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STUDENT COMMENTS

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THE CONVICT'S RIGHT TO A SPEEDY TRIAL

The evolution of a coherent and effective law guaranteeing convicts[1] the right[2] to a speedy trial under the Sixth Amendment[3] has been slow. It was not until 1967 that the Supreme Court in *Klopfer v. North Carolina*[4] held the speedy trial clause to be applicable to the states through the fourteenth amendment.[5] For the convicted imprisoned in one jurisdiction against whom charges had been filed in another, the right to a speedy trial was virtually nugatory as a consequence of his incarceration. As a result of *Smith v. Hooey*,[6] a recent Supreme Court pronouncement concerning the imprisoned's Sixth Amendment rights, the convict's right to a speedy trial has taken on new vitality. The Court, realizing the manifold harms incident to denial of a convict's right to a speedy trial on outstanding charges, placed upon the prosecuting jurisdiction the "constitutional duty to make a diligent, good faith effort . . ." [7] to bring the imprisoned accused to trial upon his demand.

The *Hooey* decision marks a new trend in the law surrounding speedy trial in assuring convicts their constitutional rights. In conjunction with other recent decisions,[8] it will have profound effects on penal administration, the law concerning speedy trial as well as relevant procedural mechanics. This article will explore the ramifications of *Hooey* in these areas and suggest possible reforms in each.

THE DETAINER SYSTEM

The administrative means by which a prisoner normally becomes aware of outstanding charges against him in other jurisdictions is through a detainer[9] sent by prosecuting authorities to the warden of the accused's place of detention. In some cases the detainer amounts to nothing more than a letter informing prison officials that an inmate is wanted elsewhere upon the completion of his sentence.[10] More typically in an interstate

[1] The term "convict" in this comment is used to refer to prisoners who have been convicted and are serving sentence in one jurisdiction on charges unrelated to ones that might be outstanding in the same or another jurisdiction.

[2] F. HELLER, THE SIXTH AMENDMENT 61 (1951). Because the Sixth Amendment speedy trial guaranty must be affirmatively demanded by one seeking its protection and is often said to be subordinate to the broader aims of "public justice", it is considered by some scholars to be a privilege rather than a right. The Supreme Court, however, has consistently referred to it as a right. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967); United States v. Ewell, 383 U.S. 116, 120 (1966); Beavers v. Haubert, 198 U.S. 77, 87 (1904).

[3] U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

[4] 386 U.S. 213, 223 (1967). "We hold here that the right to speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage." *See id.* at 223–226 for a concise summary of the historical background of the Sixth Amendment.

[5] For a general discussion of the development of the speedy trial guaranty, see, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968); Note, *The Lagging Right to Speedy Trial*, 51 VA. L. REV. 1587 (1965).

[6] 393 U.S. 374 (1969).

[7] *Id.* at 383.

[8] *See* Dickey v. Florida, —U.S.—, 90 S.Ct. 1564 (1970) (held, by implication, *Smith v. Hooey* and *Klopfer v. North Carolina* to be retroactive in their application). In *Dickey*, the state's delay in bringing petitioner to trial in 1968 on 1960 charges on account of petitioner's imprisonment in a federal penetentiary was held a denial of his right to speedy trial.

[9] It is also referred to as a hold order, detainer warrant, or sticker.

[10] L. Wenzel, Detainers: A National Survey and The Right to Speedy Trial 2–8, April, 1969 (Unpublished Thesis, Northwestern University School of Law). Wenzel in exploring the use and effects of detainers, approximates that there are about 23,700 detainers

situation, the demanding jurisdiction obtains a warrant for the arrest of the convict which is attached to the detainer and forwarded to the incarcerating jurisdiction to be executed upon the convict's release.[11] The detainer serves three functions: it notifies prison officials that a prisoner is wanted in another jurisdiction, it informs the convict of the pending charges,[12] and it requests that the authorities desiring custody be informed of the prisoner's date of release in order to facilitate his transfer or extradition to the accusing jurisdiction.[13]

The detainer system evolved as a semi-official means of gaining custody of an out-of-state accused without the "red tape" and expense involved in formal extradition proceedings.[14] The relative ease and lack of expense in the issuance of detainers certainly accounts for their ubiquity in prisons today.[15] Unlike a warrant, a detainer is not subject to judicial control or supervision. Consequently it may be issued by those who have no authority to command a warrant, *i.e.*, probation officers and prison officials.[16] As a detainer may be sent without any showing of cause or formal grounds, abuse is common. Often a detainer is sent merely for purposes of interrogation or retribution.[17] In the past, callous prosecutors have issued detainers on convicts merely for purposes of harrassment with no intent of eventual prosecution.[18] This abuse is suggested by the fact that over one half the detainers filed are never acted upon.[19] In the federal penitentiary at Leavenworth, Kansas, for example, roughly thirty per-cent of the inmates had detainers served upon them in 1958, a majority of which were eventually dropped.[20]

The deleterious effects of detainers on the convict as well as prison administration[21] have been most grave. In many state penitentiaries a detainer foreclosed the possibility of parole,[22] although the existence of a detainer no longer automatically precludes a federal prisoner from parole.[23]

Aside from the possible denial of parole, the detainer serves as an albatross by subjecting the prisoner to maximum security confinement and denial of "trusty" status. Because of a detainer, many convicts, otherwise qualified, are denied participation in progressive rehabilitation programs.[24] This is justified by the assertion that a detainee is an escape risk.[25] Such action not only frustrates the rehabilitation of the accused convict, but further exascerbates the convict's bitterness towards the penal system.

Untried detainers undermine prisoner rehabilitation.[26] The detainer instills within the mind of a prisoner an almost incurable sense of hopeless-

on file against the 342,900 convicts (exclusive of juveniles) in the United States today. He reports that 70% of these detainers are based upon the fact the convict has an untried charge pending against him. Another 18% of the detainers on file are based on probation or parole violations.

[11] Note, *Detainers: A Problem in Interstate Criminal Administration*, 48 COLUM. L. REV. 1190, 1191 (1948). When more than one detainer has been issued against an inmate, priority is afforded to the one filed first.

[12] *See* text accompanying note 132, 133 *infra*.

[13] Comment, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417 (1966). In most cases formal extradition proceedings are waived.

[14] For a discussion of the history and nature of the detainer system *see id.* at 418.

[15] *See* notes 9 *supra* and 17 *infra*.

[16] *See* Note, *supra* note 11, at 1191.

[17] *Cf.* Pitts v. North Carolina, 395 F.2d 182, 187 (4th Cir. 1968); Crow v. United States, 323 F.2d 888 (8th Cir. 1963); United States v. Candelaria, 131 F. Supp. 797, 805 (S.D.Cal. 1955); Comment, *supra* note 13, at 417; Note, *supra* note 11, at 1193.

[18] *See* Barker v. Municipal Court, 64 Cal. 2d 806, 415 P.2d 809, 51 Cal. Rptr. 921, 924 (1966) wherein the prosecutor was quoted as saying that as far as he was concerned, the defendants could "sit and rot in prison for the rest of their lives."

[19] 4 CRIM. L. REPTR. 4131 (1968); Comment, *supra* note 13, at 417. In Wenzel's thesis, *supra* note 10, the author found in one jurisdiction as many as 82% of the detainers filed are never acted upon.

[20] Bennet, *The Last Full Ounce*, FED. PROBATION, Vol. 23, June, 1959, at 21. During fiscal year 1958, Leavenworth had 380 detainers filed of which only 114 were ever executed.

[21] "The clerical time alone incident to the handling of detainers costs several thousand dollars a year in a large institution." *Id.* at 21.

[22] Pitts v. North Carolina, 395 F.2d 182, 187 (4th Cir. 1968); Heyns, *The Detainer in a States Correctional System*, FED. PROBATION, Vol. 9, July–September, 1945, at 13–14; Note, *supra* note 11, at 1192 where it is pointed out that denial of parole is further exascerbated by the adverse effect it will have on the minds of sentencing and parole officials in the accusing jurisdiction who might consider the detainee's original denial of parole as indicative of his unfitness for freedom. *See also* Comment, *supra* note 13, at 420 (extensive review of authority demonstrating how otherwise qualified prisoners are denied parole simply because of a detainer).

[23] 28 C.F.R. § 2.9 (1968).

[24] *See* Lawrence v. Blackwell, 298 F. Supp. 708, 713 (N.D. Ga. 1969); Evans v. Mitchell, 200 Kan. 290, 436 P.2d 408 (1968); Comment, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767 (1968).

[25] Lawrence v. Blackwell, 298 F. Supp. 708, 714 (N.D. Ga. 1969); Comment, *supra* note 13, at 419.

[26] United States v. Candelaria, 131 F. Supp. 797, 805 (S.D. Cal. 1955). Because of the adverse effect of the detainer, the judge drastically reduced the convict's federal sentence to permit an early trial in state court. Dickey v. Circuit Court, 200 So.2d 521, 527 (Fla. 1967); State v. Enrenyi, 454 P.2d 101, 103 (Nev. 1969).

ness.[27] The chance of ever gaining freedom is made increasingly remote with the prospect of a trial in the distant future for which preparation is seriously handicapped by virtue of the convict's incarceration.[28] Certainly the prospect of release to be accompanied by another prosecution on stale or fatuous charges would chill the zeal of the most cooperative inmate. Secondly, from the prison administrator's standpoint a detainer "makes the formulation of any effective rehabilitation program more difficult because of the uncertainty about the detainee's future."[29] Furthermore, the possibility of two prisons integrating their rehabilitation programs for transferred convicts is at best slight. Even within the same jurisdiction, it would be difficult to imagine the prison officials of a second institution beginning at the same point in a rehabilitation program established by the prison from which the detainee was taken, especially where there is a disparity in the resources of the two institutions.[30] This situation is further aggravated when one considers the policy, previously mentioned, of placing convicts on whom detainers have been issued into maximum security, irrespective of any real threat they might pose.

The Doctrine of Smith v. Hooey

The Supreme Court in *Smith v. Hooey*[31] was aware of these evils. Petitioner in that case was a prisoner at Leavenworth, a federal penitentiary in Kansas. In 1960, the sheriff of Harris County, Texas, issued a detainer to the federal prison warden on the basis of an indictment charging Smith with theft. For six years thereafter, petitioner sought in vain to get a speedy trial by sending periodic letters and more formal "motions" demanding trial in Judge Hooey's court. Upon the court's refusal to act upon his motion to dismiss for want of prosecution, petitioner brought a mandamus action in the Texas Supreme Court seeking an order to show cause why the charge should not be dismissed. Mandamus having been denied, the United States Supreme Court granted *certiorari*.[32]

Aware of the vexatious nature of untried detainers and their debilitating effects on prisoners, the Court found that delaying prosecution on a detainer until the end of the convict's sentence created "undue and oppressive incarceration prior to trial,"[33] the primary evil the speedy trial guaranty serves to prevent.[34] The foreclosure of the possibility of serving concurrent sentences in conjunction with the oppressive restrictions to which a detainee is subject were considered as onerous as incarceration without bail upon an untried charge.[35] Similarly, the Court found the petitioner, as a result of the inactive detainer, to suffer "anxiety and concern accompanying public accusation" and to have his ability to prepare a defense impaired by unreasonable delay.[36] Accordingly, the Court per Mr. Justice Stewart demanded Texas to make a good-faith effort to bring petitioner to trial in order to relieve him of the harms flowing from a detainer on which charges were pending.

A most vivid illustration of the effect of *Smith v. Hooey* on the detainer system is found in the subsequent case of *Lawrence v. Blackwell*,[37] where federal prisoners brought a class action seeking in part to enjoin the warden at the United States penitentiary in Atlanta from imposing special restrictions as a consequence of the detainers lodged against them.[38] Plaintiffs argued that the detainer system as a whole was unconstitutional in that under it present prison administration "... amounts to cruel and unusual punishment and a deprivation of due process."[39] Though denying the convicts the immediate injunctive relief sought on account of the court's reluctance

[27] *cf.* State v. Enrenyi, 454 P.2d 101, 103 (Nev. 1969); State *ex. rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 511, 123 N.W.2d 305, 309 (1963); Comment, *supra* note 24, at 767.

[28] Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956); State *ex rel.* Fredenberg v. Byrne, 20 Wis. 2d 504, 511, 123 N.W.2d 305, 309 (1963).

[29] Comment, *supra* note 13, at 421–22.

[30] Note, *supra* note, 11 at 1192.

[31] 393 U.S. at 378–380.

[32] 392 U.S. 925 (1968).

[33] 393 U.S. at 378.

[34] "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U.S. 116, 120 (1966). *See also* Dickey v. Florida, ___U.S.___, 90 S.Ct. 1954, 1570 (1970) (Brennan, J. concurring).

[35] 393 U.S. at 378.

[36] *Id.* at 379.

[37] 298 F. Supp. 708 (N.D. Ga. 1969).

[38] Plaintiffs alleged that the detainers serve to ... limit their eligibility for parole, remove their opportunity, if found guilty, to have their state sentences run concurrently with their federal service; require them to live in more restricted quarters than other prisoners; negate participation in pre-release work details or transfer to minimum-custody institutions; and adversely affect rehabilitative efforts.
Id. at 713.

[39] *Id.* at 714.

to interfere with the affairs of the Executive branch in prison administration, the court did hold that if the defendant states failed to make a diligent, good-faith effort to bring plaintiffs to trial on outstanding detainers within a reasonable amount of time, federal prison authorities must remove the restrictions flowing from the untried detainers in order to effectuate the right extended in *Smith v. Hooey*.[40] It would appear that as a consequence of *Lawrence v. Blackwell* prisoners on whom inactive detainers have been lodged can, through injunction, remove the shackles created by dormant charges in foreign jurisdictions.[41]

In *Dickey v. Florida*,[42] the most recent pronouncement of the Supreme Court concerning speedy trial, petitioner, a convict in a federal penitentiary, received in 1960 a Florida detainer charging him with armed robbery in Gadsden County, Florida. Between 1962 and 1966, Dickey sent three formal demands[43] for a speedy trial in the Gadsden County Circuit Court. Each of these was denied on account of his incarceration in a federal institution. In response, Dickey petitioned the Supreme Court of Florida to issue a writ of mandamus ordering the Gadsden County Court to secure his return for trial or withdraw the detainer against him. The Florida court granted the mandamus petition and ordered the trial court to secure the return of the accused for a speedy trial.[44]

In 1968, Dickey came to trial on a crime alleged to have taken place in 1960. His motion to have the information quashed on the ground that the delay constituted a denial of his right to a speedy trial was denied. Dickey was convicted and sentenced to ten years' imprisonment. Appeal on speedy trial grounds to the Florida District Court of Appeal proved unavailing.[45]

On writ of *certiorari* before the United States Supreme Court, Mr. Chief Justice Burger reversed the decision of the Florida Court and remanded the case with directions to vacate judgment.[46] The Court rejected the state's contention that no duty existed to bring the petitioner to trial until the *Hooey* decision in 1969. Without expressly holding *Hooey* retroactive, the Court reversed focusing more narrowly on the prejudice petitioner suffered on account of the eight year delay, his repeated demands for a speedy trial, and the absence of any valid reason for the delay.[47] Nevertheless, it may fairly be implied from *Dickey* that the doctrine of *Smith v. Hooey* is retroactive in its effect on pre-1969 detainers.[48]

The Convict's Right to a Speedy Trial Before Hooey: The "No Duty Rule"

Like the administration of the detainer system and its attendant evils, the law concerning the convict's right to a speedy trial until the *Hooey* decision has been marked by unfairness and illogic. Considering the historical and jurisprudential underpinnings[49] of the speedy trial provision, it is anomalous that, until *Hooey*, it was inapplicable to convicts. Indeed, some courts have declared the convict to be in most urgent need of its protection.[50]

[40] *Id.* at 714–16. Worth noting is the district court's denial of the convicts' motion that outstanding state charges be dismissed by the federal court. The action of the Court in this respect was based primarily on "considerations of federalism and lack of jurisdiction over the state defendants...."

