had allegedly injured him. That evidence was sufficient to shift the burden to defendant to prove he was not negligent in allowing that condition to occur. Plaintiff was in no position to assert whether defendant had exercised due care.

In a criminal case, the procedural considerations are different. The defendant is innocent until proven guilty; however, when presumptions shift the burden upon the defendant, the presumption of innocence is denied. Even if the presumption is permissible, it weights heavily upon the jury determination. *See Statutory Presumptions, supra* note 6, at 161, 185.

Justice Black's awareness of this problem appears in his dissent in United States v. Gainey, 380 U.S. 63, 78-80 (1965). Acknowledging the validity of the presumption of death after seven years' absence for use in civil suits, he simultaneously denied its validity as proof of the *corpus delicti* of a criminal charge such as murder. He feared punishment on the basis of a presumption rather than upon proof beyond a reasonable doubt of all elements of the offense. *See* note 35 and accompanying text *infra*.

20. 380 U.S. at 67. *Accord*, Leary v. United States, 395 U.S. 6, 38 (1969). The *Leary* Court temporally qualified its deference to legislative expertise: even if the legislature conceived of a presumption which met the "rational connection" test at its inception, it could later prove empirically invalid. 395 U.S. at 38 (evidence presented to the legislative committee did not reflect the reality of the drug situation as the Court perceived it at the time of its decision).

21. 395 U.S. 6 (1969).

tional connection standard. Criminal presumptions, according to the newer test, are irrational unless there is "substantial assurance" that the presumed fact is "more likely than not" to flow from the proved fact.[22] The Court recognized the use of probability to assess a presumption's constitutionality in accordance with the more likely than not standard.[23]

In later applications of the more likely than not test to statutory presumptions, the Supreme Court also discussed a stricter "reasonable doubt" standard.[24] The reasonable doubt test would allow the Court to uphold a conviction based upon a presumption whenever a rational juror could presume the fact beyond a reasonable doubt.[25] Although the Supreme Court has never explicitly accepted the reasonable doubt standard,[26] the Court's recognition of this stricter test may be implicit in view of its *In re Winship*[27] decision. Therein the Court held that the prosecution must prove each element of the al-

22. *Id.* at 36.

23. *Id.* at 39, 46. Although the legislature found that 90% of all marijuana was imported, the Supreme Court refused to apply the statutory presumption of *knowing* possession of *imported* marijuana from mere possession of the drug. Because the statistic represented the probability of importation and not the probability of one's knowledge, the Court reasoned that no rational connection existed between possession of the drug and knowledge of illicit importation. *Id.* Knowledge of the drug's importation was not implicit from one's possession. As a method of substantiation, the Court suggested that testimony from drug users regarding their knowledge of importation would be relevant. *Id.* at 47. *See* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); *Criminal Presumptions, supra* note 4, at 352. *See also* Justice Douglas' dissent in Barnes v. United States, 412 U.S. 837, 848-50 (1973), in which he follows the majority's holding in *Leary* and reasons that mere possession of a stolen check does not allow the presumption that the accused knew that the check had been stolen from the mail.

24. *See, e.g.*, Barnes v. United States, 412 U.S. 837, 843 (1973); Turner v. United States, 396 U.S. 398, 408 (1970). In these cases, the Court noted that the presumptions met the "reasonable doubt" standard, thereby satisfying the less stringent "more likely than not" test. *See also Statutory Presumptions, supra* note 6, at 171.

25. Leary v. United States, 395 U.S. 6, 46 (1969).

26. The more likely than not test is still the current legal standard. Turner v. United States, 396 U.S. 398, 408 (1970); *see* 83 HARV. L. REV. 103, 108 (1969-70). Yet, the Supreme Court has mentioned the "reasonable doubt" test in assessing the constitutionality of a presumption and has referred to the standard as "the most stringent standard the Court has applied in judging the permissive criminal law inferences." Barnes v. United States, 412 U.S. 837, 846 (1973); Turner v. United States, 396 U.S. 398, 409 (1970).

