Journal of Criminal Law and Criminology

Volume 57 | Issue 1 Article 2

1966

Statutory Presumption in Federal Narcotics Prosecutions

Gilbert Sandler

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 57, No. 1
Printed in U.S.A.

THE STATUTORY PRESUMPTION IN FEDERAL NARCOTICS PROSECUTIONS

GILBERT SANDLER

The author is a senior law student at Columbia University School of law.

The article examines the role of the presumption (that knowledge of illegal importation, and the importation itself, of narcotics may be inferred from possession of narcotics) in federal narcotics cases and questions the constitutional applicability of the presumption to cases involving conspirators and accessories.—EDITOR.

I. INTRODUCTION

Federal narcotics regulation consists of several statutes designed to restrict the international flow of narcotics as well as their domestic production and distribution. The Narcotic Drugs Import & Export (Jones-Miller) Act[1] generally forbids any unauthorized dealings in imported opium and coca leaves. The Harrison Anti-Narcotic Act[2] heavily taxes all coca and opium products regardless of their source with strict regulations imposed upon the handling of all narcotics. This legislation was designed to decrease addiction by limiting the amount of available narcotics to that which was necessary for scientific and medicinal purposes.[3] These two acts form the nucleus of the federal program.[4]

Many, if not most, narcotics prosecutions are undertaken by virtue of the authority of the Jones-Miller Act, which reads, in pertinent part, as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned not less than 5 nor more than 20 years, and, in addition, may be fined not more than $20,000."[5]

The key enforcement provision, as well as the subject of this article, is the following statutory presumption:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."[6]

An identical presumption flows from the possession of marihuana,[7] heroin,[8] and smoking opium in transit.[9] In addition, all smoking opium is rebuttably presumed to be illegally imported,[10] and anyone who manufactures opium products has the burden of proving a license to do so.[11] A presumption similar to that of the Jones-Miller Act flows from possession of narcotics in any form other than in the original tax-stamped package, in order to facilitate enforcement of the Harrison Act.[12]

Some insight into the intended effect of this pre-

[1] 21 U.S.C.A. §§171 et seq., 35 Stat. 614, c. 100 (1909). This was amended in 1922 to prohibit the importation of prepared opium, previously unrestricted, permitting the importation of only crude opium and coca leaves; the Federal Narcotics Control Board was also established while the penalties were increased to a maximum of twenty years of imprisonment. 42 Stat. 596, c.202.

[2] Int. Rev. Code of 1954, Secs. 4701 et seq., derived from 38 Stat. 785-89 (1914). The tax is 1% per ounce. All who deal in any way with narcotics must register, obtain and fill out forms, and place and retain tax stamps on packages containing narcotics. An exception is provided for drugs administered to bona-fide patients by physicians or under prescription from physicians; but doctors and druggists must keep records of all dispositions. The Act has been amended several times in particulars not here relevant.

[3] See Prosser, *The Narcotics Problem*, 1 U.C.L.A. L. REV. 405, 472-75 (1954).

[4] *Id.* at 476. Additionally, the Opium Poppy Control Act, 21 U.S.C.A. Sec. 188 (1942), narrowly restricts the production of opium to that quantity necessary for scientific use; the Marihuana Tax Act, 26 U.S.C.A. § 2599 (1937), taxes the transfer of marihuana at the rate of $1.00 per ounce and $100 per ounce for those dealers who have not registered with the Board.

[5] 21 U.S.C. § 174.

[6] *Ibid.*

[7] 21 U.S.C. §176(a).

[8] 21 U.S.C. § 176(b).

[9] 21 U.S.C. §178.

[10] 21 U.S.C. §181.

[11] 21 U.S.C. §188(m).

[12] INT. REV. CODE of 1954, sec. 4704(a).

sumption is provided by its legislative history. It was first drafted on July 7, 1866 by a conference committee convened to settle differences between House and Senate bills, both entitled "An Act Further to Prevent Smuggling and for Other Purposes."[13] The original bill[14] had instructed that "the burden of proof shall be upon the claimant where probable cause is shown for such prosecution, to be judged by the court."[15] This was interpreted by its critics to violate the traditional presumption of innocence in all criminal prosecutions by authorizing the direction of a guilty verdict upon mere proof of suspicious circumstances (probable cause).[16] Proponents of this shift in the burden of proof replied that conviction by operation of law was justified by the necessities of effective law enforcement, for skillful defense counsel might require the government to prove the impossible, *i.e.*, an illegal source or knowledge of the same, and jury convictions based on circumstantial evidence would be too infrequent.[17] Nevertheless, an amendment striking out the provision was passed,[18] a presumption substantially identical to that under consideration was drafted and approved,[19] and it was enacted on July 17, 1866.[20] Although at least one voice objected to this alleged presumption of guilt from possession, its insertion into the 1909 Act was approved without serious consideration.[21]

II. Operative Effect of the Presumption

Prior to a discussion of the effect of this presumption, it should be noted that the source of Congressional authority for narcotics regulation under the Jones-Miller Act is its power to regulate interstate and foreign commerce.[22] Likewise, the constitutional source of the Harrison Act is the tax power.[23] But Congress may not legislate for the general welfare, as by prescribing the mislabelling of drugs not in interstate commerce;[24] nor may it infringe the police power of the states by making mere possession a crime without focusing on the interstate or foreign elements.[25] Thus, constitutional difficulties can only be avoided by not allowing the operation and effect of the presumption section to render *possession* itself a criminal act.[26]

The essential elements of the crime charged by a Jones-Miller prosecution are: (1) participation in some manner in a transaction involving narcotics; (2) unlawful importation of the narcotics; (3) defendant's knowledge of such illegal source.[27] Proof of all three components is necessary for the establishment of a *prima facie* case. The provision in question creates either a double presumption of illegal importation and knowledge of the same,[28] or a single presumption that one in possession has performed every element of the crime.[29] This presumption is rebuttable and permissive, since its primary effect is to carry the case to the jury and to allow them to convict if they so choose.[30] Moreover, the presumption of innocence operates in a defendant's favor until overcome by proof of

[13] Cong. Globe, 39th Cong., 1st Sess., p. 3501 (1866).
[14] Sen. 222.
[15] Cong. Globe, 39th Cong., 1st Sess., p. 3420.
[16] *Ibid.*
[17] *Id.* at pp. 3441–42.
[18] *Ibid.*
[19] *Id.* at p. 3803.
[20] *Id.* at p. 3854.
[21] 43 Cong. Rec. 1683 (1909).
[22] U. S. Const., art. I, sec. 8.
[23] *Ibid.*
[24] Med-A-Dent Co. v. L. D. Caulk Co., 4 F.2d 126 (D.Del. 1925).

