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Presumptions, Inferences, and Strict Liability in Illinois Criminal Law: Preempting the Presumption of Innocence?, 41 J. Marshall L. Rev. 715 (2008)

Theodore A. Gottfried

Peter G. Baroni

PRESUMPTIONS, INFERENCES AND STRICT LIABILITY IN ILLINOIS CRIMINAL LAW: PREEMPTING THE PRESUMPTION OF INNOCENCE?

THEODORE A. GOTTFRIED[1] AND PETER G. BARONI[2]

I. INTRODUCTION

In criminal courts throughout the country, presumptions and inferences have been used on a regular basis. Together, they either instruct or allow the trier of fact to presume or infer an ultimate fact based on the existence of certain other predicate or basic facts.[3] A presumption represents a rule of law that requires the existence of an ultimate fact, or presumed fact, to be taken as established where other predicate or basic facts have been established.[4] An inference, on the other hand, is a conclusion, made by the trier of fact, drawn through logic and reason, after considering the basic facts presented.[5] In contrast with presumptions, inferences do not compel the fact finder to accept the ultimate fact without question. Instead, the fact finder may

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1. Illinois State Appellate Defender 1972-2007; CLEAR Initiative Commissioner 2005-2007; The John Marshall Law School, JD, 1966.

2. Co-founder, Leinenweber & Baroni and Leinenweber & Baroni Consulting; Director, CLEAR Initiative Commission 2005 to present; Howard University School of Law, JD, 1996. Mr. Baroni is also a member of the adjunct faculty at the Depaul University College of law. The authors wish to acknowledge the excellent research assistance of Bryan D. Grissman, class of 2008, DePaul University College of Law and Kimberly D. Musick, class of 2009, DePaul University College of Law. Additionally, the authors would like to thank Professor Emeritus John F. Decker for his guidance, insight and editorial input, without his assistance this article would not have been possible.

3. Sandstrom v. Montana, 442 U.S. 510, 513 (1979); People v. Jordan, 218 Ill. 2d 255, 843 N.E.2d 870 (2006); People v. Greco, 204 Ill. 2d 400, 407, 790 N.E.2d 846, 851-52 (2003); People v. Watts, 181 Ill. 2d 133, 141, 692 N.E.2d 315, 320 (1998); *see also* JOHN F. DECKER, ILLINOIS CRIMINAL LAW; A SURVEY OF CRIMES AND DEFENSES, § 2.06(D) (4th ed. 2006) (providing discussion of presumptions and inferences, which this portion of the article tracks to some extent).

4. Shari L. Jacobson, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by Allen*, 42 U. MIAMI L. REV. 1009, 1009 (1988).

5. *Id.*

come to a conclusion where basic facts suggest it to do so.[6] For years, both the United States Supreme Court and the courts of Illinois have struggled to identify the proper place for these mechanisms in the criminal system. While neither presumptions nor inferences may relieve the state of its burden to prove every element of the crime charged, it is clear that the appropriate influence of these important tools is an ever-evolving notion. In any event, constitutionally questionable presumptions appear to exist in the Illinois Criminal Code.

Strict liability has traditionally had limited application in criminal law because it removes the requirement of a criminal mind for criminal liability to attach. The recent expanded use of strict liability by the legislature as a means to circumvent court decisions striking down mandatory presumptions may violate the dictates of *Apprendi* and its concern that a prosecutor's burden of proof not be diminished.

Part II of this Article will examine the United States Supreme Court and the Illinois judicial opinions addressing mandatory presumptions. It will be shown, on the one hand, that the courts have a very dim view of presumptions but, on the other hand, Illinois penal law reflects a number of these legal vehicles that have yet to be challenged. This Section offers solutions as to how these presumptions might be remedied. Part III will focus on permissive inferences, which within limits, the United States Supreme Court and Illinois courts appear to accept. This Section offers a framework for how the courts will assess inferences in the future. Part IV will review the United States Supreme Court's as well as other responses to the concept of strict liability in general. Notwithstanding the chilly reception to the idea of utilizing strict liability in a penal code from various corridors, it will be pointed out that the Illinois legislature has recently employed the strict liability device as a possible means to circumvent court decisions striking down mandatory presumptions. Thus, the legality of this type of legislative initiative will be examined.

II. MANDATORY PRESUMPTIONS

The mandatory presumption diminishes the state's burden of proof at trial court. Mandatory presumptions force the trier of fact to accept proof of an element of the offense if certain other underlying facts are established.[7] These presumptions traditionally fall into two categories. Where the mandatory presumption is conclusive, the trier of fact must accept the presumed fact where the state has established the underlying facts, regardless of the effort or evidence proffered by the

6. *Id.*
7. *Id.* at 1010.