[41] *See also* Kane v. Virginia, 419 F. 2d 1369 (4th Cir. 1970) which allows detainees federal *habeas corpus* relief under 28 U.S.C. § 2254 (1964) as discussed in text accompanying notes 164–172 *infra*.

[42] 90 S.Ct. 1564 (1970).

[43] Petitioner's demands were in the form of writs of *habeas corpus ad prosequendum*.

[44] Dickey v. Circuit Court, 200 So.2d 521, 529 (Fla. 1967).

[45] Dickey v. State, 215 So.2d 772 (Fla. App. 1968).

[46] Dickey v. Florida, ___U.S.___, 90 S.Ct. 1564, 1569 (1970).

[47] *Id.* at 1568–69.

[48] This conclusion is bolstered by Mr. Justice Brennan's concurring opinion which asserted that the delay encountered by the petitioner amounted to a denial of due process even... "assuming arguendo that *Klopfer* is not retroactive." *Id.* at 1569. *Cf.* Carlton v. United States, 304 F. Supp. 818, 822 (E.D. Ark. 1969); Luckman v. Burke, 299 F.Supp. 488 (E.D. Wis. 1969) (*sub silentio*).

[49] *See* note 5 *supra;* Note, *Convicts—The Right to Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828 (1964). *See also* Magna Charta ch. 40 (1215) ("To no one will We deny or defer, right or justice...." Pollard v. United States, 352 U.S. 354, 364 (1956) (dissenting opinion); Petition of Provoo, 17 F.R.D. 183 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955); The Federalist No. 83–84 (A. Hamilton). In 1679 Parliament passed the Habeas Corpus Act, 31 Car. II ch. 2 (1679) which required the Crown either to bring an early prosecution within the passage of two court sessions or acquit. In 3 W. Blackstone Commentaries* 136, the famed legalist referred to the English Habeas Corpus Act of 1679 as the bulwark of the British Constitution.

[50] *See* Pitts v. North Carolina, 395 F. 2d 182 (4th Cir. 1968); Taylor v. United States, 238 F. 2d 259, 262 (D.C. Cir. 1956); Arrowsmith v. State, 131 Tenn. 480, 487, 175 S.W. 545, 546–47 (1915):

> Indeed, the importance of that consideration [speedy trial] is accentuated by the fact of the accused's imprisonment. He is less able on that account to keep posted as to the movements of his witnesses, and their testimony may be lost during

Typically, the issue as to whether a prisoner is entitled to a speedy trial presents itself on two planes: intra-jurisdictional and inter-jurisdictional. In the former, the charging and holding authorities are within the same sovereignty; in the latter instance prosecuting and incarcerating authorities are of different sovereignties, *i.e.*, two states or, as in *Hooey*, state and federal. For the most part, a speedy trial is and always has been guaranteed to prisoners held in the same jurisdiction where outstanding charges are pending regardless of county differences.[51]

The reasons supporting the absolute guaranty of speedy trial for the convict on an intra-jurisdictional level are several. Because the accused is within the boundaries of the charging jurisdiction, no jurisdictional or extradition problems are posed in obtaining custody of the prisoner for trial. As the Court stated in *Ex parte Schechtel*:[52]

> These cases are based upon the principle that even though the accused under a pending indictment may be confined to a penal institution of the same sovereign, he is, nevertheless, in the actual custody and control of that sovereign and by its authority and at its will may be produced in court for trial upon the untried charge. . . .

Conversely, if a prisoner could forcibly be subject to trial by the state, he in turn should have the right to secure a speedy trial where the prosecution is tardy in coming to court.[53]

Furthermore, the right to a speedy trial is guaranteed in every state constitution with the exception of New York and Nevada.[54] Many states have implemented this right by enacting statutes requiring the prosecution to come to trial within a statutory period of time.[55] Several states have

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his continued confinement. It would be a harsh construction of the clause, containing this guaranty, imbedded in our Bill of Rights, that would deny it application to those who stand most in need of it.

See also Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 865 (1957); Walther, *Detainer Warrants and the Speedy Trial Provision*, 46 MARQ. L. REV. 423 (1963).

[51] United States *ex rel.* Coleman v. Cox, 47 F.2d 988 (5th Cir. 1931); United States *ex rel.* Whitaker v. Henning, 15 F.2d 760 (9th Cir. 1926); Frankel v. Woodrough, 7 F.2d 796 (8th Cir. 1925); Fulton v. State, 178 Ark. 841, 12 S.W. 2d 777 (1929); Rader v. People, 138 Colo. 397, 334 P.2d 437 (1959); *Ex parte* Schechtel, 103 Colo. 77, 82 P.2d 762 (1938); Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297 (1966); Hottle v. District Court, 233 Iowa 904, 11 N.W.2d 30 (1943); Augustus v. Simpson, 416 S.W.2d 349 (Ky. Ct. App. 1967); State v. Prosser, 309 N.Y. 353, 130 N.E.2d 891, 57 A.L.R.2d 295 (1955); People v. Goldman, 24 Misc. 2d 497, 204 N.Y.S. 2d 770 (1960); Shafer v. State, 43 Ohio App. 493, 183 N.E. 774 (1932); Arrowsmith v. State, 131 Tenn. 480, 175 S.W. 545 (1915); Moreau v. Bond, 114 Tex. 468, 271 S.W. 379 (1925); Annot., 118 A.L.R. 1037 (1939):

> The general rule, followed in the majority of the states and in the Federal courts, is that, under a constitutional provision guaranteeing to accused a speedy trial, and under statutes supplementing the constitutional provision and enacted for the purpose of rendering it effective, and prescribing the time within which accused must be brought to trial after indictment, a sovereign may not deny an accused person a speedy trial even though he is incarcerated in one of that sovereign's penal institutions under a prior conviction and sentence in a court of that sovereign.

[52] 103 Colo. 77, 83, 82 P. 2d 762, 764 (1938).

[53] Arrowsmith v. State, 131 Tenn. 480, 486, 175 S.W. 545, 546 (1915).

[54] ALA. CONST. art. 1, § 6; ALASKA CONST. art. 1, § 11; ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 13; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 7; FLA. CONST. art. 1, § 16; GA. CONST. art. 1, para. 5; HAWAII CONST. art. 1, § 11; IDAHO CONST. art 1, § 13; ILL. CONST. art. 2, § 9; IND. CONST. art. 1, § 12; IOWA CONST. art. 1, § 10, KAN. CONST. BILL OF RIGHTS § 10; KY. CONST. BILL OF RIGHTS § 11; LA. CONST. art. 1, § 9; ME. CONST. art. 1, § 6; MD. CONST. DECL. OF RIGHTS art. 21; MASS. CONST. Part 1, art. 11; MICH. CONST. art. 1, § 20; MINN. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 3, § 16; NEB. CONST. art. 1, § 11; N. H. CONST. Part 1, art. 14; N. J. CONST. art. 1, § 10; N. M. CONST. art. 2, § 14; N. C. CONST. art. 1, § 35; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. 1, § 10; PA. CONST. art. 1, § 9; R.I. CONST. art. 1, § 10; S.C. CONST. art. 1, § 18; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1, § 9; TEX. CONST. art. 1, § 10; UTAH CONST. art. 1, § 12; VT. CONST. ch. 1, art. 10; VA. CONST. art. 1, § 8; WASH. CONST. art. 1, § 22; W. VA. CONST. art. 3, § 14; WIS. CONST. art. 1, § 7; WYO. CONST. art. 1, § 10.

[55] ARIZ. REV. STAT. ANN. § 13-161 (1956); ARK. STAT. ANN. § 43-1708 (1964); CAL. PEN. CODE § 1382 (West Supp. 1968); COLO. REV. STAT. ANN. § 39-7-12 (1963); DEL. CODE ANN. tit. 10, § 6910 (1953); FLA. STAT. ANN. § 915.01 (1944); GA. CODE ANN. § 27-1901 (1953); HAWAII REV. STAT. § 705-3 (1968); IDAHO CODE ANN. § 19-3501 (1948); ILL. REV. STAT. ch. 38, § 103-5 (1969); IND. ANN. STAT. § 9-1402 (1956); IOWA CODE ANN. § 795.2 (Supp. 1970); KAN. GEN. STAT. ANN. § 62-1431 (1964); ME. REV. STAT. ANN. tit. 15, § 1201 (West 1964); MASS. ANN. LAWS ch. 277, § 72 (1968); MICH STAT. ANN. § 28.978 (1954); MINN. STAT. ANN. § 611-04 (1964); MO. ANN. STAT. § 545.890 (1949); NEB. REV. STAT. § 29-1201-2 (1964); NEV. REV. STAT. § 178.556 (1967); N.M. STAT. ANN. 41-11-4 (1953); N.Y. CODE CRIM. PROC. § 668 (McKinney 1958); N.C. GEN. STAT. § 15-10 (1965); N.D. CENT. CODE § 29-18-01 (1960); OHIO REV. CODE ANN. § 2945.71 (Baldwin 1964); OKLA. STAT. ANN. tit. 22, § 812 (1969); ORE. REV. STAT. § 134.110 (1969); PA. STAT. ANN. tit. 19, § 781 (1964); R.I. GEN. LAWS ANN. § 12-13-7 (1969); S.C. CODE ANN. § 17-509 (1962); TENN. CODE ANN. § 40-2102 (1955); TEX. CODE CRIM. PROC. art. 32.01 (1966); UTAH CODE ANN. § 77-51-1 (1953); VA. CODE ANN. § 19.1-190 (1960); WASH. REV. CODE ANN. § 10.46.010 (1961); W.VA.

statutes which expressly grant the convict held within the state a speedy trial on charges stemming from a detainer issued from within the state.[56] Under such statutes, the state is required, upon the convict's demand for trial, to bring him to trial within a specified period of time or face dismissal of the charges underlying the detainer.

Though affording the accused convict imprisoned within the jurisdiction a speedy trial, courts[57] prior to *Smith v. Hooey* consistently denied it to those imprisoned outside the boundaries of their jurisdiction. The most common rationale supporting the inapplication of the right to speedy trial to convicts held in foreign jurisdictions was the comity doctrine. By this theory, whether a convict would be afforded his sixth amendment right was held to be a matter of comity between the accusing and holding sovereignties. Because the release and extradition,[58] if employed, of the accused was solely within the discretion of the incarcerating jurisdiction and in no way subordinate to any personal right of the prisoner, the charging jurisdiction was under no legal duty to compel the exercise of that discretion.[59] It was thought that because the prosecuting state lacked the *power* or *authority* to obtain the accused for trial it could not have the *duty* to do so.

Underlying the reasoning behind the "no duty" rule was the fear that the holding state might refuse to release the convict to the prosecuting jurisdiction; thus subjecting the latter to a form of "diplomatic" insult. The unreality of this theory becomes obvious, however, when one considers the unlikelihood of a state refusing to give over its prisoners, save in rare situations.[60] No doubt any holding jurisdiction, which consistently failed to cooperate in sending convicts out for trials in foreign jurisdictions, would suffer similar reprisals when it sought to obtain an out-of-state convict for trial.

The fictional nature of the comity doctrine is further highlighted by the fact that twenty states[61] have adopted the Interstate Agreement on Detainers[62] and forty-four states[63] are party to the Uniform Criminal Extradition Act.[64] In sub-

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CODE ANN. § 62-3-21 (1966); WIS. STAT. ANN. § 955.01 (West Supp. 1969); WYO. STAT. ANN. § 7-234 (1957).

[56] CAL. PEN. CODE § 1381 (West Supp. 1968); CONN. GEN. STAT. ANN. § 54-139 (1960); FLA. STAT. ANN. § 915.02 (Supp. 1969); ILL. REV. STAT. ch. 38, § 103-5(e) (1969); KAN. GEN. STAT. ANN. §§ 62-2901 to 2908 (1964); ME. REV. STAT. ANN. tit. 34, §§ 1391-1393 (West 1964); MD. ANN. CODE art. 27, § 616S (1967); MASS. ANN. LAWS ch. 277, § 72A (1968); MICH. STAT. ANN. § 28.969(1) (Supp. 1970); MO. ANN. STAT. § 222.080 (1959); MONT. REV. CODES ANN. § 94-701-1 (1969); N.Y. CODE CRIM. PROC. § 669-a (McKinney 1958); N.C. GEN. STAT. § 15-10.2 (1965), ORE. REV. STAT. § 135.510 (1963); PA. STAT. ANN. tit. 19, §§ 881-884 (1964); WASH. REV. CODE ANN. §§ 9.98.010-040 (1961); WIS. STAT. ANN. § 955.22 (West Supp. 1969).

[57] Edmonds v. County of Jefferson, State of Texas, 402 F.2d 68 (5th Cir. 1968); Henderson v. Circuit Court of Tenth Jud. Cir., State of Alabama, 392 F.2d 551 (5th Cir. 1968); Bistram v. Minnesota, 330 F.2d 450 (8th Cir. 1964); McCary v. Kansas, 281 F.2d 185 (10th Cir.), *cert. denied*, 364 U.S. 850 (1960); Sanders v. United States, 297 F. Supp. 375 (N. D. Ga. 1968) (dictum); Troyan v. United States, 240 F.Supp. 383 (D. Kan. 1964); Maryland v. Kurek, 233 F.Supp. 431 (D. Md. 1964); Wzesinski v. Amos, 143 F.Supp. 585 (N. D. Ind. 1956); *In re* Petition of Yager, 138 F.Supp. 717 (E. D. Ky. 1956); Ford v. Presiding Judge, Twentieth Jud. Cir., 277 Ala. 83, 167 So.2d 166 (1964); Lee v. State, 185 Ark. 253, 47 S.W.2d 11 (1932); Cunningham v. State, 55 Del.475, 188 A.2d 359 (1962); Evans v. Mitchell, 200 Kan. 290, 436 P.2d 408 (1968); Kirby v. State, 222 Md. 421, 160 A.2d 786, *cert. denied*, 364 U.S. 850 (1960); Traxler v. State, 90 Okla. Crim. 231, 251 P.2d 815 (1952); Cooper v. State, 400 S.W.2d 890 (Tex.1966) *overruled* in Smith v. Hooey, 393 U.S. 374 (1969); Annot., 118 A.L.R. 1046 (1939).

[58] *See, e.g.* UNIFORM CRIMINAL EXTRADITION Act §§ 2,4,7.

[59] *cf.* Ponzi v. Fessenden, 258 U.S. 254 (1922); Henderson v. Circuit Court of the Tenth Jud. Cir., State of Alabama, 392 F.2d 551 (5th Cir. 1968); Sanders v. United States, 297 F.Supp. 375 (N. D. Ga. 1968).

[60] Kyle v. United States, 211 F.2d 912 (9th Cir. 1954) (wherein Attorney General refused to release federal convict because of his being an escape risk); People v. South, 122 Cal. App. 505, 10 P.2d 109 (1932).