27. 397 U.S. 358, 361 (1970).

leged crime beyond a reasonable doubt.[28]

The *Winship* decision antedated the Court's dicta on the reasonable doubt test in cases that turned on the more likely than not standard.[29] Nevertheless, the Court has never defined the relationship between the *Winship* requirement and the less stringent more likely than not test.[30] Clearly, though, a conviction based on the more likely than not standard seems to violate *Winship* by allowing the jury to presume an elemental fact which has not been proven beyond a reasonable doubt.[31] Unless the court instructs a jury to employ the presumption only when it also satisfies the "reasonable doubt" test, violation of defendant's rights to procedural due process will occur.[32]

Consistent with the constitutional standards permitting presumptions, common law recognizes the validity of presuming intentional possession from proof of unexplained possession.[33] State courts have

28. *Id.* at 361 (first case to explicitly interpret the due process clause to require this level of proof).

29. The *Winship* decision was handed down in 1970, *id.*, whereas *Barnes* was a 1973 case, 412 U.S. 837 (1973).

30. *See* Barnes v. United States, 412 U.S. 837 (1973) (relied on *Turner* but did not cite *Winship*); Turner v. United States, 396 U.S. 398 (1970) (decided prior to *Winship*).

31. *See* Fitzgerald v. State, 339 So. 2d 209, 211 (Fla. 1976) (discussed *Winship* explicitly).

32. In re Winship, 397 U.S. 358, 363-64 (1970); Fitzgerald v. State, 339 So. 2d 209, 211 (Fla. 1976). Presumptions sway the jury despite instructions. The juror is likely to assume the presumed fact without performing an independent determination based on the reasonable doubt standard. *Statutory Presumptions, supra* note 6, at 169. The *Winship* standard provides "substance for the presumption of innocence." Adjudging the defendant by a lower standard than the reasonable doubt test puts the defendant at a disadvantage and results in a deprivation of fundamental fairness. 397 U.S. at 363.

33. Since benefit usually adheres to one possessing stolen goods, it is logical to infer the possessor's motive to break the law. *See* Barnes v. United States, 412 U.S. 837, 843-44 (1973) (possession of stolen checks allows presumption of defendant's knowledge that the checks were stolen); Adams v. New York, 129 U.S. 585, 599 (1904) (possession of policy slips gives rise to presumption of defendant's knowing possession of them); Fitzgerald v. State, 339 So. 2d 209 (Fla. 1976) (possession of a stolen car permits the presumption of defendant's intent to steal it); State v. Curtis, 148 N.J. Super. 235, 238, 372 A.2d 612, 614 (1977), *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977) (possession of tampered meter allows presumption of defendant's intent to tamper).

The U.S. Constitution requires proof that defendant actually did something illegal; proving the existence of a state of possession may therefore be insufficient. *See* Leary v. United States, 395 U.S. 6, 36 (1969) (proof of presence, while relevant and admissible as evidence, is insufficient to support a possessory conviction). *Contra* Barnes v. United States, 412 U.S. 837, 851 (1973) (Douglas, J., dissenting). *See also* Christie & Pye, *supra* note 4, at 925.

expanded the common law theory to include the possession of intangibles such as utility services.[34] Exceptions to this presumption arise when defendant's possession is nonexclusive;[35] however, courts readily find exclusive possession if defendant owns the property on which stolen property is found.[36]

The New York[37] and New Jersey[38] courts have upheld the constitutionality of statutes that presume intent to alter a utility meter from proof of possession of a tampered meter. According to interpretations by these state courts, the presumptions satisfy the rational connection and more likely than not tests of due process.[39] In the New York case, *People v. McLaughlin*,[40] the state supreme court held that the prima facie presumption was "inevitable."[41] Consequently, the statutory presumption satisfied the reasonable doubt test.[42]

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34. The common law theory encompassed only the possession of tangibles because only they were subject to physical possession. *See* People v. McLaughlin, — Misc. 2d —, 402 N.Y.S.2d 137, 144 (1978) (theft of utility services is a proper subject of larceny despite its intangibility). *See also* Ashwander v. Tennessee Valley, 297 U.S. 288 (1936) (electrical energy is personal property).