defendant.[8] Where the mandatory presumption is rebuttable, the trier of fact must accept the presumed fact unless the defendant successfully rebuts it.[9] These tools have been intensely scrutinized, both by the United States Supreme Court and Illinois courts, as they have been viewed as infringing upon a defendant's due process right to be presumed innocent until the state has proven every element of the offense beyond a reasonable doubt. Today, all mandatory conclusive presumptions have been deemed unconstitutional by the United States Supreme Court.[10] Those mandatory rebuttable presumptions that shift the burden of persuasion to the defendant have also been found per se unconstitutional.[11] In Illinois, all mandatory presumptions are now unconstitutional.[12]

A. Mandatory Conclusive Presumptions

For their part, mandatory conclusive presumptions are unflinching. They instruct the trier of fact that it must accept a presumed fact as true, without question or dispute.[13] These presumptions have long been held unconstitutional. In *Sandstrom v. Montana*, the United States Supreme Court struck down their use throughout the country.[14] In that case, the defendant was charged in Montana with deliberate homicide.[15] At trial, the jury was instructed that "the law presumes a person intends the ordinary consequences of his voluntary acts."[16] Upon this instruction, the jury convicted the defendant of deliberate homicide. The United State Supreme Court reversed the conviction, pointing out that a reasonable juror could have interpreted the presumption as either conclusive or as shifting the burden of persuasion to the defendant.[17] Both interpretations were constitutionally impermissible. At best, the defendant was forced to contradict the presumption, and at worst, where the presumption was conclusive, nothing the defendant could have done would have been enough to defeat it. In either case, the State was not required to prove every element of the offense beyond a reasonable doubt. Such a scheme "would conflict with

8. *Watts*, 181 Ill. 2d at 142, 692 N.E.2d at 320.
9. *Sandstrom*, 442 U.S. at 515.
10. *Id.*
11. Francis v. Franklin, 471 U.S. 307, 317 (1985).
12. *Watts*, 181 Ill. 2d at 147, 692 N.E.2d at 322-23; *see also* People v. Pomykala, 203 Ill. 2d 198, 208, 784 N.E.2d 784, 790 (2003) (providing an example of an instance where a defendant has been denied due process by a jury instruction).
13. *Sandstrom*, 442 U.S. at 515.
14. *Id.* at 510.
15. *Id.* at 512.
16. *Id.* at 513.
17. *Id.* at 517.

the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime charged."[18]

The Illinois appellate court, following *Sandstrom*, has struck down conclusive presumptions in the Illinois criminal code.[19] In *People v. Dodd*, the Second District found a conclusive presumption in the State's retail theft statute violated due process.[20] There, the defendant was convicted of retail theft after the jury received an instruction that "any person [who] removes merchandise beyond the last known station . . . shall be presumed to have possessed, carried away or transferred such merchandise with intention of retaining it or with the intention of depriving the merchant permanently of the possession."[21] The court found the presumption to be mandatory and conclusive, and therefore unconstitutional. Reiterating the *Sandstrom* holding, the court found that the Due Process Clause prohibited the State from relying on evidentiary presumptions that relieve it of its burden to prove beyond a reasonable doubt every essential element of the charged crime.[22] Moreover, the court felt that the presumption was misplaced. It was not completely unreasonable to think that a person carrying an item past the last known pay station was doing so out of inadvertence or thoughtlessness, and not with intent to steal it.[23]

B. Mandatory Rebuttable Presumptions

Unlike mandatory conclusive presumptions, mandatory rebuttable presumptions do not absolutely force a conclusion upon the trier of fact. When faced with such a presumption, the defendant has the burden of contradicting the conclusion. Then, at the close of evidence, the trier of fact must decide if the defendant has adequately countered the presumption. Where the defendant meets her burden, the presumption will be ignored. Where she does not, the trier of fact must accept the presumption. Rebuttable presumptions come in two forms. They will shift either the burden of production or the burden of persuasion to the defendant.[24] Where the defendant is saddled with the burden of production, she must produce some evidence that, if successfully

18. *Id.* at 523.

19. *See, e.g.*, People v. Dodd, 173 Ill. App. 3d 460, 469-70, 527 N.E.2d 1079, 1085 (2d Dist. 1988) (concluding that an instruction's mandatory presumption was constitutionally infirm).

20. *Id.*

21. *Id.* at 467-68, 527 N.E.2d at 1084.

22. *Id.* at 468, 527 N.E.2d at 1085.

23. *Id.* at 469, 527 N.E.2d at 1085.

24. County Court of Ulster County v. Allen, 442 U.S. 140, 160 n.16 (1979).

produced, will overcome the presumed fact.[25] Alternatively, where the defendant bears the burden of persuasion, she must convince the trier of fact that proof of the underlying fact does not mean that the presumed fact is true.[26]