[25] United States v. Ah Hung, 243 Fed. 762, 764 (E.D.N.Y. 1917): "The charge of unlawful importation is therefore necessary to take the case out of the ordinary police regulation of a state." See also the dissenting opinion of Mr. Justice Butler in Casey v. United States, 276 U.S. 413, 426 (1928): "Mere purchase or possession of morphine is not a crime. Congress has not attempted and has no power to make either an offense . . ." The majority, upholding the validity of the Harrison Act, did not contradict this latter statement, but found that possession justified an inference of violation of the tax provisions. See also United States v. Jim Fuey Moy, 241 U.S. 394 (1916).
[26] Griego v. United States, 298 F.2d 845, 848 (10th Cir. 1962).
[27] *Ibid.*
[28] Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930); Comment, *Narcotics Regulation*, 62 Yale L. J. 751, 768 (1953).
[29] Jackson v. U.S., 250 F.2d 772 (D.C.Cir. 1957). But note that possession itself is not an essential *element* of the crime. Pon Wing Quong v. United States, 111 F.2d 751, 758 (9th Cir. 1940). Thus, lawful or unconscious possession is innocent. Ezzard v. United States, 7 F.2d 808 (8th Cir. 1925). 1 Wharton, Criminal Evidence, § 90, p. 176 (12th ed. 1931).
[30] Brosman, *The Statutory Presumption*, 5 Tul. L. Rev. 178, 198 (1931); Comment, 38 Mich. L. Rev. 366, 369 (1940). Professor Brosman bases this conclusion on the notion that the jury may always refuse to convict unless the prosecution has proved guilt beyond a reasonable doubt, as well as the fact that the defendant is protected from a directed verdict and actual compulsion to testify. *Id.* at 197.

Professor Glanville Williams, however, would call such a presumption of law which requires the accused to prove a specific issue to the satisfaction of the jury, a "compelling presumption," if it shifts the burden of persuasion. Williams, *Burdens and Presumptions in Criminal Law*, 212. L. T. 211 (1951).

guilt beyond a reasonable doubt.[31] Thus, the presumption merely shifts the burden of going forward, rather than the burden of persuasion,[32] and prescribes a rule of evidence rather than one of substantive law.[33] Nor is the prosecution relieved of its burden of proving guilt.[34] The prosecution can, however, fulfill its burden with circumstantial evidence, *i.e.* facts from which the jury may reasonably infer guilt.[35] The presumption merely tells the jury that the fact proved is sufficient circumstantial evidence to authorize conviction.[36] It manifests legislative approval of a jury's finding that one fact exists when another is proved, and assures that, if the proved fact exists, the verdict will stand.[37] Since the accused remains immune from a directed verdict, he may not be seriously disadvantaged when ordinary reasonable inferences sufficient to support conviction are regularized into a statutory presumption.[38] Indeed, such a presumption may benefit the unwary defendant by notifying him of the circumstances which raise sufficient suspicion in order that he may come forward and reconcile such circumstances with innocence.[39]

Where, then, lies the great administrative value of this presumption which has induced its frequent legislative adoption? First, it insulates the prosecution from a directed verdict when elements of its *prima facie* case, *i.e.* illegal importation and knowledge of such source, are extremely difficult of proof.[40] Also, it may erase doubts of a jury as to the sufficiency of circumstantial evidence when the facts proved indicate guilt but may not clearly satisfy the elusive criterion of reasonable doubt.[41] Moreover, the mere mention of the presumption in the jury charge may influence it,[42] both by emphasizing the fact proved and its probable consequences, and by the very fact that the legislature saw fit to enact the rule. Additionally, it permits convictions to stand which might otherwise be reversed for insufficient evidence, since the court cannot set aside a verdict if the presumption is operative.[43] Finally, the degree of difficulty of rebuttal of the presumption may dictate the frequency of convictions.[44]

In order to effectively rebut this "presumption of guilt,"[45] a defendant need only, in theory, satisfy the jury that either (1) the narcotics in question were not illegally imported, or (2) that he had no knowledge of that fact. He is not required to take the stand to deny knowledge and submit to a test of credibility.[46] If this were necessary, it might violate the privilege of the accused against self-incrimination since the inherent inference of guilt flowing from his silence would induce him either to incriminate or perjure himself. Nor should the defendant be forced to rely exclusively on the former method of defense by proving that his possession was lawful, though the cases here are in conflict.[47] This requirement would be impossible to satisfy where either the narcotics were contraband or defendant was a mere tool and

[31] Ng Choy Fong v. United States, 245 Fed. 305, (9th Cir. 1917), *cert. denied*, 245 U.S. 669 (1918); Shepard v. United States. 236 Fed. 73 (9th Cir. 1916).

[32] Professor Williams would prefer to so construe statutory presumptions, for to shift the burden of persuasion would destroy the traditional presumption of innocence. His view that such presumptions are merely evidential is in apparent conflict with that of the English Court of Criminal Appeals. Williams, *supra* n. 30 at 212–13. See also Roviaro v. United States, 353 U.S. 53, 63 (1956).

[33] Velasquez v. United States, 244 F.2d 416 (10th Cir. 1957); Ng Choy Fong v. United States, *supra* n. 31 at 307.

[34] 110 U. PA. L. REV. 903, 904 (1962).

[35] Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COL. L. REV. 527, 545 (1955). For a general comparison between direct and circumstantial evidence, as well as the view that the latter is at least as reliable as the former, see Note, Sufficiency of Circumstantial Evidence in a Criminal Case, 55 COL. L. REV. 549 (1955).

[36] Comment, 38 MICH. L. REV. 366, 373 (1940).

[37] *Id.* at 369.