[61] CAL. PEN. CODE § 1389 (West Supp. 1968); CONN. GEN. STAT. ANN. §§ 54-186 to 54-192 (1958); HAWAII REV. STAT. § 714-1 (1968); IOWA CODE ANN. § 759A.1 (Supp. 1970); MD. ANN. CODE art. 27, §§ 616A-R (1967); MICH. STAT. ANN. § 4.147(1) (1969); MINN. STAT. ANN. § 629.294 (Supp. 1970); MONT. REV. CODES ANN. §§ 94-1101-1 to 94-1101-6 (1969); NEB. REV. STAT. §§ 29-759 to 29-765 (1964); N.H. REV. STAT. ANN. §§ 606A:1-6 (Supp. 1969); N.J. STAT. ANN. §§ 2A:159A to 159A-15 (Supp. 1969); N.Y. CODE CRIM. PROC. § 669-b (McKinney 1958); N.C. GEN. STAT. §§ 148-89 to 148-95 (Supp. 1969); PA. STAT. ANN. tit.19, §§ 1431-1438 (1964); S.C. CODE ANN. §§ 17-221 to 228 (Supp. 1968); UTAH CODE ANN. §§ 77-65-4 to 11 (Supp. 1968); VT. STAT. ANN. tit. 28, §§ 1501-1537 (1970); WASH. REV. CODE ANN. § 9.100.010 (Supp. 1969). Massachusetts and Rhode Island are also reported to have enacted the Agreement. Comment, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L. J. 767,774, n.58 (1968).

[62] The text of the INTERSTATE AGREEMENT ON DETAINERS may be found in the following: COUNCIL ON STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, PROGRAM FOR *1957* 74-78 (1957); COUNCIL ON STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 91-118 (Rev. ed.1966); ABA STANDARDS RELATING TO SPEEDY TRIAL 50-56 (1967).

[63] For compilation of state extradition statutes, *see* COUNCIL ON STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 137-139 (Rev.ed. 1966); 9 U.L.A. 143 (Supp. 1967).

[64] 9 U.L.A. 263-355 (1957).

scribing to these agreements, states expressly avow a policy of permitting the release of convicts on whom out-of-state detainers have been served.[65] Section V of the Uniform Criminal Extradition Act applies directly to the extradition of a convict held in one state to another where criminal charges are pending.[66] Similarly, the Interstate Agreement on Detainers, promulgated in 1957 by the Council on State Governments to alleviate the anti-rehabilitative effects of long-standing detainers, provides the convict a trial on charges outstanding in another jurisdiction within 180 days from the date of his demand.[67] Failure of a state, which is party to the Agreement, to bring an accused convict to trial within the prescribed time results in dismissal of the charges on which a detainer is based. The purpose and intent of both agreements reflect a design toward interstate cooperation and collaboration. The "no duty" rule under comity theory assumes the contrary. The federal government's disposition toward the release of accused convicts is exemplified by the express policy of the United States Bureau of Prisons to honor writs of *habeas corpus ad prosequendum* issued out of state courts.[68]

Cognizant of the realities of modern criminal administration and the lingering fictions underpinning the comity doctrine, Mr. Justice Stewart in *Hooey* declared that such ". . . doctrinaire concepts of 'power' and 'authority' . . . submerge the practical demands of the constitutional right to a speedy trial." [69] Accordingly, Texas was held to have a duty to bring petitioner Smith to an early trial in Judge Hooey's Court.[70]

Aside from the comity doctrine, more subtle reasons existed in the courts, prior to *Hooey*, consistently denying a speedy trial to those incarcerated in foreign jurisdictions. One of these was administrative difficulty. It was simply burdensome for prosecutors to seek out and procure defendants for trial who were held in distant state and federal penitentiaries,[71] especially if formal extradition was required. Moreover, with bulging dockets and plethoric case loads, courts as well as prosecuting attorneys were prone to delay trial of those defendants imprisoned outside the jurisdiction.[72] Such practical considerations should not, however, be allowed to temper fundamental rights. As Mr. Chief Justice Warren emphasized in *Pollard v. United States:*[73] "These . . . [Sixth Amendment rights] . . . are not mere ceremonials to be neglected at will in the interests of a crowded calendar or other expediencies."

Obviously the costs incident to transfering a convict to trial and back to prison provided a substantial incentive for state authorities to procrastinate at the expense of convicts' rights. For example, in *Heredon v. State*[74] the state was not required to assume the costs of returning an accused convict for trial who, on his volition, placed himself beyond the jurisdiction of the state. Such parsimony, in light of *Gideon v. Wainwright*[75] and the right of an indigent to appointment of counsel, is discomforting.[76] The minority of courts[77] that,

[65] INTERSTATE AGREEMENT ON DETAINERS art. I. However, Article IV (a) of the INTERSTATE AGREEMENT ON DETAINERS and UNIFORM CRIMINAL EXTRADITION ACT § 4 allow the executive authority of the holding state the power to deny the rendition of a convict to another jurisdiction.

[66] UNIFORM CRIMINAL EXTRADITION ACT § 5:

> Extradition of Persons Imprisoned or Awaiting Trial in Another State or Who Have Left the Demanding State Under Compulsion.
>
> —When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or held under criminal proceedings then pending against him in another state, the Governor of this state may agree with the Executive Authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

According to the compilation of statutes in COUNCIL ON STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 137–139 (Rev.ed.1966), thirty-four states are party to Section 5.

[67] INTERSTATE AGREEMENT ON DETAINERS art. III.

[68] Smith v. Hooey, 393 U.S. 374,381 (1969); Barber v. Page, 390 U.S. 719,724 (1968). *See* note 156 *infra*.

[69] 393 U.S. at 381.

[70] *Id.* at 383.

[71] Evans v. County of Delaware, Commonwealth of Pennsylvania, 390 F.2d 617, 618 (3rd Cir. 1968).

[72] Comment, *supra* note 13, at 418–19.

[73] 352 U.S. 354,364 (1957) (dissenting opinion). *See also* Klopfer v. North Carolina, 386 U.S. 213,223 (1967); Smith v. United States, 418 F.2d 1120, 1126 (D.C.Cir. 1969) (dissenting opinion).

[74] 369 P.2d 650 (Okla. Crim. 1962). After *Smith v. Hooey*, Oklahoma courts have placed the financial burden of transporting an indigent convict on the state. *See* Naugle v. Freeman, 450 P.2d 904 (Okla.Crim. 1969).

[75] 372 U.S.335 (1963). *See also* Miranda v. Arizona, 384 U.S.436, 444 (1966).

[76] It is interesting to note the parallel constitutional development of the right granted in the Sixth Amendment. In recent years, the assistance of counsel provision, the final clause of the amendment, has by far received the greatest attention. The speedy trial clause, on the other hand, has until recently been marked by a paucity of judicial recognizance. "Though securely rooted in history, the right to speedy trial has until recently been assigned second class status. Courts have emphasized the relativity, rather than the importance

prior to *Hooey*, placed on the state the affirmative duty of granting convicts in other jurisdictions a speedy trial rejected the cost argument as well as others. As the Supreme Court of Wisconsin stated, "We will not put a price tage upon constitutional rights."[78] It was this rationale that the *Hooey* court used in dismissing the expense objection to granting speedy trial to convicts.[79]

To a great extent, the cost argument against a convict having a speedy trial is illusory. The only real extra cost is the expense of transporting the defendant back to the holding jurisdiction after trial, as the trip to trial is necessary regardless if it takes place during or at the completion of the convict's sentence. Moreover, if at trial the convict is found guilty, the holding and sentencing jurisdictions could make arrangements whereby the convict could serve his sentences concurrently in the latter jurisdiction. This procedure would eliminate a great many expenses.

Secondly, as a consequence of *Smith v. Hooey*, prosecutors now have the burden of following each detainer issued with a trial if the accused convict so demands. As such, the administrative costs incident to nuisance detainers will be eliminated.[80] Indeed, with the burden on the prosecutor to pursue his detainer with a speedy trial, a great deal more consideration will go into the filing of a detainer. No longer will one be able to issue a detainer *carte blanche* without any consideration of the feasibility of prosecution.[81] The fatuous nature of the cost argument is further demonstrated by the fact all states party to Article V(h) of the Interstate Agreement on Detainers[82] and §24 of the Uniform Criminal Extradition Act[83] expressly agree to assume costs of transporting convicts to trial.

Perhaps the most subtle, but strongest motive behind the old "no duty" rule apart from comity, cost and convenience was punishment.[84] As the court stated in *McCary v. Kansas*[85] an oft-cited case supporting the old rule, "The reason for the rule is that he is in custody in the federal penal institution because of his own wrongdoing. . . ."[86] In effect, the old decisions were denying sixth amendment rights as *sub rosa* retribution against defendants jailed in foreign jurisdictions on previous charges. Such pre-trial punishment took three forms. By denying the prisoner speedy trial, his ability to prepare an effective defense was obviously jeopardized.[87] The possibility of serving concurrent sentences was totally foreclosed in making the convict wait until the expiration of his current sentence before standing trial on any other charges.[88] As previously suggested, callous prosecutors often would issue detainers for the sole purpose of aggravating a defendant's stay in prison.[89]

The devolution of the law denying speedy trial to convicts, ending in *Smith v. Hooey*, has been a slow one. The *ratio decidendi* of the "no duty" rule, predicated on lingering fictions of comity and state sovereignty, produced severe hardship upon imprisoned defendants who found their sixth amendment right to a speedy trial in abeyance. In view of the greater emphasis on the rights of the accused characteristic of the Warren Court,[90] and the in-

of the right." Comment, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767, 768 (1968).

[77] *See* Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968); Fouts v. United States, 253 F.2d 215 (6th Cir. 1958); Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955); Barker v. Municipal Court, 64 Cal.2d 806, 415 P.2d 809 51 Cal. Rptr. 921 (1966); Dickey v. Circuit Court, 200 So.2d 521 (Fla. 1967); Richerson v. Idaho, 91 Idaho 555, 428 P.2d 61 (1967); People v. Bryarly, 23 Ill. 2d 313, 178 N.E. 326 (1961); Commonwealth v. McGrath, 348 Mass. 748, 205 N.E. 2d 710 (1965); People v. Winfrey, 20 N.Y.2d 138, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967); State *ex rel.* Fredenberg v. Byrne, 20 Wis.2d 504, 123 N.W.2d 305 (1963).

[78] State *ex rel.* Fredenberg v. Byrne, 20 Wis.2d 504, 512, 123 N.W.2d 305, 310 (1963). *Accord*, Commonwealth v. McGrath, 348 Mass. 748, 752, 205 N.E.2d 710, 714 (1965).

[79] 393 U.S. at 380, n.11.

[80] *See* note 21 *supra* and accompanying text.

[81] *See* notes 17–20 *supra* and accompanying text.

[82] INTERSTATE AGREEMENT ON DETAINERS art. V(h):

> From the time a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. . . .

[83] UNIFORM CRIMINAL EXTRADITION ACT § 24 places on the prosecuting state the duty to pay all transportation expenses.

[84] Comment, *supra* note 24, at 772–73.

[85] 281 F.2d 185 (10th Cir.), *cert denied*, 364 U.S.850 (1960).

[86] *Id.* at 187. *See also* Bistram v. Minnesota, 330 F. 2d 450 (8th Cir. 1964); Cunningham v. State, 55 Del.475, 188 A.2d 359, 360 (1962).

[87] *See* note 28 *supra*.

[88] Smith v. Hooey, 393 U.S. 374, 378 (1969).

[89] *See* notes 17–19 *supra*.

[90] A. COX, THE WARREN COURT 71–91 (1968); Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L.REV. 249 (1968).

creased stress on inter-jurisdictional cooperation in criminal administration,[91] the result in *Smith v. Hooey* was not surprising. Further, in light of the numerous states party to the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers, the comity doctrine as espoused in *Ponzi v. Fessendon*[92] is now an anachronism. Accordingly, the *Hooey* decision compels the state to afford a convict a speedy trial upon his demand irrespective of whether he is in federal or state prison.[93]

The Elements of a Speedy Trial

Having attained his right to speedy trial, the convict may find to his chagrin the right unenforceable even in cases of protracted delay. Basically four factors are relevant in the judicial determination of whether a denial of speedy trial assumes constitutional proportions. Though significant, the length of delay in and of itself is not determinative in the finding of a violation.[94] But as Mr. Justice Brennan emphasized in *Dickey:* "The passage of time by itself . . . may . . . dangerously reduce . . . [the defendant's] . . . capacity to counter the prosecution's charges." [95] More important are the reasons for the delay; the prejudice and harm to the defendant as a consequence of the delay; and the defendant's objection to the delay. It is uniformly held that in order to prove a denial of sixth amendment rights, defendant must prove the delay to be solely[96] a result of the government's culpable or oppressive conduct;[97] the resultant prejudice to himself; and the absence of any waiver on his part.[98] Because all of these factors overlap each other in effect, it is difficult both practically and analytically to distinguish one or any combination of them as being determinative on the issue of speedy trial.[99] The waiver factor, however, has received an inordinate amount of attention. Even in cases of the most flagrant violation of speedy trial, any sort of express or implied waiver on the part of the defendant will deny him protection of the right.[100]

Despite the express command of the sixth amendment that a speedy trial will be enjoyed in all criminal prosecutions, judicial construction[101]

[91] The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime In a Free Society 279–291 (1967).

[92] 258 U.S. 254 (1922).

[93] Although the petitioner in *Smith v. Hooey* was incarcerated in a federal prison, the duty imposed on the state still applies if the accused is imprisoned in another state penitentiary. May v. Georgia, 409 F.2d 203 (5th Cir. 1969); Luckman v. Burke, 299 F. Supp. 488 (E.D. Wis. 1969).

[94] Smith v. United States, 418 F.2d 1120 (D.C. Cir. 1969); Von Feldt v. United States, 407 F.2d 95 (8th Cir. 1969); Carroll v. United States, 392 F.2d 185 (1st Cir. 1968); Fleming v. United States, 378 F.2d 502 (1st Cir. 1967); Hampton v. Oklahoma, 368 F.2d 9 (10th Cir. 1966); Fouts v. United States, 253 F.2d 215 (6th Cir. 1958) United States v. Valez-Arenaz, 299 F.Supp. 463 (D.C.P.R. 1969); United States v. Bandy, 269 F.Supp. 969 (D.C.N.D. 1967); Note, *The Right to a Speedy Trial*, 20 Stan.L.Rev. 476, 478 (1968).

[95] Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1571 (1970) (concurring opinion).

[96] Defendant may not complain of any delay of which he was the cause. *Id.* at 1574; Harrison v. United States, 392 U.S. 219, 221 n.4 (1968); Morland v. United States, 193 F.2d 297, 298 (10th Cir. 1951); United States v. Alagia, 17 F.R.D. 15, 17 (D.C.Del.1955); People v. Barksdale, 110 Ill. App. 2d 163, 166, 249 N.E.2d 165, 167 (1969); State v. Yates, 442 S.W.2d 21, 24 (Mo. 1969); Annot., 129 A.L.R. 572 (1940).

[97] *Compare* Hanrahan v. United States, 348 F.2d 363, 368 (D.C.Cir.1965)(Dictum); United States v. Reed, 285 F.Supp. 738, 743 (D.C.D.C. 1968) which held that delay occasioned by the government's negligence, as opposed to willful, culpable conduct, is a constitutional violation *with* Petition of Provoo, 17 F.R.D. 183 (D.C.Md.), *aff'd mem.*, 350 U.S. 857 (1955) where deliberate acts of the prosecution resulted in long delay. *See* Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1576 (1967) (Brennan, J. concurring):

> A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as a purposeful failure. . . . Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary.