35. When others have an equal right and facility of access to property, nonexclusive possession results. Lewis v. State, 181 So. 2d 357, 358 (Fla. 1965).

36. *Id.*

37. People v. McLaughlin, — Misc. 2d —, 402 N.Y.S.2d 137 (1978); Eff-Ess, Inc. v. New York Edison Co., 237 App. Div. 315, 316-17, 261 N.Y.S. 126, 129 (1932).

38. State v. Curtis, 148 N.J. Super. 235, 372 A.2d 612 (1977), *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977).

39. *Id.* People v. McLaughlin, — Misc. 2d —, 402 N.Y.S.2d 137, 143 (1978). As early as 1932, the New York court (Eff-Ess, Inc. v. New York Edison Co., 237 App. Div. 315, 316-17, 261 N.Y.S. 126, 129 (1932)) allowed the presumption of intent to tamper with utility meters in both criminal and civil cases. The court found a "rational connection" between proof that defendant benefited from the stolen electricity and the presumption of intent. Because it was "too clear to admit to serious question," the opinion provided no reasoning for its conclusion. Interference with the meter constituted the *corpus delicti*. 237 App. Div. 315, 316-17, 261 N.Y.S. 126, 129 (1932). For an opposing view of the constitutional propriety of the presumption, see the dissent's argument in *Eff-Ess*. *Id.* at 318, 261 N.Y.S. at 130.

40 — Misc. 2d —, 402 N.Y.S. 2d 137 (1978) (relied on *Eff-Ess*).

41. *Id.* By doing this, the court implicitly rules out the possibility of vandalism. *Accord*, State v. Curtis, 148 N.J. Super. 335, 238-39, 372 A.2d 612, 615 (1977) (no independent motivation existed in anyone other than the beneficiary).

To uphold convictions, presumptions "must exclude, to a moral certainty every reasonable hypothesis except guilt." People v. McLaughlin, — Misc. 2d at —, 402 N.Y.S.2d at 144. In State v. Curtis, 148 N.J. Super. 235, 372 A.2d 612 (1977), the court held that the constitutional validity of a presumption was "not dependent upon its rationality as an absolute verity in every instance." *Id.* at 239, 372 A.2d at 615.

42. "And search as we may, we are unable to extract any reasonable hypothesis as

The New Jersey Superior Court reached a similar result in *State v. Curtis*.[43] The state's meter tampering presumption[44] is similar to that of New York and Florida except for an additional provision. Under this statute, the accused cannot be convicted by means of the presumption unless he received the stolen electricity for at least thirty-one days or had his meter read since moving to the premises.[45] Upholding the constitutionality of this statute, the court in *State v. Curtis* found that the presumption met the more likely than not standard when tested by "human conduct and experience."[46] No violation of defendant's procedural rights occurred since "all the normal accoutrements of the burden of proof . . . prevail[ed];"[47] the jury still had to establish defendant's guilt beyond a reasonable doubt.[48]

The *MacMillan* court,[49] contrary to *McLaughlin* and *Curtis*, held that due process constraints prohibited the statutory presumption of intent to tamper with a utility meter. The Florida court reasoned that according to common experience, neither the use or receipt of benefits from stolen electricity, nor the existence of a tampered meter on

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to why someone other than the subscriber himself would tamper with a meter so as to deprive the supplier of its lawful charges." *McLaughlin*, — Misc. 2d at —, 402 N.Y.S.2d at 144. In their dissenting opinion in Barnes v. United States, 412 U.S. 837, 853 (1973), Justices Brennan and Marshall indicated that the reasonable doubt test is met where the inference is inevitable.

43. 148 N.J. Super. 235, 372 A.2d 612 (1977), *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977).

44. N.J. STAT. ANN. § 2A-170-63 (West 1971). In New Jersey, the crime is not larceny, but a disorderly persons offense.

45. *Id.*

46. 148 N.J. Super. 235, 238-39, 372 A.2d 612, 614-15 (1977), *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977). The possibility that tampering was incident to vandalism or other causes outside of defendant's control did not destroy the substantial probability of the presumption's validity. According to the court's reasoning, no independent motivation existed in anyone other than the beneficiary of the stolen electricity. *Id.* In cases of accident, motive is not a significant factor. The mechanics of the meter, however, make accidental alteration unlikely.