[38] Note, *Constitutionality of Rebuttable Statutory Presumptions*, *supra* n. 35 at 546.

[39] Williams, *supra* n. 30.

[40] Brosman, *supra* n. 30 at 203.

[41] *Id.* at 204; McCormick, Charges on Presumptions and Burden of Proof, 5 N. C. L. REV. 291, 302–03 (1927). Professor McCormick doubts that the ordinary jury could systematically weigh the circumstantial evidence of guilt against the presumption of innocence resulting in the reasonable doubt standard when judges have such great difficulty in such cases; the presumption and instruction thereon alleviates this mystery to a great degree.

[42] *Supra* n. 36 at 375–76.

[43] *Ibid.*; 110 U. PA. L. REV. 903, 904 (1962); Brosman, *supra* n. 30 at 205.

[44] Brosman, *supra* n. 30 at 203. When the difficulty of rebuttal as manifested by an extraordinarily high percentage of convictions becomes too great, the effect of the presumption may be to render the mere fact of possession criminal, raising constitutional problems. *Id.* at 203–04.

[45] United States v. Johnson, 260 F.2d 508 (7th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959).

[46] Perez v. United States, 297 F.2d 12 (5th Cir. 1961), reversing a conviction for smuggling marihuana under 21 U.S.C. § 176(a) for the trial court's failure to charge that defendant need not personally testify in order to explain his possession. *Cf.* Knapp v. United States. 311 F.2d 71 (5th Cir. 1962), *rehearing denied* 316 F.2d 744 (1963).

[47] In United States v. Turner, 65 F.2d 587 (2d Cir. 1933), a charge that defendant's denial of knowledge

actually had no knowledge of their source; the result would be the creation of a new federal crime of possession.[48] However sufficient an honest denial of knowledge should be for rebuttal purposes, the broad legislative objective would be thwarted if every participant in narcotics transactions were shielded from punishment by ignorance. Although mere negligence is insufficient to charge the accused with knowledge, an essential element of the crime, "willful ignorance" or a "conscious purpose to avoid enlightenment,"[49] should serve as a valuable test. Thus, an intermediary in several narcotics transactions could not credibly plead honest or ordinarily negligent ignorance,[50] while absolute liability is averted.[51]

It has been said that "When credible evidence is admitted, the statutory presumption ceases to operate and the fact which would have been presumed must be established by the evidence."[52] Although a defendant need not prove lawful possession, his explanation of possession or denial of knowledge must be believed by the jury, whose finding is accorded much weight. Thus, where defendant's operations were suspicious,[53] or his testimony contradicted,[54] convictions were affirmed notwithstanding pleas of ignorance. Although the statutory presumption may vanish upon the production of rebuttal evidence, a valid inference may remain based on the circumstantial force of the facts proved.[55] The jury may, and often does, disbelieve the defendant's denial; though he has met his burden of going forward, the jury draws logical inferences from the fact of possession.[56] Moreover, the standard of credibility is high.[57] From this point of view, the presumption itself is not given evidential value; rather the fact proved is accorded such effect.[58]

It is uncertain, however, that in each instance of conviction despite attempted rebuttal, the jury

was legally insufficient for discharge of his statutory burden required a showing of lawful importation was held reversible error. In United States v. Moe Liss, 105 F.2d 144 (2d Cir. 1939), the second circuit conceded that lack of knowledge would constitute a valid defense, yet upheld a charge requiring a showing of "possession lawful under the statute." *Id.* at 146. The conviction could have been affirmed and the charge characterized as harmless error had the court wished to follow *Turner*, since it found defendant's explanation to have indicated "guilty knowledge." *Ibid.* *Turner* was distinguished on the ground that its sole reversible error was the withdrawal of the case from the jury. *Ibid.* This distinction appears invalid, however, in view of the fact that the accused in *Turner* had never attempted to show lawful possession. If that part of the charge requiring such a showing were not objectionable, any error would have been harmless and the conviction affirmed.

Further evidence that "possession lawful under the statute" did not include innocent possession is provided by United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945). There the court followed its dictum in *Moe Liss* by refusing to require disclosure of the names of informers establishing defendant's possession. Although, arguably, the informer's testimony could aid in establishing the credibility of defendant's denial of knowledge, such disclosure was held valueless to defendant since the fact of possession "left him with the burden of coming forward with proof that he possessed the narcotics lawfully." *Id.* at 652. *Accord*, United States v. Feinberg. 123 F.2d 425 (7th Cir. 1941), *cert. denied*, Feinberg v. United States, 315 U.S. 801 (1942); United States v. Kapsalis, 313 F.2d 875 (7th Cir.), *cert denied*, Robinson v. United States, 374 U.S. 856 (1963) (denial of knowledge, though credible inasmuch as chief prosecution witness conceded strong possibility that narcotics were domestically produced, held legally insufficient).

However, the tenth circuit has recently chosen to follow *Turner*. Griego v. United States, 298 F.2d 845 (10th Cir. 1962). The ninth circuit has indicated its approval. Bradford v. United States, 271 F.2d 58 (9th Cir. 1959) (dictum). See also 110 U. PA. L. REV. 903, 907, n. 25 (1962).

[48] See n. 44, *supra*.

[49] Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962).

[50] See Bradford v. United States, 271 F.2d 58 (9th Cir. 1959).

[51] Although absolute liability may be imposed for the fact of violation of "public welfare" offenses, i.e. liquor laws, pure food and drug laws, traffic laws, the severity of the penalty in these narcotics prosecutions (twenty years imprisonment plus $20,000 fine) resists their classification with that sphere in which *mens rea* is no longer necessary. See Sayre, Public Welfare Offenses, 33 COL. L. REV. 55, 70–72 (1933).

[52] WHARTON, *op cit. supra* n. 30.

[53] United States v. Gibson, 310 F.2d 79 (2d Cir. 1962); Caudillo v. United States, 253 F.2d 515 (9th Cir. 1958), *cert. denied*, Romero v. United States, 357 U.S. 931 (1958).

[54] Landsborough v. United States, 168 F.2d 486 (6th Cir. 1948), *cert. denied*, 335 U.S. 826 (1948).

[55] MCCORMICK, EVIDENCE § 311 (1954).