[98] United States *ex rel.* Solomon v. Mancusi, 412 F.2d 88 (2d Cir. 1969); Von Feldt v. United States, 407 F.2d 95 (8th Cir. 1969); Harling v. United States, 401 F.2d 392 (D.C.Cir. 1968); United States v. Kaufman, 393 F.2d 172 (7th Cir.), *cert. denied*, 393 U.S. 1098 (1968); United States v. Jackson, 369 F.2d 936 (4th Cir. 1966); Hedgepeth v. United States, 365 F.2d 952 (D.C. Cir. 1966); United States v. Simmons, 338 F.2d 804 (2d Cir. 1964); United States v. Fay, 313 F.2d 620 (2d Cir. 1963); United States v. Richardson, 291 F.Supp. 441 (S. D. N. Y. 1968). *See also* Miller v. Rodriquez, 373 F.2d 26, 28 (10th Cir. 1967); Smith v. United States, 331 F.2d 784, 787 (D.C.Cir. 1964) Fleming v. United States, 378 F.2d 502 (5th Cir. 1967) states the test of denial of speedy trial in the disjunctive, i.e., defendant must demonstrate either prejudice or oppressive, culpable conduct on the part of the prosecution.

[99] United States v. Fay, 313 F.2d 620, 623 (2d Cir. 1963).

[100] United States v. Perez, 398 F. 2d 658 (7th Cir. 1968) (six year delay); Bruce v. United States, 351 F. 2d 318 (5th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966) (seven year delay); United States v. Fouts, 253 F. 2d 215 (6th Cir. 1958), *remanded and aff'd*, 258 F. 2d 402 (6th Cir. 1958) (ten year delay); Carlton v. United States, 304 F. Supp. 818 (E.D. Ark. 1969) (two year delay); Partsch v. Haskins, 175 Ohio St., 139, 191 N.E.2d 922 (1963) (ten year delay); Barr v. Sheriff, Washoe County, __Nev.__, 459 P.2d 218 (1969) (two year delay).

has engrafted upon the provision the condition that it is only effective when demanded. Unlike the law pertaining to the right to counsel,[102] the defendant has the burden of ensuring for himself the right to a speedy trial by taking an affirmative action demanding that he be brought to trial within a reasonable amount of time. Failure to take such action or mere silence by the defendant has traditionally constituted waiver.[103]

The demand doctrine is based on the assumption that defendants might welcome delay in prosecution as a means of either forestalling punishment or allowing more time for the preparation of a defense.[104] Another reason for courts construing a defendant's silence to be acquiesence in delay is the fear that a defendant will sit back and let his case lapse in hopes that either it will be dropped or that the delay will amount to a deprivation of speedy trial.[105] Hence, in justification of the demand doctrine jurists often employ the metaphor that the right to speedy trial is not designed as a sword for a defendant's escape, but rather as a shield for the defendant's protection.[106] Also, there is the contention that the defendant who makes a demand for speedy trial would probably be most prejudiced by denial of it.[107] This rests on the notion that those who suffer most from delayed trials would be most likely to complain.

The vitality of the demand doctrine has not been lessened by *Smith v. Hooey*.[108] In that case petitioner addressed demands for a speedy trial to respondent's court over a six year time span. Accordingly, post-*Hooey* courts interpreted the order of the Supreme Court decision to be predicated on the demand of the incarcerated.[109]

In *Dickey v. Florida*,[110] petitioner made three express demands for trial. The majority opinion placed great emphasis on this fact in reversing Dickey's conviction.[111]

An increasing number of courts, however, have held that it is not incumbent on the accused to demand a speedy trial or otherwise suffer the loss of the right.[112] As a result, certain exceptions have grown up around the demand doctrine.[113] It is not

[101] *E.g.*, United States v. McCorkle, 413 F.2d 307 (7th Cir. 1969); May v. Georgia, 409 F.2d 203 (5th Cir. 1969); Von Feldt v. United States, 407 F.2d 95 (8th Cir. 1969); Chapman v. United States, 376 F.2d 705 (2d Cir.), *cert. denied*, 389 U.S. 881 (1967); United States v. Sanchez, 361 F.2d 824 (2d Cir. 1966); Bruce v. United States, 351 F.2d 318 (5th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966); United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963); United States v. Lustman, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); United States v. Fouts, 253 F.2d 215 (6th Cir. 1958), *remanded and aff'd*, 258 F.2d 402 (6th Cir. 1958); Chinn v. United States, 228 F.2d 151 (4th Cir. 1955); Carlton v. United States, 304 F.Supp. 818 (E.D.Ark. 1969); United States v. Penland, 300 F.Supp. 354 (D.C. Mont. 1969); Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955); Kirby v. State, 222 Md. 421, 160 A.2d 786 (1960); Cummings v. State, __Miss.__, 219 So.2d 673 (1969); White v. State, 8 Md.App. 51, 258 A.2d 50 (1969); Petition of Duran, 152 Mont. Ill, 448 P.2d 137 (1968); State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (1968); People v. Abbatiello, 30 App. Div. 2d 11, 289 N.Y.S.2d 287 (1968); Mack v. Maxwell, 174 Ohio St. 275, 189 N.E.2d 156 (1963); State v. Jestes, __Wash.__, 448 P.2d 917 (1968); State v. Stoekle, 41 Wis.2d 378, 164 N.W.2d 303 (1968)__. *See* Note, *The Right to Speedy Trial*, 20 Stan.L.Rev. 476, 479–480 (1968); 8A J. MOORE, FEDERAL PRACTICE, ¶48.04[1] (Cipes ed. 1968); Annot., 57 A.L.R.2d 302 (1958).

[102] *See* note 75 *supra*.

[103] *See* note 101 *supra*.

[104] *Cf.* Ponziv. Fessenden, 258 U.S. 254, 264 (1922); United States *ex rel.* Von Cseh v. Fay, 313F.2d 620, 623 (2d Cir. 1963).

[105] *Cf.* Hedgepeth v. United States, 364 F.2d 684, 688 (D.C. Cir. 1966); United States v. Gladding, 265 F.Supp. 850, 854 (S.D.N.Y. 1966).

[106] United States v. Lustman, 258 F.2d 475, 478 (2d Cir. 1957), *cert. denied*, 358 U.S. 880 (1958); United States v. Tchack, 296 F. Supp. 500, 502 (S.D.N.Y. 1969); United States v. Gladding, 265 F. Supp. 850, 854 (S.D.N.Y. 1966).

[107] United States v. McCorkle, 413 F.2d 307, 309 (7th Cir. 1969).

[108] 393 U.S. 374 (1969). "Upon the petitioner's *demand*, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial." *Id.* at 383 (emphasis added). *See* 49 NEB. L. REV. 166, 172 (1969).

[109] May v. Georgia, 409 F. 2d 203, 204 (5th Cir. 1969); Carlton v. United States, 304 F. Supp. 818, 822 (E.D. Ark. 1969); Luckman v. Burke, 299 F. Supp. 488, 494 (E.D. Wis. 1969); Cummings v. State, __ Miss.__, 219 So. 2d 673, 675 (1969).

[110] __U.S.__, 90 S.Ct. 1564 (1970).

[111] "Petitioner's challenge is directly to the power of the state to try him after the lapse of eight years during which he repeatedly demanded and was denied a trial." *Id.* at 1568. Mr. Justice Brennan, however, finding the demand doctrine of questionable constitutional validity, stated in his concurring opinion, "I do not read the Court's opinion as deciding that [the defendant] is not entitled to speedy trial unless he demands it at the time of the delay." *Id.* at 1570 (concurring opinion).

[112] *E.g.* Pitts v. North Carolina, 395 F.2d 182, 187 (4th Cir. 1968); Fouts v. United States, 253 F.2d 215, 218 (6th Cir. 1958), *remanded and aff'd*, 258 F.2d 402 (6th Cir. 1958); Taylor v. United States, 238 F.2d 259, 261 (D.C. Cir. 1956); United States v. Richardson, 291 F. Supp. 441, 446–47 (S.D.N.Y. 1968); Needel v. Scafati, 289 F. Supp. 1006, 1013 (D.C. Mass. 1968), *rev'd on other grounds*, 412 F.2d 761 (1st Cir.), *cert. denied*, 396 U.S. 861 (1969); United States v. Reed, 285 F.Supp. 738, 741 (D.D.C.1968); United States v. Dillon, 183 F. Supp. 541,543 (S.D.N.Y. 1960); United States v. Chase, 135 F. Supp. 230,233 (N.D.Ill. 1955); Ex parte State, 255 Ala. 443, 446–47, 52 So. 2d 158, 161 (1951); Bell v. State, __Miss.__, 220 So. 2d 287, 288 (1969); Annot., 57 A.L.R.2d 334 (1958).

[113] *See* United States v. Hill, 310 F.2d 601, 603 (4th

surprising that most of the cases allowing for exceptions involve the situation where the defendant is imprisoned. These courts have realized that the demand doctrine, intended to apply in all cases where the accused raises his sixth amendment rights as a defense, has its harshest effect on the accused convict. As stated in *United States v. Chase*, "[A] waiver will not be implied when the action required to avoid it is virtually impossible. While it is easy to say that a man confined to Alcatraz should take active steps in his own behalf, there are practical obstacles in his path which make this easier to say than to do." [114]

Where the convict is never informed of pending charges lodged against him by a detainer, he may be excepted from the demand doctrine.[115] Obviously a man cannot waive his right to speedy trial on charges of which he is ignorant. Assuming the convict is cognizant of outstanding charges, the problem then arises as to the means available to make an effective demand. This of course presupposes that a convict is even aware of his sixth amendment right, much less the necessity of demanding its enforcement. Sensing the inequity of applying waiver of fundamental rights[116] to convicts who lack both legal knowledge and resources to execute a formal demand for trial, courts[117] have engrafted an exception to the demand rule for convicts "powerless" to assert their rights.

The exceptions imposed on the demand doctrine make manifest the gross unfairness of applying the doctrine to convicts at all. The assumption that a convict has the requisite knowledge, access to counsel[118] and power to make an affirmative demand for trial when (and if) informed of a detainer is fantasy. To construe a waiver out of a prisoner's reticence is to ignore the exigent realities of prison life and places too high a premium on "public justice." [119]

The implicit adherance of *Smith v. Hooey* and *Dickey v. Florida* to the demand doctrine is disappointing from the convict's standpoint. The presumption that silence constitutes waiver of the constitutional right to a speedy trial runs against the grain of modern constitutional law. As made clear in *Johnson v. Zerbst*[120] " '[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiesence in the loss of fundamental rights.' " [121] Accordingly, the test of waiver in *Johnson*, a right to counsel case, and later cases[122] has been whether there was "an intentional relinquishment or abandonment of a known right or privilege."[123] If waiver is to be based on express intention and inquiry into "the particular facts and circumstances surrounding" [124] the defendant, the demand rule appears constitutionally infirm. As pointed out in *United States v. Richardson:*[125] "It [the demand doctrine] neither requires any showing of defendant's intent to waive his right nor demands any knowledge of this right from a defendant." If *Klopfer v. North Carolina*[126] makes the right to speedy trial as fundamental as the right to counsel, no logical reason exists to support

Cir. 1962); United States v. Gladding, 265 F. Supp. 850, 855 (S.D.N.Y. 1966).

[114] United States v. Chase, 135 F. Supp. 230, 233 (N.D.Ill. 1955).

[115] Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968) at 188:

> Since this ingredient of basic fairness was excluded, by keeping the prisoner in ignorance of his right to demand trial, we will not hold that he was waived his fundamental right to a speedy trial by failing to seek an immediate hearing seven years after the prosecution had initiated proceedings against him.

Taylor v. United States, 238 F.2d 259, 261 (D.C. Cir. 1956); United States v. Reed, 285 F. Supp. 738, 741 (D.D.C.1968); Ex parte State, 255 Ala. 443, 446, 52. So.2d 158, 161 (1951); Bell v. State, __Miss.__, 220 So.2d 287 (1969).

[116] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

[117] *Cf.* Fouts v. United States, 253 F.2d 215, 218 (6th Cir. 1958), *remanded and aff'd*, 258 F.2d 402 (6th Cir. 1958); United States v. Richardson, 291 F. Supp. 441, 447 (S.D.N.Y. 1968); Needel v. Scafati, 289 F. Supp. 1006, 1013 (D.C. Mass. 1968), *rev'd on other grounds*, 412 F.2d 761 (1st Cir.), *cert. denied*, 396 U.S. 861 (1969); United States v. Chase, 135 F. Supp. 230, 233 (N.D. Ill. 1955); Commonwealth v. Sutton, 214 Pa. Super. 148, 251 A.2d 660, 663 (1969) (dissenting opinion).

[118] United States v. Richardson, 291 F. Supp. 441, 447 (S.D.N.Y. 1968) (absence of counsel negates waiver); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 139–140 (1967) The Commission cites legal counsel for convicts as a "pressing need" of correctional institutions.

[119] Beaver v. Haubert, 198 U.S. 77 (1904) at 87: "The right of speedy trial is necessarily relative. It is consistent with delays and depends on circumstances. It secures rights to a defendant. It does not preclude public justice."
See Dickey v. Florida, —U.S.—, 90 S.Ct. 1564 (1970), at 1568: "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality on the need to have charges promptly exposed."

[120] 304 U.S. 458 (1938).

[121] *Id.* at 464 (footnotes omitted).

[122] Miranda v. Arizona, 384 U.S. 436, 475 (1966); Brookhart v. Janis, 384 U.S. 1, 4 (1964); Fay v. Noia, 372 U.S. 391, 439 (1963); Carnley v. Cochran, 369 U.S. 506, 516 (1962); Glassner v. United States, 315 U.S. 60, 70–71 (1942).

[123] 304 U.S. at 464.

[124] *Id.* at 464.

[125] 291 F. Supp. 441, 446 (S.D.N.Y. 1968).

[126] 386 U.S. 213, 223 (1967).

a less strict standard of waiver for the former than that established for the latter.[127]

It would seem that the demand doctrine's "... implication of waiver from silence or inaction misallocates the burden of ensuring a speedy trial." [128] If the state has the burden of advising the accused of his right to counsel and to remain silent,[129] then the duty exists to speedily try the accused.[130] Accordingly, it should be presumed that the accused desires a speedy trial, unless he expressly accepts or requests a delay. Waiver of one's right to speedy trial by silence, however, assumes the contrary and in effect places the burden on the accused convict to assure himself of his sixth amendment right.[131]

The administrative provisions of the Interstate Agreement on Detainers[132] are designed to facilitate the convict's making the "demand" necessary under present law. Article III(c) of the Agreement provides that a warden on receipt of a detainer shall inform the convict on whom it is lodged of its source and contents. The warden shall also inform the prisoner of "his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." [133] Though ameleorative of certain problems endemic to the demand doctrine, the Agreement makes the right to speedy trial turn on the defendant's demand. It also allows for the prosecution to circumvent the defendant convict's rights by not filing a detainer at all so as to preclude him from making any demand. Aware of this pitfall, the American Bar Association in its *Standards Relating to Speedy Trial* places an affirmative duty on the prosecutor to promptly issue a detainer on defendants known to be imprisoned within and without the boundaries of his jurisdiction.[134]

The ABA *Standards* as well as the Interstate Agreement on Detainers, however, still permit inaction by the defendant to constitute waiver, although both promote the issuance of a demand. As a solution to this problem a uniform prison administrative system might be devised whereby a prisoner, upon receipt of a detainer, would be forced with the aid of legal counsel to express an election between demand or waiver of speedy trial. By this system a prisoner, having been advised by a lawyer of the consequences of either choice, could knowingly and intelligently decide to forgo speedy trial if he so desired. Such a procedure would effectively eliminate the problems inherent in the demand doctrine's application to convicts in its current form.