47. *Id.* Even with a prima facie presumption, the legislature cannot prevent the jury from acquitting a defendant. The judicial branch, not the legislature, maintains the ultimate authority to determine guilt. *See* United States v. Gainey, 380 U.S. 63, 68 (1965).

48. 148 N.J. Super. 235, 238-39, 372 A.2d 612, 614-15 (1977), *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977).

49. MacMillan v. State, 358 So. 2d 547, 549 (Fla. 1978). In its deletion of the presumption in subsection 3 of § 812.14, FLA. STAT. (Supp. 1976), the Florida court simultaneously extinguished the presumption in civil cases.

one's property could sufficiently corroborate the presumption.[50] The *MacMillan* court purported to employ the rational connection and more likely than not tests just as the courts had in *Curtis* and *McLaughlin*.[51] Florida, however, applied these same standards to achieve an opposite result.[52]

The *MacMillan* court emphasized the nonexclusive nature of defendant's possession of the tampered meter since it was situated in an easily accessible location.[53] Although defendant possessed the tampered meter and received free utility services, the court could not uphold defendant's conviction. The Florida court found it too easy to posit situations in which defendant could be innocent.[54] The New York and New Jersey courts, however, dismissed the theory of nonexclusivity, asserting that defendant's innocence was improbable given the situation posed in the statute.[55] Therefore, the unique importance of nonexclusivity to the *MacMillan* court's analysis accounts for its divergent approach despite the three state courts'[56] explicit use of identical constitutional standards.

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50. 358 So. 2d at 550.

51 *Id.* at 549.

52 *Id.* "We find that it cannot be said with substantial assurance that the presumed fact that defendant is guilty . . . is more likely than not to flow from the proved fact of possession of the premises or receipt of benefits."

53. *Id* at 550. Pranksters, angry neighbors or any occupant of the premises could easily gain access to defendant's meter without defendant's notice or knowledge. Notwithstanding, the presumption would operate to procure a guilty verdict and conviction

54 *Id.*

55. The mere possibility of defendant's innocence was not sufficient to overcome the validity of an otherwise valid presumption. No motive would exist for anyone other than defendant to tamper with the meter. State v. Curtis, 148 N.J. Super. 235, 238, 372 A.2d 612, 614 (1977), *cert. denied*, 75 N.J. 22, 379 A.2d 253 (1977).

56. MacMillan v. State, 358 So. 2d at 550. Factual differences between the cases of the three states may help to distinguish them. In addition to evidence presented in *MacMillan*, the *Curtis* court considered physical evidence; the meter's malfunctioning was caused by the removal of a ring found in defendant's garage and introduced into evidence. With this extra bit of persuasive evidence, it was easier to uphold defendant's conviction in *Curtis*. Factual distinctions may be very important since the "statutory inference can have no probative force independent of the factual context in which it applies." 148 N.J. Super. at 239, 372 A.2d at 616. Yet in People v. McLaughlin, under facts more analogous to *MacMillan*, the New York court explicitly upheld the constitutionality of the presumption. — Misc. 2d —, 402 N.Y.S.2d 137 (1978)

Although each court depended upon "common experience" to rationalize its holding, there are no expressed differences in these experiences that account for the antithetical results. Certainly geography is not the factor. The Florida court gives no

Vagueness inherent in the more likely than not standard may also explain the *MacMillan* court's dissonant holding.[57] No court has articulated the degree of probability required to satisfy the more likely than not test.[58] Incident to this failure, wide latitude has developed

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reason to expect the probability of vandalism to be greater in Miami than in the highly urbanized states of New Jersey and New York.

The Florida court's failure to consider Turner v. United States, 396 U.S. 398 (1970), may also account for the disparate results. Nowhere in the opinion did the Florida court mention *Turner*, though *MacLaughlin* and *Curtis* relied upon that case heavily. *Turner* is important because it recognizes distinctions between presumptions which are logically similar.