[56] Walker v. United States, 285 F.2d 52 (5th Cir. 1960); 40 Tex. L. Rev. 287 (1961); Caudillo v. United States, *supra* n. 53 at 518.

[57] In United States v. Norton, 310 F.2d 718 (2d Cir. 1962), defendant testified positively that he thought the narcotics were produced in New York or California and additionally explained his possession by giving the name of his source. The court affirmed his conviction because he had read about the illegal importation of heroin from Italy and had not further corroborated his rebuttal by establishing the existence and identity of his source. *Id.* at 718–19. Is there a real difference between requiring the accused to prove a possession lawful under the statute and permitting the jury to require specific identification of the source of the narcotics? Compare *United States* v. *Moe Liss*, *supra* n. 47 with the *Norton* case, *supra*. Perhaps the jury has greater discretion in the latter case, but the difficulty of rebuttal appears as great.

[58] Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245, 263 (1943); Note, *Constitutionality of Rebuttable Statutory Presumptions*, *supra* n. 35 at 530. See, generally, McBaine, *Presumptions: Are They Evidence?* 26 CAL. L. REV. 519 (1958).

is convinced beyond a reasonable doubt that the accused actually knew that the narcotics had been illegally imported.[59] It is probable that many narcotics offenders can testify truthfully that they had no knowledge of unlawful importation, for they were not concerned with the primary source of the narcotics.[60] Conviction of such intermediaries would be impossible under a literal reading of the statute, but is authorized by judicial expansion of "knowledge" to include "willful ignorance."[61] A narrow construction would limit the force of the statute to primary sources of import traffic and is unsupported by the broad purpose of the act as manifested by its comprehensive language.[62] Though the greater the difficulty of rebuttal, the more often possession itself is punished,[63] the result of this construction is merely a partial relaxation of the *mens rea* requirement.[64] Perhaps justification for this relaxation may be found, as in the case of manslaughter and other crimes of negligence, in the great danger to innocent members of society and the creation of a penal deterrent to recklessness,[65] although many intermediaries affected by this construction are addicts who act under compulsion and are themselves the victims of the criminal acts.[66]

III. Constitutional Limitations

The constitutionality of the presumption is well-settled.[67] The primary basis for this conclusion is that, when a rational connection exists between the fact proved and those presumed,[68] the federal jurisdictional facts, *i.e.* unlawful importation and knowledge, can be established by circumstantial evidence.[69] Since the presumption is not conclusive,[70] Congress has not exceeded the bounds of its authority by declaring mere possession to be criminal.[71] There is no violation of defendant's privilege against self-incrimination, for assuming the aforementioned rational connection, he is no more compelled to testify than he would be in the absence of the presumption and the presence of a circumstantial *prima facie* case.[72] Notwithstanding that the general failure of rebuttals based on independent evidence[73] may create an actual compulsion for the accused to testify, this result is not clearly traceable to the presumption.[74] Nor is there an infringement of the presumption of innocence since that presumption may be overcome by circumstantial evidence.[75] There is no curtailment of the jury trial guarantee, for judicial or legislative authorization to convict, like an instruction on the burden of proof, still permits the jury to make the ultimate decision.[76] Finally, careful instruction to the jury of

[59] See 40 Tex. L. Rev. 287, discussing *Walker* v. *United States*, *supra* n. 56, and concluding that convictions in the face of honest denials are the product of insufficient rational connection between possession and actual knowledge of the source.

[60] *Griego* v. *United States*, *supra* n. 49.

[61] *Ibid.* See also text accompanying n. 49.

[62] 21 U.S.C. §174, quoted *supra* at p. 7. This should dispel the view created by preceding sections and the title of the act that it was solely concerned with importation and exportation of narcotics. The act was born of international conferences which resolved to curb narcotics traffic in general. See 43 Cong. Rec. *supra* n. 21.

[63] See n. 44, *supra*.

[64] See n. 51, *supra*.

[65] *Cf.* Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Col. L. Rev. 632, 636–42 (1963).

[66] Arguably, however, this broad construction helps to prevent the expansion of addiction to the uninitiated, an objective of great importance to society.

[67] Yee Hem v. United States, 268 U.S. 178 (1924) upheld the validity of the presumptions in both the Jones-Miller and Harrison Acts. The latter presumption was also sustained in Casey v. United States, 276 U.S. 413, 13 Corn. L. Q. 627 (1928); the former in Charley Toy v. United States, 266 Fed. 326 (2d Cir. 1920); Copperthwaite v. United States, *supra* n. 28; *Caudillo* v. *United States*, *supra* n. 53.

The court in *Casey*, *supra*, also upheld the Harrison Act provision that possession was *prima facie* evidence of a purchase within the jurisdiction, thus establishing the venue of the federal court. See also 18 U.S.C., §3237, laying venue wherever the unlawful act was begun, completed or continued.

[68] To meet this standard, the fact proved must render the inference more probable than not, rather than merely tend to prove the fact to be established. McCormick, *supra* n. 55, sec. 313, p. 660.

[69] See Note, *Constitutionality of Rebuttable Statutory Presumptions*, *supra* n. 35 at 548. The roots of the rational connection test can be found in Mobile, J. & K.C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910):

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of 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, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

See Tot v. United States, 319 U.S. 463 (1943), finding no such connection between possession and illegal use of firearms.

[70] *Cf.* n. 44, *supra*.

[71] See n. 25, *supra*.

[72] *Yee Hem* v. *United States*, *supra* n. 67 at 185; McCormick, *supra* n. 55, sec. 313, p. 662. In many cases, rebuttal may consist of independent expert testimony that the narcotics in question were similar to those domestically produced and circumstantial evidence of defendant's lack of knowledge, i.e. casual connection with the transaction. *Cf. Caudillo* v. *United States*, *supra* n. 53. Thus defendant need not testify at all, though in some such situations he could truthfully testify without incriminating himself.

[73] See, *e.g. United States* v. *Norton*, *supra* n. 57.

[74] McCormick, *supra* n. 55, sec. 313, p. 662.

[75] *Yee Hem* v. *United States*, *supra* n. 67 at 184–85.