As previously mentioned, in order for a defendant to claim a denial of his sixth amendment right, he must allege prejudice.[135] That is, he must demonstrate how the delay of which he complains impairs his ability to defend himself.[136] This rule, though unique to speedy trial as contrasted to right to counsel,[137] is not without merit where the delay is relatively short. Such delay may work to the defendant's advantage in allowing him more time in trial preparation, or it simply may not cause any genuine harm. However, in cases of a delay over a substantial period, the necessity of having the convict demonstrate prejudice is questionable.[138]

The convict, by virtue of his imprisonment prior to trial, can assert two types of prejudice resulting from delay. Obviously, the defendant's imprisonment over a long period prior to trial seriously impairs procurement of counsel, keeping track of witnesses, and pretrial preparation generally.[139] Moreover, the prosecution, who can collect its evidence immediately while memories are still fresh and stay in touch with witnesses all during the interim between indictment and trial, has a demonstrable advantage over the imprisoned accused. The convict, unlike the ordinary defendant, does not have the opportunity to make bail.

A second form of prejudice which is unique to the convict is that which results to him personally

[127] *See* Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1575 (1970) (Brennan, J. concurring): "The equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake."

[128] Id. at 1575. (Brennan, J. concurring).

[129] Miranda v. Arizona, 384 U.S. 436 (1966.)

[130] Dickey v. Florida, —U.S.—, 90 S.Ct. 1564 (1970).

[131] *Id.* at 1575. (Brennan, J. concurring.)

[132] *See* note 62 *supra*.

[133] Article III(c).

[134] ABA, STANDARDS RELATING TO SPEEDY TRIAL §3.1 (1967).

[135] *See* note 98 *supra* and accompanying text. *See also* United States v. Ewell, 383 U.S. 116, 122 (1966).

[136] 8A J. MOORE, FEDERAL PRACTICE ¶48.04[3] (Cipes ed. 1968). In Smith v. United States, 418 F.2d 1120, 1124 (D.C. Cir. 1969) Judge Wright, dissenting, points out that there are two kinds of relevant prejudice:

> ... prejudice to the defendant's ability to defend against the charge, and prejudice to his person. Prejudice to the person takes the milder form of anxiety and stigma when the accused is released on bail. Its more virulent form, more oppressive to the accused and more destructive of the presumption of innocence, is extended pre-trial incarceration.

[137] Miranda v. Arizona, 384 U.S. 436 (1966).

[138] Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1576–77 (1970) (Brennan, J. concurring).

[139] *cf.* Pitts v. North Carolina, 395 F.2d 182, (4th Cir. 1968); Bruce v. United States, 351 F.2d 318, 320 (5th Cir. 1965); Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956).

as a consequence of an untried detainer.[140] Courts,[141] cognizant of the evils accruing from untried detainers, recently have given increased judicial attention to these evils as a form of prejudice. Although the negative effects of an untried detainer do not relate directly to the accused's ability to prepare a defense,[142] it might be argued that the adverse psychological effects of a lingering detainer may in effect produce such deep felt resignation in the prisoner that he is incapable of effectively preparing for trial.[143]

Although placing the burden of showing prejudice on the defendant is not objectionable in cases where delay is not *ipso facto* unreasonably long, the burden of proof and risk of ultimate non-persuasion should be reversed in cases of protracted delay.[144] Mr. Justice Harlan's concurrence in *Smith v. Hooey* on this matter is most consonant with the law of evidence and the Bill of Rights. Realizing petitioner's six year delay to be unreasonable, he asserted:

> If petitioner makes a *prima facie* showing that he has in fact been prejudiced by the State's delay, I would then shift to the State the burden of proving the contrary.[145]

The allocation of the burden of proving prejudice in cases of prolonged and extended delay might best be handled by presumption.[146] Upon defendant's showing of long, unexplained delay, prejudice would be presumed[147] thereby shifting to the state the burden of coming forward to prove the absence of prejudice.[148] The presumption in favor of the defendant more clearly reflects the strong probability that unreasonable pre-trial delay is far more likely to be detrimental to the defendant's case than to have no effect at all.[149] Indeed, if the prosecution causes the delay, it should have to account for it.[150]

Executing The Right to Speedy Trial

"While *Smith v. Hooey* clearly establishes a right to a speedy trial for federal prisoners with pending state charges, it gives precious little practical guidance to the lower courts about the effectuation of that right."[151] Certain procedural matters, however, are clear.

Under current state and federal decisional law[152] and detainer statutes,[153] a convict must make an affirmative demand for trial. To be effective, this demand must be made not only to prosecuting authorities but to the court having jurisdiction as well.[154] The demand must be asserted promptly (upon notification of complaint or indictment) and objection should be voiced at every delay caused by the prosecution so as to preclude any charge of waiver by acquiesence.

Upon receipt of a prisoner's demand for trial, the prosecutor then has the "constitutional duty to

[140] *See* notes 21–30 and accompanying text.

[141] *See e.g.* Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968); Lawrence v. Blackwell, 298 F.Supp. 708 (N.D. Ga. 1969); United States v. Candelaria, 131 F.Supp. 797 (S.D.Cal. 1955).

[142] 8A J. Moore, Federal Practice ¶48.04[3], at 48–33 (Cipes ed. 1968). "Prejudice experienced by prisoners against whom detainers are filed without being brought to trial, can be serious in nature, though it may not actually impair the ability to defend."

[143] Smith v. Hooey, 393 U.S. 374, 378–79 (1969) (by implication).

[144] *Accord.*, Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968) at 185:

> Because this constitutional guarantee is so basic to a fair trial, courts have made it abundantly clear that after a delay of this magnitude, it is not the defendant who must bear the burden of showing prejudice, but the state must carry the obligation of proving 'that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delay.' Williams v. United States, . . . 250 F.2d 19, 21 (1957); United States v. Lustman, 258 F.2d 475 (2d Cir. 1958); United States v. Chase, 135 F.Supp. 230 (N.D.Ill.1955).

See also Smith v. United States, 418 F.2d 1120, 1121–22 (D.C. Cir. 1969); Lawrence v. Blackwell, 298 F.Supp. 708, 715 (N.D.Ga. 1969). Professor Moore concurs with the President's Commission on Law Enforcement and the Administration of Justice that the maximum period of delay between arrest and trial in common law felony cases should be four months. 8A J. Moore, Federal Practice ¶48.03[1] (Cipes ed. 1968).

[145] 393 U.S. at 384.

[146] Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1578 (1970) (Brennan, J. concurring).

[147] Petition of Provoo, 17 F.R.D. 183,203 (D.Md. 1955), *aff'd mem.*, 350 U.S. 857 (1955).

[148] *E.g.*, Hedgepeth v. United States, 364 F.2d 684, 687 (D.C.Cir. 1966); Williams v. United States, 250 F.2d 19,21 (D.C.Cir.1957); IX J. Wigmore, Evidence §2487 at 280–81 (3rd ed. 1940); Note, *The Right to Speedy Trial*, 20 Stan L. Rev. 476, 502–03 (1968).

[149] A presumption of prejudice in cases of extended delay would also alleviate the defendant of the practical difficulties inherent in proving various intangible harms, *i.e.*, failure of memory, public accusation, and personal anxiety. *See* Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1577 (1970) (Brennan, J. concurring).

[150] *See generally*, J. Moore, Federal Practice ¶48.04(2) (Cipes ed.1968).

[151] Lawrence v. Blackwell, 298 F.Supp. 708, 715 (N.D.Ga. 1969).

[152] *See* note 101 *supra*.

[153] *See* notes 56, 61, and 62 *supra*.

[154] United States v. Santos, 372 F.2d 177 (2d Cir. 1967); United States v. Lustman, 258 F.2d 475, 478 (2d Cir. 1957), *cert. denied*, 358 U.S.880 (1958); State v. Smith, 10 N.J. 84, 89 A.2d 404 (1952); *In re* Ditton's Petition, 145 Mont. 594, 403 P.2d 205 (1965); Interstate Agreement on Detainers art. III(a)(1956).

make a diligent, good-faith effort . . ." [155] to bring the cause to trial. If the accused is in a federal penitentiary, a state prosecutor may obtain custody of the accused by requesting that the executive authority of his state ask the United States Attorney General to cause the release or transfer of the defendant.[156] If the prosecutor finds the accused to be imprisoned in another state, two means of procurement are available to him. Where the holding state is party to the Uniform Criminal Extradition Act, the charging jurisdiction may invoke section five of the act.[157] Alternatively, the prosecutor might employ article IV(a)[158] of the Interstate Agreement on Detainers, providing the respective jurisdictions have adopted it.[159] Like the Extradition Act, the rendition of a convict into the temporary custody of the prosecuting jurisdiction under article IV(a) is dependent on the discretion of the holding jurisdiction's governor.[160]

[155] Smith v. Hooey, 393 U.S. at 383.

[156] 18 U.S.C. §4085 (1964) reads in part:

(a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

[157] *See* note 66 *supra*.

[158] Article IV(a) reads as follows:

The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

[159] *See* note 61 *supra*.

[160] Article IX of the INTERSTATE AGREEMENT ON DETAINERS, however, calls for a liberal construction of its provisions so as to effectuate it purpose, i.e., the interstate rendition of convicts on whom detainers have been served. *See* May v. Georgia, 409 F.2d 203, 205 n.5 (5th Cir. 1969), indicates that the refusal of a holding state to render a convict for trial in another jurisdiction is subject to review by the federal courts "since it would tend to interfere with . . . Sixth Amendment rights."

When the prosecution chooses not to go to trial, the convict has two options. If he desires a speedy trial he can cause a writ of *habeas corpus ad prosequendum*[161] to be issued from the trial court[162] having jurisdiction over his case to secure his release for trial. Otherwise, he may refrain from taking any affirmative action towards securing an early trial and hope the charges against him will be dropped before the termination of his sentence. In doing this, the convict would of course run the risk of facing trial at the end of his sentence where any claim to the denial of his right to a speedy trial might be held waived by his silence.

Should a convict's demand for a speedy trial by means of motion, writ of *habeas corpus ad prosequendum*, mandamus,[163] or other appropriate means prove ineffectual, a recent Fourth Circuit decision, *Kane v. Virginia*,[164] makes federal *habeas corpus* relief[165] available to the convict. Kane, a prisoner serving a five year sentence at a federal penitentiary in Illinois, received a detainer in 1966 from Virginia charging him with grand larceny. After a series of requests for speedy trial were ignored by prosecuting authorities and the Virginia trial court, Kane in 1968 petitioned the Supreme Court of Appeals of Virginia for dismissal of the charge against him and removal of the detainer. Kane's petition was summarily dismissed. Upon denial of relief by the state, the Illinois convict sought *habeas corpus* relief in the United States District Court of Eastern Virginia under 28 U.S.C. § 2254 (1964). This application was denied.[166]

Although relief under 28 U.S.C. § 2254 (1964) is granted normally only after trial by the state and full exhaustion of state remedies,[167] the Fourth Circuit Court granted immediate relief. Sensing the unfairness in requiring the detainee to raise and adjudicate the speedy trial issue in the state court at the end of his federal sentence for purposes of

[161] *cf.* United States v. Kipp. 232 F.2d 147 (7th Cir. 1956); Thompson v. Stephens County, 450 P.2d 853 (Okla. Crim. 1969); Heredon v. State, 369 P.2d 650 (Okla. Crim. 1962). *See also* Carbo v. United States, 364 U.S. 611 (1961) (Power of federal district court to issue writ of *habeas corpus ad prosequendum* extends nationwide).

[162] Lawrence v. Willingham, 373 F.2d 731, 732 (10th Cir. 1967).

[163] Smith v. Hooey, 393 U.S. 374, 375 (1969); Dickey v. Circuit Court, 200 So. 2d 521 (Fla. 1967). *But see* Thompson v. Stephans County, 450 P. 2d 853 (Okla. Crim. 1969).

[164] 419 F.2d 1369 (4th Cir. 1970).

[165] 28 U.S.C. §2254 (1964).

[166] 419 F.2d at 1370.

[167] *Id.* at 1372. *See also* Word v. North Carolina, 406 F. 2d 352 (4th Cir. 1969); Sanders v. United States, 297 F. Supp. 375 (N. D. Ga. 1969).

exhaustion, Judge Butzner stated, "Denial of speedy trial adversely affects both the prisoner's present circumstances and his ability to defend himself in the future. Only a present remedy can lift its dual oppressions." [168] Accordingly, the Court ordered Kane discharged from custody under the detainer and that the Virginia charges be barred.[169]

In order for a convict to obtain federal habeas relief against untried charges underlying a detainer, three preliminary requirements must be met. First, the prisoner must make demands for trial.[170] Second, the convict must show that the state failed to make a diligent effort to bring him to trial. Finally the prisoner must exhaust all state remedies in seeking the dismissal of the state charges.[171] Additionally, it is crucial that such pre-trial *habeas corpus* relief be brought in a federal district court having jurisdiction over the state wherein the charge is pending.[172]

Generally, if the state, following the *Hooey* mandate, brings the convict to trial upon his demand, the determination of any deprivation to the right to a speedy trial will be made by the state court.[173] Speaking for the majority of the Court in *Hooey*, Mr. Justice Stewart remanded petitioner's case to the Texas trial court.[174] Judging from the concurrences of Justices Black,[175] Harlan,[176] and White,[177] it appears that the determination as to whether petitioner Smith's nine year delay in trial amounted to constitutional violation was to be made by the trial court. Dismissal was not mandatory. Nevertheless, it would seem most consistent with the thrust of the *Hooey* doctrine that in future cases involving inordinate and oppressive delays by the prosecution that a trial court would be compelled to dismiss the stale charges against the defendant.[178] Of course, upon an adverse determination by the state courts, a defendant would always have recourse to the federal courts for *habeas corpus* relief.[179]

Conclusion

The mandate of *Smith v. Hooey* has given the convict's right to speedy trial new vitality. It serves the immediate needs of the accused convict who prior to the Supreme Court decision suffered immeasurably from denial of his sixth amendment right. Yet the beneficial effects of the decision inure to society as well.[180] As indicated in requiring the prosecution to come forward with an early trial on each detainer filed against a convict, the undesirable effects resulting from nuisance detainers on both rehabilitation and correctional administration are alleviated.[181]

Nevertheless, the reform in the areas of criminal administration and the jurisprudence surrounding the right to speedy trial is not complete. The fact that only twenty states have adopted the Interstate Agreement on Detainers makes this glaringly obvious. Indeed, the full statewide adoption of the Agreement would greatly aid the administrative effectuation of the *Hooey* mandate. Though *Hooey* is a step in the proper direction in giving greater judicial strength to the right to a speedy trial, legal anachronisms still pervade the law in this area. The strict adherance to the demand doctrine in cases involving convicts is a vivid example of such archaic law.

In the last analysis, the effectuation of the *Hooey* decision as well as the speedy trial guarantee is greatly dependent on the good-faith cooperation of good faith cooperation of judicial and correctional administrators on all levels of our federalistic system.[182] Without such cooperation, Gladstone's maxim—"justice delayed is justice denied"—will continue to ring its simple truth.

[168] 419 F.2d at 1372.

[169] *Id.* at 1373.

[170] May v. Georgia, 409 F. 2d 203 (5th Cir. 1969).

[171] Kane v. Virginia, 419 F.2d 1369, 1373 (4th Cir. 1970); Piper v. United States, 306 F. Supp. 1259, 1261 (D.C.Conn.1969).