In *Turner*, the Court invalidated a conviction for knowing possession of illegally imported cocaine, but also upheld a heroin conviction that similarly required knowledge of illegal importation. Holding that one could presume the requisite knowledge in the case of heroin possession but not for cocaine, the Court made an important distinction. In both instances, it was possible that the possessor did not know of the drug's derivation. As to heroin, however, this possibility was very unlikely since no heroin was produced domestically. 396 U.S. 408. This was not true for cocaine; its legal importation accounts for a large quantity of the present cocaine supply and theft of the substance is not uncommon. 396 U.S. at 419. Given these facts, it is legitimate to maintain the presumption from possession of heroin since the probability is almost 100% that the drug was illegally imported. Likewise, the presumption is invalid for cocaine possession because the possibility that the drug was not imported illegally is much greater. According to *Turner*, then, a presumption may not be invalidated by the mere possibility of its falsity. If the presumption's truth is highly probable, it is constitutional. 396 U.S. at 408.

57. *See Rebuttable Presumptions, supra* note 7, at 537; *Statutory Presumptions, supra* note 6, at 179. In many instances courts use the test to ensure a multitude of constitutional rights for the defendant's protection. *See* note 16 and accompanying text *supra*. Attempting to guarantee this protection through a single due process standard, the Supreme Court has stretched the test to its limits. *Rebuttable Presumptions, supra*. Arguably, explicit adoption of the "reasonable doubt" standard would solve many of these problems. For a discussion of *Winship* requirements, see notes 31-35 and accompanying text *supra*. *See also Statutory Presumptions, supra* note 6, at 169, in which it is stated that the use of the "reasonable doubt" standard leads to confusion of due process questions.

58. For general background on this proposition, see *Statutory Presumptions, supra* note 6, at 179, 183. It is unclear whether a correlation of 50% would be constitutional under the more likely than not test or whether the probability must be greater than 90%, thereby approaching unification with the reasonable doubt test. When the correlation is low, defendant's innocence is more likely. The accuracy of jury verdicts based upon presumptions of low probability is suspect. *See* Bailey v. Alabama, 219 U.S. 219 (1911).

If determining the necessary strength of the presumption is purely statistical, perhaps it should be left to the legislators who can assure consistent jury verdicts under similar facts, not readily within the jurors' common knowledge. *See Statutory Presumptions, supra* note 6, at 180. Yet, when presumptions involve subjective factors such as intent, the superiority of the legislator as a fact-finder is questionable. The subject is not a matter within the legislature's unique expertise. *Id.* at 181. Statutory

in application of the standard.[59] One court may demand a greater degree of correlation between the proved and presumed fact than another court.[60] The Florida court interpreted the more likely than not test to mandate evidence of the same strength as that required by the reasonable doubt test.[61] As a result, application of the two standards is identical. In many instances, however, use of the stringent reasonable doubt test either forbids criminal presumptions entirely or reduces their prosecutorial value.[62]

The United States Supreme Court has not applied the more likely than not standard in the context of utility theft presumptions,[63] thus the Florida Supreme Court is free of any binding precedent.[64] In view of the preference for predictability and uniformity in the application of constitutional requirements,[65] however, the Florida court

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presumptions may usurp constitutionally guaranteed judicial function. U.S. CONST. art. III, § 2. *See generally* Baker v. Carr, 369 U.S. 186, 211 (1962) (deciding which branch of government has authority in any given matter is a delicate exercise in constitutional interpretation); Toth v. Quarles, 350 U.S. 11 (1955) (constitutional importance of the judicial function).

59. *Statutory Presumptions, supra* note 6, at 167, 185. *See also* Barnes v. United States, 412 U.S. 837, 843 (1973): "To the extent that the rational connection, more likely than not, and reasonable doubt standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than difference of substance."

60 Strong dissents in the Supreme Court cases in this area indicate this wide variation. *See, e.g.*, U.S. v. Gainey, 380 U.S. 63 (1965) (Black, J., dissenting).

61 *Compare* MacMillan v. State, 358 So. 2d 547 (Fla. 1978) *with* Turner v. United States, 396 U.S. 398 (1970) (applications of reasonable doubt standard).