[76] McCormick, *supra* n. 55, sec. 313, p. 662. For a

the existence of the presumption[77] is not objectionable as a forbidden comment on the weight of the evidence.[78]

Courts have unanimously found a rational connection between the fact of possession and both unlawful importation and knowledge because the narcotics laws so severely limit the amount in circulation.[79]

Perhaps with a view toward denials of a rational connection between possession and unlawful importation[80] or scienter,[81] commentators have suggested broader tests of constitutionality. The "comparative convenience" test is based upon the policy decision that it is not unfair or without the bounds of due process to compel the accused to present evidence, i.e. of source and scienter, which is clearly more accessible to him when the imposition of that burden on the government would be obstructive of a successful prosecution.[82] It is uncertain, however, that this argument is sound inasmuch as so many defendants, *i.e.* intermediaries or casual facilitators, have neither greater knowledge of the source of the narcotics nor access to such information than the prosecution; moreover, the government may still prove these elements circumstantially.

The "greater includes the lesser" offense test[83] is here inapplicable because Congress has no power to punish upon proof of the operative fact,[84] hence it cannot exercise legislative grace by permitting the accused to exculpate himself by rebutting the presumption. Although Wigmore has attacked the rational connection requirement as improper judicial interference with legislative discretion,[85] and McCormick would sustain a statutory presumption on either of the three foregoing tests,[86] the broad influence of the instant presumption, as manifested by the difficulty of rebuttal, seems to require, at least, the safeguard provided by the rational connection requirement.[87]

IV. The Operative Fact

Implementation of this safeguard cannot be achieved on a general plane because there obviously is a rational connection between possession on the one hand, and unlawful importation and scienter, as judicially construed,[88] on the other. Also, if defendants are to be protected at all, it must be before the presumption becomes operative; beyond that point they are at the mercy of a jury conditioned by the presumption. This would suggest careful judicial definition of the operative fact, possession, as well as close scrutiny of the rational connection in each case. Reasonable inferences, both of unlawful importation and knowledge thereof, drawn from the circumstances should be prerequisite to a finding of possession.[89]

Since possession is not an essential element of the crime, convictions may be supported by independent evidence, direct or circumstantial,[90] of

summary dismissal of the unusual argument that the presumption constituted an unlawful delegation of judicial power to the jury, see Stein v. United States, 166 F.2d 851 (9th Cir. 1948), *cert. denied*, 334 U.S. 844 (1948). This argument appears untenable in view of (1) the lack of express prohibition against a judgment notwithstanding the verdict, (2) the judicial alternative of disclaiming the operative fact of possession as a matter of law, and (3) the traditional view that the jury should weigh the evidence. Although judges may be more logical, the inferences in question are so interrelated to the facts found, that judicial appraisal of circumstantial evidence is no more desirable than in the case of direct evidence.

[77] That some instruction is necessary, see n. 41, *supra*.

[78] Brosman, *The Statutory Presumption*, 5 Tul. L. Rev. 178, 201 (1931).

[79] See *Yee Hem* v, *United States*, *supra* n. 67 at 184, to the effect that legitimate possession of opium is so rare that persons in possession are bound to know the restrictions on its importation and handle it at their peril. Moreover, judicial notice may be taken of the fact that unlike opium, heroin and marihuana are not used for scientific purposes. See *Caudillo* v. *United States*, *supra* n. 53 at 547; Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930).

[80] See the dissenting opinions of Mr. Justice McReynolds and Mr. Justice Butler in *Casey* v. *United States*, *supra* n. 67 at 421, 426–427.

[81] 40 Tex. L. Rev. 287 (1961).

[82] Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 Col. L. Rev. 527, 533–34 (1955); Brosman, *supra* n. 78 at 181.

[83] See n. 25, *supra*.

[84] Note, *Constitutionality of Rebuttable Statutory Presumptions*, *supra* n. 82 at 533–34, 544; If the legislature could have imposed liability upon proof of a fact, defendant is certainly not prejudiced by its use in a rebuttable presumption. See Ferry v. Ramsey, 277 U.S. 88 (1928).

[85] Wigmore, Evidence, § 1356, pp. 1063 et seq. (2d ed. 1923).

[86] McCormick, *supra* n. 55, sec. 313, p. 663.

[87] See Brosman, *supra* n. 78 at 187.

[88] See notes 61–64, *supra* and accompanying text.

[89] The closest judicial statement to this effect is by Kaufman, J., dissenting in United States v. Gregory, 309 F.2d 536, 539 (2d Cir. 1962), *cert. denied*, Sumpter v. United States, 373 U.S. 953 (1963):

> "Where the possession is so fleeting and where the ability to control is so tenuous that it is unreasonable to deduce knowledge therefrom, then the shifting of the burden of proof to the defendant is improper."

[90] Rodella v. United States, 286 F.2d 306, 311 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961):

> "That the narcotic drug is that type which is prohibited can be proved (a) by testimony relating to the substance itself, such as color analysis, etc., or (b) by testimony as to the surrounding circumstances, or (c) by reliance on the statutory presumption arising from proof of possession."

participation in the prescribed act, unlawful importation and knowledge thereof.[91] Nor does actual possession, in the ordinary sense of the word, automatically activate the presumption; possession must be conscious[92] and of sufficient duration to manifest control over the narcotics,[93] so that the facts to be presumed may be reasonably inferred.[94] Likewise, the presumption may become operative without any showing of actual physical possession, when the accused has such dominion and control as to insure his power of disposal.[95] However, although proof of dominion and control over property on which narcotics are found is a strong circumstance tending to prove constructive possession, mere ownership of such property, especially when another has more immediate possession,[96] or mere proximity to the drug or association with one who controls the property on which it is found,[97] is insufficient.

It is obvious from the foregoing discusssion that circumstantial evidence, *i.e.*, other incriminating circumstances, is useful in determining when it is reasonable to ask the accused to explain his possession. Circumstantial evidence may also prove the fact of actual[98] or constructive[99] possession. The availability of such evidence may

[91] Pon Wing Quong v. United States, 111 F.2d 751 (9th Cir. 1940).