[172] *See* Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969); Piper v. United States, 306 F. Supp. 1259 (D. C. Conn. 1969); Sanders v. United States, 297 F. Supp. 375 (N. D. Ga. 1969); Lawrence v. Blackwell, 298 F. Supp. 708 (N. D. Ga. 1969). *Contra*, Ashley v. Washington, 394 F. 2d 125 (9th Cir. 1968).

[173] *Accord*, May v. Georgia, 409 F.2d 203, 205 (5th Cir. 1969); Lawrence v. Blackwell, 298 F.Supp 708, 715–16 (N.D. Ga. 1969); Maryland v. Kurek, 233 F. Supp. 431, 433 (D. Md. 1964).

[174] 393 U.S. 374, 383 (1969).

[175] "[J]udgment is set aside only for the purpose of giving the petitioner a trial, and that if a trial is given the case should not be dismissed." *Id.* at 383.

[176] "I do not believe that Texas should automatically forfeit the right to try petitioner." *Id.* at 384.

[177] "I join the opinion of the Court, understanding its remand... to leave open the ultimate question whether Texas must dismiss the criminal proceedings against the petitioner." *Id.* at 384.

[178] *See generally* United States v. Smith, 418 F. 2d 1120, 1123–6 (D. C. Cir. 1969) (Wright, J. dissenting); 8A J. Moore, Federal Practice ¶48.03 (Cipes ed. 1968).

[179] *See* Word v. North Carolina, 406 F. 2d 352 (4th Cir. 1969); Pitts v. North Carolina, 395 F. 2d 182 (4th Cir. 1968); Luckman v. Burke, 299 F. Supp. 488 (E.D. Wis. 1969).

[180] *See* Dickey v. Florida, —U.S.—, 90 S.Ct. 1564, 1571 (1970) (Brennan, J. concurring).

[181] *See* notes 21–30 and accompanying text.

[182] Note, *supra* note 11, 1209.

DUE PROCESS, SELF-INCRIMINATION, AND STATUTORY PRESUMPTIONS IN THE WAKE OF *LEARY* AND *TURNER*

I. INTRODUCTION

The word "presumption" is used to mean many different things, but this they all have in common: they involve a relationship between a proven or admitted fact or group of facts, A, and another fact or conclusion of fact, B, which is sought to be proven.[1]

Presumptions in law have been created by legislatures in order to facilitate the successful prosecution of crimes where particular required items of proof are unusually difficult to demonstrate. Two presumptions were recently questioned by the Supreme Court in *Leary v. United States*[2] and *Turner v. United States*.[3] The former case dealt with trafficking in marihuana, while the latter dealt with heroin and cocaine.

Prior to the *Leary* decision the government was able to prosecute marihuana cases under the Marihuana Tax Act[4] and the Narcotic Drugs Import and Export Act[5] with virtual assurance that it would gain a conviction if it could establish that the defendant was in possession of marihuana when arrested.[6] The government would win because the defendant would either not have paid the transfer tax under the Marihuana Tax Act or not be able to overcome the statutory presumption in §2(h) of the Narcotic Drugs Import and Export Act.[7] *Leary* altered this, however.

On December 22, 1965, Dr. Timothy Leary crossed the International Bridge at Laredo, Texas, on his way to Mexico. The Doctor and his party were denied entry by the Mexican authorities. The Doctor then returned to the American side. An inspection of Leary's car by American officials disclosed small amounts of marihuana.

Leary was subsequently indicted for smuggling marihuana into the United States,[8] transporting and concealing marihuana illegally brought into the United States,[9] and transporting and concealing marihuana without paying the transfer tax imposed by the Marihuana Tax Act.[10] He was

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[1] F. JAMES, CIVIL PROCEDURE 248 (1965).

[2] 395 U.S. 6 (1969). *Leary* has been noted in *e.g.*, 6 HOUSTON L. REV. 185 (1968); 20 CASE W. RES. L. REV. 251 (1968); and 83 HARV. L. REV. 103 (1969).

[3] 396 U.S. 398 (1970).

[4] INT. REV. CODE of 1954, §4744(a)(2).

[5] 21 U.S.C. §176a (1964).

[6] See *e.g.*, United States v. Minor, 398 F.2d 511 (2d Cir. 1968), *cert. granted*, 395 U.S. 932, *aff'd*, 396 U.S. 87 (1969); Costello v. United States, 324 F.2d 260 (9th Cir. 1963); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962); United States v. Vial, 282 F.Supp. 472 (D. Mass. 1968); and Arrizon v. United States, 224 F.Supp. 26 (S.D. Cal. 1963).

[7] The presumption in 21 U.S.C. §176a, §2(h) of the Act, is that if the accused is found to be in possession of marihuana, it is deemed that he has knowledge of its having been illegally imported.

The courts have been somewhat inconsistent in analyzing the effects of the presumption, however. For example, in United States v. Gibson, *supra*, the court said that the statute merely shifted the burden going forward onto the accused and that the government still had to prove its case beyond a reasonable doubt. 310 F.2d at 82. In United States v. Mont, 306 F.2d 412 (2d Cir. 1962), moreover, Judge Friendly wrote that the government, in a case involving a similar statutory presumption regarding narcotics, had the burden of establishing that the defendant knew that he was receiving, concealing, etc. a narcotic drug imported in violation of the law. Thus, he construed the statute (21 U.S.C. §174 (1964) in this case) to require a showing of scienter. In the *Gibson* case the scienter requirement seems to have been tacitly abandoned so long as possession is shown. The court intimated, however, that had the defendant shown that a sufficient quantity of marihuana was domestically produced the presumption might be rebutted.

[8] The indictment charged a violation of 21 U.S.C. §176a which reads:

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports, or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five years or more than twenty years and, in addition, may be fined not more than $20,000 . . . .
>
> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, *such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.* (Emphasis added.)

[9] *Id.*

[10] INT. REV. CODE of 1954, §4744(a)(2) reads in pertinent part:

> It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—
>
> (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
>
> (2) to transport or conceal, or in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained.
>
> Proof that any person shall have had in his

found guilty on the last two counts.[11] The smuggling count was dismissed.

The Supreme Court granted certiorari[12] to consider: (1) whether the requirement that Leary pay the transfer tax violated his fifth amendment privilege against self-incrimination, and (2) whether Leary was denied due process because of the statutory presumption in 21 U.S.C. §176a, providing that possession of marihuana is sufficient evidence both of its illegal importation and of the defendant's knowledge of its illegal importation. The Court found in favor of the petitioner on both issues.[13]

The Court said that by requiring the petitioner to obtain an order form from the government for the transfer of marihuana, the Marihuana Tax Act[14] compelled him to identify himself not only as a transferee but also as a nonregistered transferee within the meaning of the act.[15] The Act directed that the information required by the registration provisions be conveyed by the Internal Revenue Service to state and local law enforcement agencies on request.[16] Since the petitioner was not a person, who, under state law, might legally possess marihuana,[17] the Court found that he was therefore one of a class constituting "a select group inherently suspect of criminal activities."[18] Thus, petitioner had ample reasons to fear that transmittal to state officials that he was an unregistered transferee of marihuana "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt"[19] under the state marihuana laws then in effect.[20]

The government argued that there was no incriminatory aspect in the Act since it was designed to prevent a nonregistered person from obtaining an order form.[21] The Court rejected this argument finding that the congressional intent was to allow nonregistered as well as registered persons to obtain the forms and prepay the transfer tax—even though the former paid a significantly higher tax. Hence, the Court found, Congress was serious about the transfer being taxed and was not merely

possession and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

[11] *See* 18 U.S.C. §4208 (1964). Petitioner was tentatively sentenced to the maximum penalties under both §176a (twenty years and $20,000) and §4744(a)(2) (ten years and $20,000), the prison sentences to run consecutively. The minimum penalty for conviction under §176a is five years imprisonment with no consideration given for a suspended sentence, for probation, and parole is not permitted. 26 U.S.C. §7237(d) (1964). The Fifth Circuit affirmed the decision. Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *reh. denied*, 392 F.2d 220 (1968).

[12] 392 U.S. 903 (1968).

[13] Leary v. United States, 395 U.S. 6 (1969).

[14] INT. REV. CODE of 1954 §4741, *et seq.* (1964).

[15] 395 U.S. at 16.

[16] INT. REV. CODE of 1954 §4773 (1964). In all states possession of marihuana except by registered or specifically authorized persons is a crime. 26 U.S.C. §§4742(b)(1)–(2) (1964) exempts persons who receive marihuana under medical prescription or directly from a doctor. 26 U.S.C. §4742(b)(4) (1964) exempts transfers to public officials. The Act suggests, moreover, that a delivery of marihuana to an employee or agent of a registrant is considered a "transfer" to the registrant himself. 26 U.S.C. §4755(b)(3) (1964), 26 C.F.R. §§152.41, 152.42. Delivery to a common carrier is also a "transfer" to the addressee. 26 U.S.C. §4755(b)(2) (1964), 26 C.F.R. §152.127(c).

[17] *See* 9b U.L.A. 409–10 (1966). Although Pennsylvania and California have not adopted the Uniform Narcotic Drugs Act, they have their own statutes making possession of marihuana a criminal offense. *See* CALIFORNIA HEALTH & SAFETY CODE §11530 (West 1964); PA. STAT. ANN., tit. 35, §§780–2(g) 780–4(g) (1964).

[18] 395 U.S. at 18.

[19] Marchetti v. United States, 390 U.S. 39, 48 (1968).

[20] Leary v. United States, 395 U.S. at 16 n. 14. The Court intimates that compliance with the Act could have created a substantial risk of incrimination under 21 U.S.C. §176a (1964), the other federal statute under which petitioner was convicted. The Court chose to decide this latter count on the grounds of an unfounded statutory presumption, but it seemed ready to find that the statute also violated petitioner's privilege against self-incrimination since complying with this part of the statute may involve one becoming a forced witness against himself. See discussion note 70 *infra* and accompanying text.

[21] 395 U.S. at 19. The government had an anomalous position to argue. It had to argue that Congress did not really intend to issue the order form for which the $100 tax was levied. It was merely a "put-on" to bring trafficking in marihuana within the implied police powers of the taxing power of the Constitution. It was no joke, however, in Covington v. United States, 395 U.S. 57 (1969), the companion case to *Leary*. There the defendant was served by narcotics agents with notice that they had reason to belive that he had marihuana and that he must within eight days produce his registration form or be liable for the tax. Under the section, they proceeded to levy on him an assessment of $2,903.75 including 28 cents interest. They also impounded Covington's car. They knew, of course, that Covington did not possess the order form since none are ever issued. ⟨4 CRIM. L. RPTR. 4125 (1969).⟩ The Supreme Court affirmed the district court's dismissal of the indictment on the ground that the defendant's fifth amendment privilege would be a complete defense to the prosecution "unless the plea is untimely, the defendant confronted no substantial risk of self-incrimination, or the privilege had been waived." 395 U.S. at 59. The Court held that the defendant's assertion of his privilege at trial created a legal presumption of nonwaiver. *Id.* at 60.

interested in prohibiting such transfers.[22] Referring to the disclosure requirements of the Act,[23] the Court said that the conclusion was inescapable that the statute was intended to uncover violations of state marihuana laws. Thus, if a nonregistered person complied with the Act, it would be tantamount to an admission of guilt under the criminal statutes of any state the transferee happened to be in.

This construction of the statute clearly brings it within the rationale of *Marchetti v. United States*,[24] *Grosso v. United States*,[25] and *Haynes v. United States*.[26] In these cases the Court held that it was a violation of the petitioner's fifth amendment rights to require him to register and pay the occupational tax on wagers as required by the federal wagering tax statutes[27] (*Marchetti*); or to pay an excise tax on the proceeds of wagering[28] (*Grosso*); or to register a weapon under the National Firearms Act[29] (*Haynes*), because to do so would be to place the registrant in a group inherently suspect of criminal activities under state law. The Court in these cases reasoned that although the petitioners did not have a right to violate state law, nevertheless once having done so they could not be compelled to give evidence against themselves. The Court in *Leary*, therefore, declined the government's request that it restrict the use to which the federal agencies might put the information gathered under the Act and concluded that "a timely and proper assertion of the privilege should have provided a complete defense to prosecution under §4744(a) (2)." [30]

Thus, if Leary had complied with the Act, he would have been criminally liable under state marihuana laws and would have furnished the government with evidence of his own guilt. If he failed to comply, moreover, he would have been criminally liable under federal law. The Court held that such a situation violated his fifth amendment rights against self-incrimination since it meant that he would first have to incriminate himself by filing a tax return in order to claim the protection of the fifth amendment.[31]

The result in *Leary* on this issue was predictable given the result in *Marchetti*, *Grosso*, and *Haynes*.[32] The more difficult problem is whether Congress may, by a statutory presumption, legitimately establish what evidence must be accepted by a jury as conclusive of proof in a criminal case.

II. Due Process Aspects of Statutory Presumptions

The Court, turning to petitioner's contention that the statutory presumption contained in 21

[22] 395 U.S. at 21. Clinton Hester, Assistant General Counsel to the Treasury Department, testified before the House Ways and Means Committee that the bill's purpose was "not only to raise revenue, but also to discourage the current and widespread undesirable use of marihuana by smokers and drug addicts." *Hearing on H.R. 6385 before the House Committee on Ways and Means*, 75th Cong., 1st Sess., at 5 (1937). In United States v. Doremus, 249 U.S. 86 (1919), and Nigro v. United States, 276 U.S. 332 (1928), the dissenting opinions expressed doubts about such a statute as 26 U.S.C. §4744(a) being constitutional. *See also Hearings on H.R. 6906 before a Subcommittee of the Senate Committee on Finance*, 75th Cong., 1st Sess., 5 (1937). *But see* United States v. Sanchez, 340 U.S. 42 (1950), where the government in its brief plainly took the position that the Act imposed only a tax and not a prohibition on transfers to nonregistrants. *Brief for the United States in No. 81, O.T. 1950*, United States v. Sanchez 340 U.S. 42 (1950), at 28–29.

[23] 26 U.S.C. §4733 (1964) reads in pertinent part:

> ...The Secretary or his delegate is authorized to furnish upon written request, certified copies of any of the said statements [the registration certificates, etc.] or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia.... as shall be entitled to inspect the said statements or returns....

[24] 390 U.S. 39 (1968).

[25] 390 U.S. 62 (1968).

[26] 390 U.S. 85 (1968).

[27] 26 U.S.C. §§4411–12 (1964).

[28] 26 U.S.C. §4401 (1964).

[29] 26 U.S.C. §5851 (1964).

[30] 395 U.S. at 27.

[31] The Court made it clear that it was not dealing with the undoubted fifth amendment right of an accused to remain silent at trial, but rather with the implied right that one cannot be criminally liable for having failed to obey a statute which required an incriminatory act to fall under the act. This was in response to the government's claim that *Marchetti* did not provide a shield for any taxpayer who was outside the privilege's protections. The government argued that Leary had waived his fifth amendment right by testifying to his not paying the transfer tax. But the Court held that this was precisely the sort of forced testimony that the fifth amendment should prevent. *But see* Stewart, J., concurring opinion, 395 U.S. at 54.

[32] Warren, C. J., dissented in *Marchetti* and *Grosso* arguing that the Court had stripped from Congress the power to make its taxing scheme effective. He argued that the focus of the Court's attention should have been on the statutory requirement in 26 U.S.C. §6107 (1964), which provides that federal officials must turn over the information obtained through the registration forms to state prosecutors. *See* 390 U.S. 62, 81 (1968). The *Leary* Court, however, refused to follow this line of reasoning and Warren himself felt bound by the rationale of *Marchetti* to concur in the *Leary* result. 395 U.S. at 54.