62. According to *MacMillan* standards, the presumed fact must almost certainly flow from the proved fact. 358 So. 2d 547 (Fla. 1978).

The reasonable doubt test for determining due process rights is identical to the burden of persuasion standard that forbids conviction unless all elements of an offense are proven beyond a reasonable doubt. Because of this identity, only those presumptions of fact for which a jury would have found defendant guilty without the use of a presumption could be deemed constitutional. *Criminal Presumptions, supra* note 4, at 354.

63 No United States Supreme Court decision has dealt with this presumption. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (establishes power of judicial review over state courts). *See generally* Kauper, *The Supreme Court and the Rule of Law*, 59 MICH. L. REV. 531, 533-34 (1961).

64. "State courts are the final interpreters of state law even though their actions are reviewable under the federal Constitution." J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 20-21 (1978). The state is free to decide the constitutionality of its own law as long as it does not violate constitutional principles. *Id.*

65. "To know the law is helpful, even when the law is bad." K. LLEWELLYN, THE

should have distinguished and supported its unique analysis more fully.[66]

The *MacMillan* court, in its strict application of the more likely than not test, has made an already vague standard of law more ambiguous.[67] Even if the more stringent reasonable doubt standard is

BRAMBLE BUSH 64-66 (1951). The law should operate evenhandedly rather than arbitrarily. Thus, prior cases and their articulated rationales provide the most conclusive data for courts to use in arriving at subsequent decisions. Note, *Stare Decisis and the Lower Courts: Two Recent Cases*, 59 COLUM. L. REV. 504, 504-08 (1959).

66. *Cf.* P. MISHKIN & C. MORRIS, ON LAW IN COURTS 80 (6th ed. 1978) (when a court overrules a prior case, it should do so "with care, only upon a strong basis in reason which is explicated at the time of action, and only when it does not upset justified reliance upon the old law"). Florida's decision has created a schism in constitutional interpretation and application which needs resolution. A single national standard is desirable if law is to have the authority and accuracy to operate as a guiding principle for society. *See also* Malloy v. Hogan, 378 U.S. 1 (1964) at 10-11.

67. Ambiguity results when no logic can explain the inconsistencies between the decisions. Other jurisdictions seeking to adopt criminal presumptions will experience difficulty knowing what will be constitutionally acceptable. Only a ruling by the United States Supreme Court can resolve the problem.

Additionally, the *MacMillan* decision spawned new legislation in Florida. Following the decision, Florida had no statutory presumption for utility theft prosecutions although the state's need to obtain sufficient evidence for conviction remained. In response to this void, the state legislature enacted a new subsection to the meter theft act. Trespass and Larceny—Utility or Cable Television Service, 1978 FLA. LAWS. Ch. 78-262, effective July 1, 1978. The new subsection requires either "knowing" alteration, or use or receipt of diverted utility service "under such circumstances as would induce a reasonable person to believe that such direct benefits have resulted from tampering, . . . for the purpose of avoiding payment." The new legislation varies significantly from the unconstitutional section it replaces. It does not explicitly set up a presumption and therefore is not subject to the constitutional attack set forth in *MacMillan*.

Despite Florida's attempt to avoid the difficulties of the prior legislation, some constitutional problems may still inhere. On its face, the new statute appears to satisfy requirements stated in Leary v. United States, 395 U.S. 6, 33 (1969). The "conversion from a . . . presumption of law approach to a circumstantial evidence approach" provides an ideal compromise between prosecutorial needs and constitutional rights. *Abrogation of Presumptions, supra* note 4, at 161. No court has yet ruled on its constitutionality.