[92] Compare Perez v. United States, 297 F.2d 12 (5th Cir. 1961) (dictum to the effect that in order to activate presumption, prosecution must prove that defendant was aware of presence of marihuana grains in his trouser cuffs) with Espinoza v. United States, 317 F.2d 275 (9th Cir. 1963) (defendant who transported heroin in two rubber condoms held to have burden of establishing ignorance of contents, though circumstantial evidence, *e.g.* of outer wrapping and casual participation, might sustain this burden.)

The second and seventh circuits have apparently followed *Espinoza* in treating knowledge of possession of narcotics as knowledge of unlawful importation, hence part of defendant's burden of rebuttal. See United States v. Barrington, 291 F.2d 481 (2d Cir. 1961); United States v. Kapsalis, 313 F.2d 875 (7th Cir. 1963), *cert. denied*, 374 U.S. 856 (1963). This view seems justified on the ground that knowledge is a fact peculiarly within defendant's control and testimonial proof may be aided by circumstantial evidence.

[93] In United States v. Santore, 290 F.2d 51 (2d Cir. 1960), *cert. denied*, 365 U.S. 834 (1961), defendant Narducci's conviction was reversed because his grasp of a package of narcotics in an automobile trunk had been momentary before he dropped it upon spying federal agents. *United States* v. *Barrington*, *supra* n. 92, distinguished *Santore* on the ground that momentary possession was accompanied by other incriminating circumstances, i.e. defendant's addiction, past participation in narcotics transaction, and use of narcotics jargon in reference to the package in his possession. In *United States* v. *Gregory*, *supra* n. 89, defendant Sumpter's conviction was affirmed although his only contact with the narcotics was to receive the package from his automobile companion and immediately dispose of it through the window, because the court found his action motivated by his recognition of approaching federal agents.

Santore may be criticized for failing to properly evaluate the incriminating circumstance of Narducci's immediate disposal of the package. Would one without knowledge of the contraband nature of the package have acted so suspiciously? *Gregory* seems justified on the grounds that if the accused had recognized the officers, his actions manifested guilty knowledge; if his disposal of the package were the innocent act of an agent directed by his principal, he could have so testified. As in the case of joint tortfeasors, such allocation of responsibility is much more readily shown by the defense.

[94] See n. 89 *supra*, and accompanying text.

[95] Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962). Such "constructive possession" applies to a defendant who has sufficient dominion and control over the narcotics to direct their possession. This doctrine is justified by a judicial imputation to Congress of an intention to "avoid freeing the principal who does not have manual possession while punishing the agent who does." *Id.* at 118. Such principals are more likely to have the capacity to explain the source of the narcotics than the agents in possession.

[96] Jackson v. United States, 250 F.2d 772 (D.C.Cir. 1957). (conviction reversed when only proof of possession was defendant's possession of key to his nephew's room in which narcotics were found hidden in a television set).

Cf. United States v. Landry, 257 F.2d 425 (7th Cir. 1958), reversing a conviction when defendant merely claimed ownership of heroin found in actual possession of another. Although Congress has indeed made "possession" and not "ownership" the operative fact, this decision seems somewhat inconsistent with the "constructive possession" rationale which seeks to punish the principal who has actual control rather than the agent. Any justification derived from the fact that the physical possessor may explain his possession by mere reference to the owner is weakened by the improbability that such explanation will be accepted as exculpatory. See, *e.g.* United States v. Norton, 310 F.2d 718 (2d Cir. 1962), and n. 44, *supra*.

[97] Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962) (though possession may be joint and need not be exclusive, wife held not to have constructive possession over husband's narcotics).

[98] Medrano v. United States, 315 F.2d 361 (9th Cir. 1963), *cert. denied*, 375 U.S. 854 (1964), citing Cellino v. United States, 276 F.2d 991 (9th Cir. 1960).

The best circumstantial evidence of actual possession is fingerprint evidence. Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), *cert. denied*, 340 U.S. 854 (1964). See also United States v. Chiarelli, 192 F.2d 528 (7th Cir. 1952), *cert. denied*, 342 U.S. 913 (1952); United States v. Pisano, 193 F.2d 355 (7th Cir. 1951). Although such evidence is reliable as to the fact that the accused touched the package, it becomes less reliable in view of the facts that the package may have contained a different substance at the time of contact, and defendant is likely to have more difficulty recalling when and why he made contact than if he were caught in actual possession.

[99] White v. United States, 315 F.2d 113 (9th Cir. 1963), *cert. denied*, 375 U.S. 821 (1964), citing Rodella v. United States, 286 F.2d 306 (9th Cir. 1960); United States v. Malfi, 264 F.2d 147 (3rd Cir. 1958), *cert. denied*, 361 U.S. 817 (1959).

permit the government to use trained anonymous informers,[100] though some limitations on this practice are necessary to insure the accused a fair opportunity to rebut the presumption.[101]

Although the propriety of this use of circumstantial evidence to prove the operative fact of a statutory presumption has been attacked as basing an inference on an inference,[102] this criticism is relevant only if circumstantial evidence is inherently less reliable than direct evidence.[103] The latter proposition is countered by the ordinary difficulties, *e.g.*, honesty and memory of witnesses, intrinsic to the direct evidence method of proof.[104] For the same reason, the circumstantial evidence test for appellate review of the sufficiency of the evidence, which requires that all circumstances be consistent with guilt and inconsistent with any reasonable hypothesis of innocence, has been replaced in some federal courts by the traditional substantial evidence test.[105]

The functional significance of the permissibility of proving actual possession by means of circumstantial evidence has been somewhat overshadowed by the doctrine of constructive possession. Based as it is on the judicial implementation of an imputed legislative purpose to punish the leaders of criminal operations,[106] the doctrine compels the conclusion not only that possession need neither be immediate nor exclusive.[107] but also that actual physical custody is not required.[108] The problem remains, however, of an ad hoc definition of "dominion and control" in order that the accused may have a fair opportunity to rebut the presumption.[109]

The factors which generally indicate such control are (1) active negotiation in the transaction; (2) power to determine (a) the quantity and (b) the price of the narcotics; (3) power to direct (a) delivery or locus of the drug and (b) method of payment; (4) apparent intimacy of contact with the illicit traffic as manifested by assurances of (a) quality of the drug, (b) reliability of other parties to the transaction, (c) previous participation, or (d) future intention to participate; (5) apparent stake in the venture as manifested by (a) receipt of or (b) control over, the proceeds. Findings of constructive possession have invariably resulted from a combination of these factors.[110]

[100] See, *e.g.*, Dear Check Quong v. United States, 160 F.2d 251 (D.C.Cir. 1947), in which the testimony of an informer who purchased narcotics from defendant was unnecessary because the informer was searched immediately before and after the transaction and the officers could testify as to the exchange of narcotics for government funds and sole contact during the period of exchange with the accused. No explanation of the possession so proved was attempted.