See also 6 Duquesne L. Rev. 291 (1968); 5 San Diego L. Rev. 390 (1968); 19 Syracuse L. Rev. 789 (1968); 13 Vill. L. Rev. 650 (1968) for comments on the *Marchetti* case.

U.S.C. §176a,[33] denied him due process of law, stated:

> ... [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[34]

That is, the Court approved the test of *Tot v. United States*[35] that there must be a rational connection between the facts proved and the facts presumed before a statutory presumption can be upheld as constitutionally permissible.[36]

In *Tot* the accused had been convicted under the Federal Firearms Act[37] for receiving a firearm in interstate commerce after having been previously convicted of a violent crime. The only evidence the government offered was that Tot was in possession of a firearm when arrested and that he had been previously convicted of assault and battery.[38] The statute provided that anyone who has been previously convicted of a violent crime and is found in possession of a firearm shall be presumed to be in violation of the Act making it illegal for such a person to receive a firearm in interstate commerce. The *Tot* Court found that there was no rational connection between the possession of a firearm and its possible receipt in interstate commerce and therefore invalidated the presumption.

In a later case, *United States v. Gainey*,[39] the Court was confronted with a similar presumption. This case involved a conviction for carrying on the business of a distiller without having complied with the law.[40] The statute at issue presumed that proof of the accused's presence at an illegal still while distilling was going on was sufficient evidence to authorize conviction, unless this presence was explained to the jury's satisfaction. Although this presumption appears to shift the burden of ultimate nonpersuasion onto the accused, the trial judge charged the jury that it need not convict on the evidence of presence alone even if the accused does not explain his presence satisfactorily. The Fifth Circuit reversed on the ground that the *Tot* "rational connection" test was not satisfied by the statute.[41] The Supreme Court in turn reversed this decision noting that the presumption was rational since the legislative recognition of the implications of the seclusion of an illegal still "only confirms what the folklore teaches—that strangers to the illegal business rarely penetrate the curtain of secrecy. We therefore hold that §5601(b) (2) satisfies the test of *Tot v. United States* ...."[42] Thus, by using folklore as empirical data, the Court decided that there was a rational connection between one's presence at a still and his participation in carrying on the business of illegal distilling.

Later in *United States v. Romano*,[43] the Court was confronted with a companion presumption to the one upheld in *Gainey*. The statute at issue in *Romano* made possession, custody or control of an unregistered still a crime.[44] Presence was again considered sufficient evidence to convict, but the Court struck this statute down because, unlike "carrying on," "possession" is only one function in which one present at a still might be engaged. The Court felt that it was therefore irrational to conclude that presence necessarily implies possession. The Court also thought that the language in the statute would mislead the jury into thinking that presence alone was sufficient to convict.[45]

But was this not also true in *Gainey*? Presence was enough to convict for the crime of carrying on the business of an illegal still. The Court's attempt to distinguish the two cases on the basis of the meanings of the words "possession" and "carrying on" appears to be tenuous, too. The

[33] This section imposes criminal punishment on every person who knowingly brings marihuana into the United States contrary to law. If the defendant is shown to have had marihuana in his possession, the possession is deemed sufficient evidence to authorize conviction under the statute unless the defendant explains his possession to the satisfaction of the jury. Note 8 *supra*.

[34] 395 U.S. at 36.

[35] 319 U.S. 463 (1943).

[36] *Id.* at 467. *See* United States v. Gainey, 380 U.S. 63, 67 (1965) which followed *Tot* and added that significant weight should be accorded Congress's capacity to amass the facts and cull conclusions from them. *See also* United States v. Romano, 382 U.S. 136, 141 (1965), which held that to infer from one's presence at a still to his possession, custody or control of the still is arbitrary absent some showing of the defendant's function.

[37] 52 Stat. 1250 (1938).

[38] 319 U.S. at 464.

[39] 380 U.S. 63 (1965).

[40] INT. REV. CODE of 1954 §5601(b)(2).

[41] *Sub nom.* Barnett v. United States, 322 F.2d 292 (5th Cir. 1963).

[42] 380 U.S. at 67–68.

[43] 382 U.S. 136 (1965).

[44] 26 U.S.C. §§5601(a)(1), (b)(1) (1964).

[45] This conclusion seems inescapable since the trial judge can charge the jury that presence without explanation authorizes conviction. The average juror, moreover, would probably interpret "authorize conviction" as something stronger than the possibility that he may convict—he already knows that he may convict.

Court in *Gainey*, however, insisted that before *Gainey* the trial courts had always instructed the juries that presence was only a factor to be considered in deciding a case.[46] Congress, the Court reasoned, intended to establish this as the rule by creating the presumption embodied in the statute. If this were the actual intent of Congress, however, why was the similar presumption struck down in *Romano*? Surely it was possible to remove the possible objection that presence alone was enough to convict by means of a jury instruction which would tend to neutralize the constitutional infirmities contained in the statute.

The *Romano* Court would not allow this, however, and concluded:

> Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—"the inference of one from the proof of the other is arbitrary . . . ." [47]

The Court would not allow the burden of persuasion to shift in *Romano*. It would allow presence to be admitted into evidence, but the prosecution still had to prove that the accused had a function which connected him with possession, control or custody on the still. This does, then, represent a gloss on the *Tot* rationale compared with the *Gainey* decision—despite the Court's attempt to reconcile the two cases. In *Romano*, the "folklore" on which the Court in *Gainey* relied was pretty much ignored.

The Court in *Leary* declared that it was following the "upshot" of *Tot*, *Gainey* and *Romano* in its decision.[48] This "upshot" was said to be that the presumed fact must be "more likely than not" to flow from the proved fact on which it depends. It is questionable, however, whether *Tot* or its progeny had ever stated that a criminal statutory presumption had to be at least "more likely than not." [49] It is true that the language of *Tot* demanding a rational connection between the fact proved and the fact presumed did not rule out a "more likely than not" test, but it did not demand it either. This test, nevertheless, while not quite reaching the "beyond a reasonable doubt" standard, the traditional test of criminal guilt, does stiffen the minimum requirements which the Court will demand in testing the constitutional validity of a criminal statutory presumption.

The Court in *Leary* found the presumption that one possessing marihuana was presumed to possess illegally imported marihuana which he knew to be illegally imported violated the petitioner's due process rights. This was so because the presumption authorized the jury to infer two essential elements of the crime: (1) the marihuana was imported or brought into the country illegally, and (2) the defendant knew it. That is, if the defendant could not explain his possession of marihuana to the satisfaction of the jury, the jury had to find the defendant guilty. The defendant, therefore, for all practical purposes had the burden of ultimate persuasion shifted to him by means of the statute. The Court held that the second part of the presumption was unconstitutional because it was not more likely than not that one in possession of marihuana would know that it was illegally imported.[50]

In reaching its conclusion in *Leary*, the Court compared the amounts of foreign grown marihuana imported into this country with the amount grown locally.[51] Since the Court found that most of the marihuana consumed was imported,[52] the

[46] 380 U.S. at 66.

[47] 382 U.S. at 14.

[48] 395 U.S. at 36.

[49] *See* 83 HARV. L. REV. 103 (1969) for a note which discussess the standard enunciated in *Leary*.

[50] 395 U.S. at 52. After consideration of the means by which a marihuana user might know if the drug is imported or not, the Court concluded that it was impossible to determine that the average user would have such knowledge. So holding the Supreme Court reversed the judgment of conviction outright on count three, failure to pay the transfer tax; reversed the judgment of conviction on count two, illegally importing marihuana; and remanded the case to the court of appeals for further proceedings consistent with the opinion. The Court added that this decision did not imply "any constitutional disability in Congress to deal with the marihuana traffic by other means." Mr. Justice Stewart concurred in the opinion but felt that the fifth amendment had been extended beyond its original moorings of a testimonial privilege. Mr. Justice Black also concurred in the result.

The Court specifically did not reach the validity of the illegal importation inference and also refused to reach a possible third element—that the importation was with intent to defraud the United States.

[51] 395 U.S. at 39. The Court relied on *Hearings in, and Control of, Narcotics, Barbiturates and Amphetamines before a Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. (1955).

[52] In *Leary*, counsel for the defendant had argued that since federal agents themselves destroy over 1900 acres of domestic marihuana annually (enough to make 17,000,000 cigarettes) the presumption was an indefensible absurdity. 4 CRIM. L. RPTR. 4123 (1969). In Nebraska alone there is an estimated 115,000 acres of marihuana ready for harvesting. *Pop Drugs: the High as a Way of Life*, TIME, September 26, 1969, at 69.

government contended that under *Yee Hem v. United States*[53] the presumption should be upheld since in that case the Supreme Court had sustained a similar presumption in 21 U.S.C. §174[54] relating to narcotic drugs, nearly all of which are imported. The Court, however, refused to compare the two. It said that even though most of the marihuana consumed was imported, it was still unlikely that the user (unless he is perhaps a pusher[55]) would know that it was illegally imported.

The problem with a criminal statutory presumption is, of course, that the courts and the legislatures frequently fail to specify the impact of a rebuttable presumption on the admissibility of evidence, the burden of going forward, and the burden of persuasion.[56] A presumption may also overreach its avowed purpose as a rule of evidence and become a rule of substantive law.[57] The presumption may be so strong as to become an irrebuttable presumption rather than a means of placing the burden of going forward on the defendant or of testing the admissibility of evidence. Despite this problem, it has been declared constitutional for Congress to create an irrebuttable presumption.[58] In *Bowers v. United States* the presumption in the Federal Agricultural Adjustment Act provided that if any producer failed to account for the disposition of any peanuts, it would be deemed that he marketed an amount of peanuts in excess of the allotment equal to the normal yield per acre. He would therefore be liable in fines to that extent. Thus, the government was still held to proving that the producer did not have to prove anything concerning the excess of normal yield per acre. Although this looks very much like an irrebuttable presumption, the Court held that Congress had created a rule of substantive law and not such a presumption.[59] The reason for calling it a substantive rule of law and not an irrebuttable presumption is that the prosecution, even where a statutory presumption exists, must still prove its case beyond a reasonable doubt. If the presumption can be called a substantive rule of law, the problem of irrationally shifting the burden of proof to the defendant does not arise. The burden is still on the prosecution to establish its case, but its quantum of proof is greatly reduced because of the substantive rule of law with which the defendant must comply.

This begs the question, however, for it is clear that the presumption in *Bowers* is irrebuttable and calling it a substantive rule of law does not make it any less so. It merely makes it semantically easier for the Court to defer to the Legislature's findings.

[53] 268 U.S. 178 (1925). In this case the Court sustained a presumption virtually identical to the one at issue. The case, however, dealt with smoking opium rather than marihuana and is, therefore, at least distinguishable on its facts. *Accord* Gee Woe v. United States, 250 F. 428 (5th Cir.), *cert. denied*, 248 U.S. 562 (1918); Toy v. United States, 266 F. 326 (2d Cir.), *cert. denied*, 254 U.S. 639 (1920).

[54] 21 U.S.C. §174 (1964) reads:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States ... contrary to law, or receives, conceals, buys, sells, or in ay manner facilitates the transportation, concealment, or sale of any narcotic drug after being imported or brought in, knowing the same to have been 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 five or more than twenty years and, in addition, may be fined not more than $20,000....
>
> 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.* (Emphasis added.)

[55] *See* United States v. Minor, 398 F.2d 511 (2d Cir. 1968), *cert. granted*, 395 U.S. 932 (1969), where the defendant argued that his conviction under the Harrison Narcotics Act, 26 U.S.C. §4705(a), which provided that a person who sells narcotics must do so pursuant to a written order form which the buyer will supply, was a violation of his fifth amendment privilege against self-incrimination. The court convicted him. In United States v. Buie, 407 F.2d 905 (2d Cir.), *cert. granted*, 395 U.S. 976 (1969), too, the court convicted the defendant under 26 U.S.C. §4742 (1964) for selling marihuana without paying the transfer tax. Defendant's fifth amendment argument was to no avail. The Supreme Court affirmed the decisions in both *Minor* and *Buie*, Minor v. United States, 396 U.S. 87 (1969). White, J., distinguished the cases from *Leary* in that sellers and not buyers were the subject of the prosecution. The Court reasonsed that Minor's and Buie's purchasers would not be willing to comply with the order form requirement to list their sellers even if the seller insisted on selling only pursuant to the order form, thereby creating no substantial risk of self-incrimination. The dilemma confronting the buyer, then, does not confront the seller.

[56] Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 1141 (1966). This article is a good probe into the constitutionality of statutory presumptions.

[57] Criminal presumptions are treated in MCCORMICK, EVIDENCE 635–72 (1954); Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEXAS L. REV. 34 (1931); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); Note, 56 HARV. L. REV. 1324 (1943); Note, 55 COLUM. L. REV. 527 (1955).

[58] Bowers v. United States, 226 F.2d 424 (5th Cir. 1955).

[59] *See* United States v. Carlisle, 234 F.2d 196 (5th Cir.), *cert. denied*, 352 U.S. 841 (1956); *see also* United States v. Davio, 136 F. Supp. 423 (E.D. Mich. 1955).

In holding the statutory presumption in *Leary* invalid, the Court did not have to wrestle with such a problem since here the presumption was clearly rebuttable. It did, however, have to overrule a series of lower court decisions which had consistently upheld the constitutionality of the presumption in 21 U.S.C. §176a. In *Robinson v. United States*[60] the Eighth Circuit rejected the defendant's contention that since marihuana grew in Minnesota, and since this fact was well known, it was illogical to infer that the marihuana was imported in every case. The Court held that on its face the statute met the rational connection standard demanded in *Tot*. The court in *Costello v. United States*[61] said much the same thing. It went so far as to state that the mere fact that marihuana was grown domestically did not render the statute invalid even though the marihuana involved in that case was of the domestic variety.[62]

The question which arises is whether the courts in these cases were able to ignore or rationalize their decisions with *Tot*. Most of the Courts tended to point out that the possession of a firearm or ammunition, the subject of the *Tot* case, is ordinarily lawful; whereas, the possession of marihuana is lawful in only a very few particular instances—such as for testing under government control.[63] This ignores the real question, however. It is not whether we are dealing with a gun or with marihuana which is important. It is really a question of whether one's possession of the gun implies that he received it in interstate commerce or whether one's possession of marihuana implies that he knew that it was illegally imported. The broader question, too, is whether Congress can create an evidentiary presumption dispositive of a criminal case which can withstand constitutional scrutiny. In other words, is it constitutionally permissible for Congress to tell a jury what evidence it should or should not accept as conclusive in a criminal case?

The first doubts about validity of the §176a presumption appeared in 1968 in the Southern District of New York. In *United States v. Adams*[64] the court held that while the first presumption in the marihuana importation statute[65] (namely, that the marihuana was illegally imported) was probably constitutional, it was arbitrary to presume that everyone in possession of marihuana knew of its illegal importation and to so presume violated the defendant's due process rights. The court, facing the realities, agreed that because many people know or believe that a substantial amount of marihuana is grown or harvested in the United States, it is irrational to presume that one in possession of marihuana knows that it is illegally imported.[66]

Adams followed the rationale of *Tot* saying that even where the prosecution has a statutory presumption in its favor, it is still held to the burden of proving every element of the crime beyond a reasonable doubt.[67] The practical effect of the §176a presumption, however, was to relieve the prosecution of its traditional burden. This was so because under this statute the court is required to instruct the jury that the defendant was arrested in possession of marihuana. That alone is enough to convict him if he cannot explain such possession to their satisfaction. A defendant could be convicted, therefore, without any proof that the marihuana was illegally imported or that he knew that it was imported. The court reasoned that this would violate the defendant's fifth amendment due process rights.[68] It would violate them because the defendant could be convicted without the prosecution's having to establish one of the elements of the crime, the knowledge of illegal importation.