It is likely that courts will see through the purported redefinition of the offense as an attempt to circumvent due process guarantees, and thus find the new legislation unconstitutional. *Cf.* MacMillan v. State, 358 So. 2d 547 (1978) (reasoning that the statute would be unconstitutional for the same reasons, whether the presumption was implicit or explicit). Assuming that future courts do not follow that reasoning, additional constitutional problems may arise involving the nature of the elements that are necessary to define a punishable crime. Arguably, the courts will interpret the new statute to allow strict liability; even if the accused did not purposefully alter a meter, simple possession of an altered meter under circumstances that allow a reasonable person to find purposefulness, would allow the defendant to be found guilty. This

presumed the proper test,[68] the Florida court's use of the standard is too severe. In terms of what the standard attempts to achieve—ensuring due process rights while easing the prosecutorial burden—the court's reasoning is unjustified.[69] Subject to the reasonable doubt standard, presumptions do not aid the prosecutor in establishing a *prima facie* case.[70] Consequently, this hinders any attempt to control

objective standard used in the new statute requires that *mens rea* be inferred independent of defendant's actual state of mind.

Recently, many legislatures have departed from the common law requirement that intent be a necessary element of all criminal offenses. W. LAFAVE AND A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 218-23 (1972). *E.g.*, State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948). Some scholars believe that the state has the authority to use presumptions in connection with a lesser offense when it has power to punish for the greater offense. The application of due process tests to presumptions is considered "grace" rather than mandate. *See* Ashford & Risinger, *supra* note 4, at 180.

An essential question in this regard is whether the legislature has the authority to declare this "lesser offense" punishable. If this new legislation is acceptable, the prosecutor will achieve more convictions than under the old law because of the lower evidentiary requirement. *Compare* FLA. STAT. § 812.14(c) (Supp. 1976) *with* 1978 Fla. Laws. Ch. 78-262. This result is ironic in light of *MacMillan's* attempt to protect the criminal from arbitrary authority since the objective standard's operation increases the likelihood that innocent people will be found guilty. However, it is probable that the statute will be found unconstitutional; to punish conduct without reference to the actor's state of mind is unjust. LAFAVE & SCOTT, *supra*, at 221-22. Although the statute contains reference to state of mind, it is not defendant's *actual* state of mind, but rather an objective one founded upon the reasonable person, not the accused.

Whatever its constitutional interpretation, the *MacMillan* decision and its attendant legislative response may have prevented other states from adopting statutes similar to that of New Jersey or New York in order to avoid court battles and the risk of unconstitutionality.

68 *See* notes 26-32 and accompanying text *supra*.

69 Reasonable doubt does not mean that the jury should not convict if there is a minute possibility of innocence. It should do so only when the doubt is reasonable. *Compare* MacMillan v. State, 358 So. 2d 547 (Fla. 1978) *with* State v. Curtis, 148 N.J. Super. 235, 372 A.2d 612 (1977) (*Curtis* rejected the possibility of innocence while *MacMillan* relied upon it). In light of the cases that found defendant guilty beyond a reasonable doubt, denial of the presumptions' validity in *MacMillan* is not warranted. Since the presumptions used did not *require* the jury to find guilt unless it found guilt as to all elements beyond a reasonable doubt, it would appear that according to the jurors' "common experience," the presumptions met the constitutional requirements of due process.

The reality of the situation however, may negate this view. A presumption typically operates where there is no other evidence of the presumed fact. Therefore, the jury is likely to accept the presumption without making an independent assessment of its validity. *See Statutory Presumptions, supra* note 6, at 169.

70. *See* note 63 and accompanying text *supra*.

the meter theft problem and creates a need for alternative solutions.[71] Finally, should other courts accept the reasoning in *MacMillan*, statutory presumptions in other areas of criminal law could be banned as unconstitutional.[72]

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71. *See* note 3 and accompanying text *supra*.

Alternatives to the legislation discussed might include: 1) design tamper-proof meters; 2) create investigative systems to discover tampered meters; 3) explore civil remedies, such as allowing treble damages; 4) establish governmental subsidies for utility costs, as there are many persons who simply cannot afford the high utility costs; 5) provide governmental subsidies for defendants to investigate the validity of a presumption and to employ expert witnesses to adequately rebut presumptions; and 6) utilize computer data of the probabilities that any presumption might be true in a case, given certain individual variables unique to that case. *See generally Abrogation of Presumptions, supra* note 4, at 186.

72. *See* Ashford & Risinger, *supra* note 4, at 183; *Statutory Presumptions, supra* note 6, at 181.