[101] Roviaro v. United States, 353 U.S. 53 (1956) held that the government must, if requested, disclose the identity of undercover informers who participated in proving possession:

"The fact that petitioner here was faced with the burden of explaining or justifying his alleged possession of the heroin emphasizes his vital need for access to any material witness. Otherwise the burden of going forward might become unduly heavy. *Id.* at 63.

[102] See Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 COL. L. REV. 549, 551 (1955) and cases cited therein. *Cf.* n. 76, *supra*. See also, *Rodella* v. *United States*, *supra* n. 99, at 312, n. 4:

"It is not basing a presumption on an inference because the proof of possession, whether actual or constructive, calls for a reasoned conclusion of the trier of fact—based on factual evidence in either case.

[103] Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, *supra* n. 102 at 555.

[104] *Id.* at 557. See 3 WHARTON, CRIMINAL EVIDENCE, p. 472 (12th ed. 1955): "As a legal matter, there is no distinction between direct and circumstantial evidence."

[105] See Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, *supra* n. 102 at 549, and cases cited therein. See also Holland v. United States, 348 U.S. 121 (1954), finding a jury charge in reasonable hypothesis terms unnecessary, and even undesirable.

[106] *Hernandez* v. *United States*, *supra* n. 95 at 116–17. See generally n. 95, *supra*. But see the opinion of L. Hand, J., concurring and dissenting in *United States* v. *Santore*, *supra* n. 93 at 70–71, attacking this statutory construction. True, Congress could have expressly included constructive possession as an operative fact; yet it seems unlikely that it would choose to castigate the "tools" rather than the "minds" of criminal activity. The legislative history is unrevealing. See also 110 U. PA. L. REV. 903, 907–08 (1962).

[107] Brown v. United States, 222 F.2d 293 (9th Cir. 1955). See n. 97, *supra*.

[108] It should be noted that one in constructive possession has the power to determine physical custody and could, at any time, have been in actual possession. See, e.g., United States v. Cox, 277 F.2d 302 (2d Cir. 1960) where the finding of possession sufficient to activate the presumption was based on the defendant's negotiations with the purchaser/federal agent and his direction to the cache of narcotics. Defendant might have placed the package himself or directed another to do so.

Cf. RESTATEMENT, TORTS § 216, similarly defining possession of chattels in terms of control. This section was cited in *Rodella* v. *United States*, *supra* n. 90 at 312.

[109] See 110 U. PA. L. REV. 903, 907 (1962).

[110] See, e.g. United States v. Moia, 251 F.2d 255 (2d Cir. 1958) (defendant set price and terms of delivery); United States v. Ladson, 294 F.2d 535 (2d Cir. 1961), *cert. denied*, 369 U.S. 824 (1962) (defendant set terms of payment and delivery, and received proceeds); United States v. Countryman, 311 F.2d 189 (2d Cir. 1962) (defendant directed delivery and received proceeds); United States v. Ramis, 315 F.2d 437 (2d Cir. 1963) (defendant set terms of sale and delivery, vouched for quality of narcotics and solicited future sales); Knapp v. United States, 311 F.2d 71 (5th Cir. 1962),

Some however, such as (2), capacity to set the terms of the transaction, (4) (a), capacity to assure the quality of the drug, and (5) (b), ultimate custody of the proceeds, are especially significant, because they are generally associated with the principals of the enterprise.[111] With the doctrinal objective[112] and the problems arising from organized criminal enterprise,[113] clearly in focus, the Second Circuit has, in *United States v. Hernandez*,[114] adopted a test of constructive possession which requires that the accused have such a relationship with one having physical custody of the narcotics as to be able to assure their delivery as a matter of course.[115] This test thus liberates from the statutory burden of explanation those casual facilitators whose association with the criminal enterprise is so tenuous that they may have no knowledge, actual or constructive, of the source of the narcotics.[116] It also appears to codify the aforementioned factors of constructive possession as relevant both to the power of the accused to produce the drugs and the degree of facility with which he can do so.[117]

Another interesting problem is presented when the accused is a participant in a transaction in which another has actual or constructive possession of the narcotics. Since conspirators are criminally liable for all acts within the common purpose of the conspiracy,[118] and aiders and abettors are treated not as facilitators, but under a separate statute,[119] it has been stated that the possession of one party may be attributed to the conspirator, aider or abettor,[120] in order to activate the presumption. Although this proposition has received some judicial approval, it has never been accepted as the sole basis for decision.[121] The Second Circuit was evenly divided on this question in *United States* vs. *Santore*,[122] but has ultimately required independent proof of possession in order to activate the presumption against an aider and abettor in *United States* v. *Jones*.[123] The Ninth Circuit had reached

---

rehearing denied 316 F.2d 794 (1963) (defendant knew locus of narcotics and ultimately disposed of proceeds in joint bank account which he shared with partner who had physical possession of the drugs); Lucero v. United States, 311 F.2d 457 (10th Cir. 1962) (defendant negotiated sale, set price, and vouched for the quality of the drug); *Cellino* v. *United States*, *supra* n. 98 (defendant introduced buyer and seller and vouched for the latter's reliability).

But see United States v. Jones, 308 F.2d 26 (2d Cir. 1962) reversing a finding of constructive possession when the accused merely introduced the contracting parties and received payment for such service as an intermediary; he was expressly to be excluded from future transactions.