III. Self-Incrimination Aspects of Statutory Presumptions

This argument in *Adams* is essentially that of the *Leary* decision. But just as there are due process infirmities with the sort of presumption found in the Narcotic Drugs Import and Export Act, there are also problems on self-incrimination grounds.[69] In order to avoid the presumption that

[60] 327 F.2d 618 (8th Cir. 1964).

[61] 324 F.2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930 (1964).

[62] *See also* Caudillo v. United States, 253 F.2d 513 (9th Cir.), *cert. denied*, 357 U.S. 931 (1958).

[63] Borne v. United States, 332 F.2d 565 (5th Cir. 1964); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962); Williams v. United States, 290 F.2d 451 (9th Cir. 1961). All of these cases upheld the constitutionality of the statutory presumption in 21 U.S.C. §176a.

[64] 293 F.Supp. 776 (S.D.N.Y. 1968).

[65] 21 U.S.C. §176a (1964).

[66] 293 F.Supp. at 779. This goes further than *Leary* since in the latter case the Court decided that most marihuana consumed domestically is imported. *See* n. 52 *supra* and accompanying text.

[67] *See, e.g.*, United States v. Llanes, 374 F.2d 712 (2d Cir.) *cert. denied*, 388 U.S. 917 (1969); United States v. Gibson, 310 F.2d 79 (2d Cir. 1962).

[68] For a discussion of the due process rights involved in this sort of case see Note, 44 N.Y.U.L. Rev. 623 (1969).

[69] This argument on self-incrimination grounds was alluded to in *Leary*. *See supra* note 20.

one knows that his marihuana has been illegally imported, a defendant would have to take the stand and explain his possession of marihuana to the satisfaction of the jury. This would mean, of course, that the defendant could not invoke his privilege against self-incrimination, for to do so would mean conviction since the defendant would have to rebut the presumption if it is not to work against him. That is, the defendant for all practical purposes has a Hobson's choice offered to him: either he must testify or he will be convicted. If he must testify, he cannot invoke the privilege against self-incrimination and rely on the possibility that the prosecution will fail in establishing every element of the crime beyond a reasonable doubt. Instead, the prosecution need not produce any evidence of the defendant's mens rea, but rather can rely on the possibility that the defendant will fail in rebutting the presumption to the satisfaction of the jury. The defendant's constitutional right is therefore threatened because the statute makes him a forced witness if he wishes to escape conviction. It waives his privilege for him.[70]

This argument was forwarded in *Yee Hem v. United States*[71] and rejected. There the Court addressed itself to the contention that the federal statute was unconstitutional which provided that possession of smoking opium was, in the absence of a satisfactory explanation, prima facie evidence of the crime of concealing it with knowledge of its unlawful importation.[72] The Court said:

> The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not, as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create, but which is inherent in the case.[73]

The statute does compel, however. It compels the defendant to bear the burden of going forward despite his fifth amendment privilege against testifying against himself. The Court, moreover, seems to be saying that since it is more convenient to have the defendant bear the burden of proof in these cases, we will allow Congress by legislative fiat to place that burden on him. *Tot*, however, held that the test of comparative convenience in placing the burden of going forward on the accused was impermissible absent some showing of a rational connection between the fact proved and the ultimate fact presumed. *Tot* also said that the inference of one fact from proof of another should not be so unreasonable as to be a purely aribtrary mandate,[74] and that the process of determining such connection must be highly empirical, amassed from the stuff of actual experience.[75]

Thus, after *Tot*, the test of comparative convenience can no longer be the sole standard by which the burden is shifted to the defendant. If it were, the legislature might validly command that the proof of the identity of the accused should create a presumption of the existence of all facts essential to guilt since he is in a better position to know these facts than is the prosecution. This result would run counter to all valid precepts of criminal evidence. What such a presumption would do, of course, would be to presume the defendant to be guilty until he proves beyond a reasonable doubt that he is innocent.

Although the regulation of narcotics is somewhat different from the regulation of marihuana, nevertheless if *Tot* is to be taken seriously, the rejection of the self-incrimination argument in *Yee Hem* should be revalued where presumptions do force an accused to take the stand or be convicted. Since *Yee Hem* was decided before *Tot* perhaps the Court should not reject arguments out of hand based on self-incrimination grounds.

Recently, the Court in *Turner v. United States*[76] had an opportunity to revalue the *Ye Hem* decision but refused to do so. In *Turner* the accused was found guilty on two counts of violating the Narcotic Drugs Import and Export Act[77] and on two counts of violating the federal statute which makes it a crime to purchase, possess, dispense or distribute narcotic drugs from other than the

[70] This argument was advanced in Ruis v. United States, 328 F.2d 56 (9th Cir. 1964) and rejected. The case, however, was a habeas corpus proceeding following a conviction on a plea of guilty. The statutory presumption was not operative, therefore, and perhaps the court's denying the argument following a guilty plea does not offend the rules of criminal evidence.

[71] 268 U.S. 178 (1925).

[72] 21 U.S.C. §174 (1964).

[73] 268 U.S. at 185.

[74] *See also* Pollock v. Williams, 322 U.S. 4 (1944); Cases v. United States, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770, *reh. denied*, 324 U.S. 889 (1943).

[75] *See supra* note 52.

[76] 396 U.S. 398 (1970).

[77] 21 U.S.C. §174 which is identical to the marihuana statute except that it pertains to narcotic drugs. The text of the statute appears at note 54 *supra*. The first count was for a heroin violation of §174; the second count involved cocaine.

original stamped packages.[78] The Court of Appeals for the Third Circuit affirmed the conviction[79] despite the petitioner's argument that the trial court's instructions on the inferences that might be drawn from an unexplained possession of drugs violated his privilege against self-incrimination by penalizing him for not testifying about his possession of the drugs.

The Supreme Court ignored this argument and chose to focus its attention on the defendant's failure to show that heroin was domestically produced.[80] The Court, however, did find that cocaine was produced in this country in such quantity as to negate the presumption that one in possession knew of its illegal importation. The Court, therefore, affirmed with respect to the heroin counts and reversed with respect to the cocaine counts.

This decision, however, involves the Court in some circular reasoning. The Court acknowledges that *Leary* did not decide whether a criminal presumption must satisfy the criminal "reasonable doubt" standard of proof but that even under its "more likely than not" standard, Turner would stand convicted. It said that the prosecution had the burden of showing that Turner (1) knowingly received, concealed and transported heroin which (2) was illegally imported and which (3) he knew was illegally imported.[81] The Court said, moreover, that the government had to prove each of these three elements to the jury beyond a reasonable doubt. The Court upon enunciating the black letter theory of criminal law, then proceeded to allow the opposite result to follow. The government's proof in the case consisted in showing that the defendant was in possession of heroin; and since he didn't explain his possession to the satisfaction of the jury, the Court permitted the presumption to operate, resulting in his conviction on grounds of his knowing that the heroin was illegally imported.[82]

The Court, therefore, approved Congress's attempt to shift the burden of proof on the defendant in a case involving the possession of heroin. The Court construed the rationale of *Gainey*[83] to mean that an instruction to the jury can be given which authorizes but does not require the jury to convict on possession alone.[84] This presupposes, of course, that the defendant will attempt to rebut the inference of the statute. If he does not, then possession alone is sufficient to convict, and the trial judge is so authorized to charge the jury.

The Court also said that the jury in this case was justified in accepting the legislative judgment that possession of heroin is equivalent to possessing illegally imported heroin.[85] But this does not reach the defendant's knowledge of its illegal importation. Presently, the defendant must testify if he wishes to show the jury that state of his mind. This does not mean that the prosecution should have to show the defendant's subjective state of mind. It simply means that the prosecution should introduce enough evidence to indicate what the accused's state of mind was such that the jury can draw its own inference with regard to that state. It means that the prosecution under our system of jurisprudence should have to establish every element of a crime.

Thus, although the Court paid lip service to the proposition that the government bears the burden of proving that the accused knew the heroin was illegally imported, it in fact required the accused to prove that he did not know that it was illegally imported. Apparently, the Court was again relying on the fact that it is within the accused's personal ambit of knowledge as to whether he did or did not believe that the heroin was illegally imported.[86] The test of comparative convenience, however, can only be used where there is a rational connection between the fact proved and the fact presumed and, applying the gloss from *Leary*, where one fact is more likely than not to occur in the presence of the other. Is it more likely than not to infer that one possessing heroin will know of its having been illegally imported? But even this question does not reach the true crux of the issue. It may very well be within Congress's power to determine whether most heroin is illegally imported, but it is beyond its power to determine whether all who

[78] 26 U.S.C. §470(a) (1964). Counts three and four involved heroin and cocaine violations of the statute respectively.

[79] 404 F.2d 782 (1968).

[80] The Court thus concentrated on petitioner's due process rights, but chose to avoid whether the statute involved any self-incrimination problems, or, at least, felt that this subject was moot.

[81] 396 U.S. at 405.

[82] The trial judge had instructed the jury that possession in the absence of any explanation by the defendant was sufficient to convict him.

[83] See *supra* note 39 and accompanying text.

[84] 396 U.S. 398, 406 at note 6.

[85] It is this type of interference by Congress in the jury's domain which Black finds so objectionable. See his concurring opinion in *Leary*, 395 U.S. at 55, and his dissenting opinion in *Turner*, 396 U.S. at 425.

[86] This is the position which *Tot* expressly overruled. See *supra* note 74 and accompanying text.

possess it know of its illegal importation. This element of scienter, however, is necessary in order to gain a criminal conviction.[87]

The Court seemed to recognize, too, that the ordinary jury would not always know that heroin illegally circulating in this country was not manufactured here. Therefore, it felt that the presumption was needed. It also seemed to recognize that the knowledge aspect was a matter of some doubt since Mr. Justice White, in writing the opinion, went to great pains to point out that Turner was a distributer and not a user and was therefore aware that the heroin was illegally imported.[88]

All this rhetoric, however, does not conceal the weakness of the Court's argument that this presumption also applies to users, that the burden of persuasion is shifted to the defendant, that the proof beyond a reasonable doubt of defendant's knowledge of the heroin's being illegally imported is lifted from the government, and that the defendant stands in jeopardy unless he takes the stand.[89]

Despite these problems the Court in *Turner*, as mentioned earlier,[90] chose to ignore this argument and concentrated on asking whether there was any empirical data to show that heroin was produced domestically. Finding none, it concluded that under *Leary* it was more likely than not that the possession of heroin meant that it was illegally imported heroin and that the defendant knew that it was illegally imported. This, of course, meets the criteria for the empirical side of the *Leary* test, but does not answer the question of whether it violates one's privilege of not having to testify against oneself. Following this argument to its conclusion, then, it should be apparent that if the standard of placing the burden is not stricter than in *Yee Hem*,[91] the defendant must accept the burden whether he wishes to remain silent or not. If he wishes to be convicted, he will stand upon his privilege; if he wishes to rebut the statute, he must perjure himself as well as establish part of the government's case in chief, if he is in fact guilty.

IV. Conclusion

A criminal statutory presumption stands as suspect, then, because it is possibly only a convenient way to secure a conviction without having the government bear the burden of producing all the evidence sufficient to show guilt. Whether this result should be countenanced by the Court is probably in direct proportion to how much weight it ascribes to the black letter assertion that a man is presumed innocent until he is proven guilty.[92]

Under a statutory presumption such as the ones in 21 U.S.C. §174 or §176a, moreover, an accused is arguably placed under a serious threat of self-incrimination if the statute is construed so as to shift the burden of proof to him without regard for the rationality of the presumption.[93] Since *Tot* rejects the approach of shifting the burden without a showing of rationality, the lesson of *Leary* and *Turner* is that any criminal statutory presumption may be suspect on either due process or self-incrimination grounds.[94] Although Congress can

[87] The standard to prove this element of scienter, however, need not be more than circumstantial.

[88] 396 U.S. at 416–17.

[89] It would seem that the average jury might disbelieve an accused arrested in possession of heroin who testified that he did not know of its being illegally imported. It would seem, too, that a jury could find the requisite knowledge should the government build a sufficient case showing facts sufficient to indicate that he would know of its being illegally imported should he choose to remain silent. Thus, the presumption may not be necessary to win a conviction. It makes it easier to win one; but because of the constitutional problems it raises, it should perhaps be abandoned.

[90] See *supra* note 80 and accompanying text.

[91] The *Yee Hem* standard seems to be based on some sort of comparative convenience rationale.

[92] Guilt is not only an objective state either. It also connotes a subjective state of the criminal. No statutory presumption can reach this latter state, but this state has been traditionally inferred by juries from circumstantial evidence put on by the government. The question is whether this should be any different in cases involving drugs.

[93] This seems to be the case in *Turner* since the court can instruct the jury that possession absent explanation is enough to convict.

[94] *But see* Walden v. United States, 417 F.2d 698 (5th Cir. 1969), 6 Crim. L. Rptr. 2105 (5th Cir. 10/2/69) where the defendant was convicted under 21 U.S.C. §176a for failing to declare the 350 pounds of marihuana concealed in his hearse when he crossed the border. The court said that the requirement that all marihuana brought into the United States must be declared and invoiced does not compel an illegal importer to incriminate himself. The court reasoned that it would be strange to punish a traveler for failure to declare ordinary merchandise and at the same time to hold that an importer of contraband does not have to declare. Since no one compels him to import contraband, his fifth amendment rights are not violated.

The court further said that since the government placed no reliance on the presumption in §176a, the *Leary* decision was inapposite and the conviction would be affirmed. Since the defendant was apprehended while crossing the border, this case is somewhat different from the case where one apprehended in the United States would be subject to the presumption.

declare what acts are criminal, it must be circumspect in declaring what evidence is sufficient to convict.[95] Since this latter is the traditional task of the jury to determine and since the prosecution must bear the risk of ultimate nonpersuasion, any sweeping declaration by Congress that evidence of one kind or another will be conclusive of guilt is suspect where sensitive fifth amendment rights are concerned, and especially where it tends to relieve either the jury or the government from their respective and traditional tasks.

The thrust of this comment does not reach the question of how the government should control illegal trafficking in drugs. It merely points out a legitimate concern of the Court in this area. This concern is that the areas in which a statutory presumption can operate are perhaps narrower than either Congress or the federal prosecutors would like. The Court seems to restrict a presumption's operative force vis-à-vis an accused's rights on trial. Perhaps the Court has not yet reached the point where presumptions, such as the ones found in 21 U.S.C. §174 or §176a, will be struck down on self-incrimination grounds, but it has found them wanting on due process grounds in some cases.

[95] This is what Justice Black argues against in his concurring opinion in *Leary* (395 U.S. at 55). His determination to protect the inviolability of the jury trial appears as he scores Congress for attempting to take the finding of fact away from the jury through the device of a statutory presumption.

> "Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell juries they can covict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn."

See also his concurring opinion in Tot v. United States, 319 U.S. at 473, and his dissenting opinion in United States v. Gainey, 380 U.S. at 74. Black is saying that Congress cannot take the fact-finding function away from the jury and that the only time a statutory presumption could be relied upon is when there is a rational connection between the facts inferred and the facts which have been proved *beyond a reasonable doubt*. That is, the facts proved must be relevant evidence which tends to show the existence of the facts presumed. This way the jury is still permitted to make the final inference even though the presumption makes that inference easier to make.