[111] Thus, *Cellino*, *supra* n. 98, may be criticized as ensnaring a mere casual facilitator. 110 U. PA. L. REV. 903, 907 (1962). The accused therein was no more actively involved than the defendant in *Jones*, *supra* n. 110 for purposes of activating the presumption. The attempted distinction on the ground that the former defendant had warranted the seller's reliability fails because of the lack of rational connection of this fact to illegal source of the drugs and scienter. Any agent, ignorant of the source, could praise his principal. Perhaps for this reason the second circuit indicated its readiness to stray from *Cellino* if necessary. *Id.* at 30, n. 2.

[112] See text accompanying n. 109, *supra*.

[113] Difficulties inhere, not when the transaction involves only one potential defendant, but where there are principals, agents, and casual facilitators.

[114] 290 F.2d 86 (2d Cir. 1961).

[115] *Id.* at 90.

[116] See 31 FORD. L. REV. 821, 823 (1963).

[117] The results in the cases cited in n. 110, *supra* generally are preserved. *Cellino*, *supra* n. 98, and *Lucero*, *supra* n. 110, are possible exceptions since neither defendant had the power to produce narcotics as a matter of course. The latter case can be so read only if the finding of the dissent that defendant acted on the orders of another, is accepted.

[118] See United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

[119] 18 U.S.C. § 2 punishes aiders and abettors as principals. 21 U.S.C. § 174 similarly treats facilitators.

[120] United States v. Cohen, 124 F.2d 164, 165 (2d Cir. 1941), *cert. denied*, Bernstein v. United States, 315 U.S. 811 (1942). This assertion may be regarded as dictum since there was evidence of both actual and constructive possession. *Cellino* v. *United States*, *supra* n. 110, distinguished *Cohen* on this ground.

[121] See, e.g., United States v. Chiarelli, 192 F.2d 528 (7th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952); United States v. Maroy, 248 F.2d 663 (7th Cir. 1957); Alexander v. United States, 241 F.2d 351 (8th Cir. 1957), *cert. denied*, 354 U.S. 940 (1957); United States v. Moia, 251 F.2d 255 (2d Cir. 1958). In every case there was sufficient evidence of either actual or constructive possession.

[122] *Supra* n. 93. Santore's conviction was on alternative grounds since he had knowledge of his colleague's possession and could probably produce narcotics as a matter of course, thus justifying an independent finding of constructive possession. Lumbard, C. J., with Moore and Smith, J. J., argued that although 21 U.S.C. § 174 would require proof of possession for activation of the presumption against a facilitator, 18 U.S.C. § 2 required an aider and abettor to have mere knowledge of another's possession in order that possession may be attributed to him for presumption purposes. This was consistent with the legislative purpose since it was as reasonable to expect those without custody of the drug to be able to explain its source as those in possession. *Id.* at 77–78. Waterman, Friendly and Clark, J. J. found no basis for distinguishing between a facilitator and aider and abettor. *Id.* at 80, n. 1. They also found the reasoning by which the essential scienter was proved by showing mere knowledge of possession of another to be circuitous and totally unwarranted by reasonable inferences. *Id.* at 80–82.

See also 110 U. PA. L. REV. 903, 906 (1962); 31 FORD. L. REV. 821, 824 (1963).

[123] *Supra* n. 110. See also *United States* v. *Hernandez*, *supra* n. 114; United States v. Monica, 295 F.2d 400

the same conclusion in *Hernandez* v. *United States*,[124] on the strength of reasoning suggested in *Santore*[125] to the effect that the scienter required of a principal[126] who is an aider and abettor may not be proved by attribution of possession, for that would presume the fact to be proved, *i.e.*, that he was an aider and abettor.[127] Moreover, the theory behind the presumption contradicts such an attribution, for an aider and abettor is not only not the party best able to explain the source of the narcotics, but he would, in addition, be required to justify the possession of another.[128] A defendant might even be convicted as an aider and abettor to the commission of a substantive offense when no such offense had in fact been committed for the absent principal in possession might be able to satisfy the jury.[129] Finally, requiring a casual participant to explain another's possession would frequently impose an impossible burden,[130] permitting the jury to infer guilt from, not even possession, but mere association with a criminal enterprise. The necessity for proof of the facts on which federal jurisdiction is based would then be obviated and the constitutional limitations ignored.[131]

(2d Cir. 1961), *cert. denied*, 368 U.S. 53 (1962). The argument follows from *Santore*, *supra* n. 110, and *Hernandez* v. *United States*, *infra* n. 124.

[124] 300 F.2d 114 (9th Cir. 1962). See also *Cellino* v. *United States*, *supra* n. 98.

[125] See n. 119, *supra*.

[126] *Supra* n. 93 at 80–82.

[127] *Hernandez* v. *United States*, *supra* n. 124 at 123. The court also noted: "It would be anomalous indeed if proof of a common scheme or plan, admittedly insufficient to constitute a conspiracy violative of sec. 174 because proof of the requisite specific knowledge was lacking, could nonetheless provide the basis for imputing the same specific knowledge for the purposes of conviction of the substantive offenses under the same statute." *Id.* at 121.

See also 31 FORD. L. REV. 821, 824 (1963); 110 U. PA. L. REV. 903, 906 (1962).

[128] *United States* v. *Jones*, *supra* n. 110 at 33; 31 FORD. L. REV. 824, 825 (1963).

[129] *Hernandez* v. *United States*, *supra* n. 124 at 123–24; *United States* v. *Jones*, *supra* n. 110 at 33.

V. CONCLUSION

Although the statutory presumption as a rule of evidence merely regularizes reasonable inferences drawn from the circumstances of narcotics transactions, it has great practical value in federal prosecutions. The broad discretion lodged in the jury with legislative authorization to convict upon a finding of possession, may, if unrestricted by the rational connection requirement, result in the unauthorized creation of a federal crime of possession. However, since the general validity of the presumption is well-settled, and the legislative delegation to the jury is clear, judicial controls must be exerted by *ad hoc* review of the presence of the operative fact, possession. Consistent with the imputed legislative intent, the presumption should be activated only against a defendant when the circumstances indicate that he either knows or has willfully ignored the source of the narcotics. This theoretical objective should determine the limits of the doctrine of constructive possession. It should also serve as a point of reference in the resolution of all criminal problems arising under the presumption.

[130] *Cf.* n. 44, *supra*.

[131] *Hernandez* v. *United States*, *supra* n. 124 at 121.