As in the case of mandatory conclusive presumptions, the United States Supreme Court is similarly critical of mandatory rebuttable presumptions. In *Francis v. Franklin*, the Court held that if such a presumption shifts the burden of persuasion to the defendant, it is per se unconstitutional.[27] In *Franklin*, the defendant was on trial for murder after escaping from prison and killing a nearby resident.[28] At trial, the judge instructed the jury that there was a rebuttable presumption that a person of sound mind and discretion was presumed to have intended the natural and probable consequences of her actions.[29] The jury returned a guilty verdict and the defendant was sentenced to death.[30] On appeal, the United States Supreme Court struck down the conviction and the use of that presumption.[31] The state must never be relieved of the burden of persuasion on every element of the offense beyond a reasonable doubt.[32] In any murder charge, intent to kill is an element of the offense.[33] Despite the State's argument that the defendant could rebut the presumption, the Court found little distinction between it and the type of mandatory conclusive presumption struck down in *Sandstrom*.[34] While the rebuttable presumption did not remove the presumed fact from the jury's consideration, it did relieve the State of affirmatively proving it by requiring the jury to accept the presumed fact unless the defendant persuaded it otherwise.[35] In other words, while a rebuttable presumption was less direct in its command to the jury, it was no less onerous for the defendant, and it had the same effect of removing the burden from the State in proving an essential element of the offense. As a result, the Court found the presumption unconstitutional.[36]

In *Francis*, the United States Supreme Court explicitly refused to address the constitutionality of mandatory rebuttable presumptions that shifted the burden of production to the

25. *Id.*
26. *Watts*, 181 Ill. 2d at 143, 692 N.E.2d at 321.
27. *Francis*, 471 U.S. 307 at 317.
28. *Id.* at 309-11.
29. *Id.* at 311-12.
30. *Id.*
31. *Id.* at 325.
32. *Id.* at 313.
33. *See, e.g., id.* at 315 n.4 (stating that intent is an element of malice murder in Georgia).
34. *Id.* at 316.
35. *Id.* at 317.
36. *Id.*

defendant.[37] The Illinois Supreme Court, however, has not been so reluctant.[38] With its 1998 decision, in *People v. Watts*, striking down these presumptions, the court effectively made all mandatory presumptions unconstitutional in Illinois.[39] In *Watts*, the defendant was charged with home repair fraud, among other offenses.[40] He was prosecuted under the home repair fraud statute that set forth two elements.[41] The statute also set forth a mandatory rebuttable presumption for intent not to perform the work agreed to where (1) the defendant did not substantially perform; (2) the defendant refused to refund the victim's payments; and (3) the defendant committed any of seven other acts enumerated in the statute.[42] Based on affirmative findings on all three of these presumptions, the court concluded that the presumption of intent was triggered and that the defendant had failed to rebut the presumption.[43] Therefore, the court found him guilty of home repair fraud.[44]

The Illinois Supreme Court found no difference between this production-shifting presumption and the persuasion-shifting presumption struck down by the United States Supreme Court.[45] The production-shifting presumption forced the defendant to come forward with a "certain quantum of evidence to overcome [it]."[46] Where the defendant failed to do so, the trier of fact was essentially required to direct a verdict against him.[47] As in *Francis* and *Sandstrom*, the State was relieved of the burden of proving intent.[48] The statute required the jury to accept that intent existed based on some predicate facts.[49] In all cases, therefore, it became the defendant's burden to disprove intent. And where he did not, he must be found guilty.[50] The court found

37. *Id.* at 314.

38. *See* People v. Woodrum, 223 Ill. 2d 286, 860 N.E.2d 259 (2006) (excising unconstitutional presumption from statute); *see also Jordan*, 218 Ill. 2d 255, 843 N.E.2d 870 (finding an unconstitutional presumption that was severable from the rest of the statute); *Watts*, 181 Ill. 2d 133, 692 N.E.2d 315 (holding the presumption portion of the Illinois home repair fraud act unconstitutional).

39. *See Watts*, 181 Ill. 2d at 147, 692 N.E.2d at 322-23 (declaring mandatory rebuttable presumptions in the criminal arena unconstitutional).

40. *Id.* at 135, 692 N.E.2d at 317.

41. *Id.* at 138, 692 N.E.2d at 318.

42. *Id.*; *see* 815 ILL. COMP. STAT. 515/3(c)(1)-(7) (2006) (setting forth the statutory elements of the home repair fraud statute).

43. *Watts*, 181 Ill. 2d at 139, 692 N.E.2d at 319.

44. *Id.*

45. *Id.* at 150, 692 N.E.2d at 324.

46. *Id.* at 147, 692 N.E.2d at 323.

47. *Id.*

48. *See id.* at 150, 692 N.E.2d at 324 (stating that the trier of fact "is *required* to find that the defendant did not intend to do promised work").

49. *Id.*

50. *Id.*

that form of burden-shifting, as to production or persuasion, violated the Due Process Clause and was per se unconstitutional.[51]

Later, in *People v. Jordan*, the Illinois Supreme Court reinforced its earlier decision.[52] In *Jordan*, the defendant was convicted of endangering the life and health of a child.[53] The defendant was charged after he left his child unattended in a vehicle for one hour, when the temperature outside was only twenty-two degrees.[54] The endangering the life and health of a child statute contained a rebuttable presumption that a person commits the offense of endangering the life and health of a child if he left a child six years or younger unattended in a motor vehicle for more than ten minutes.[55] The Illinois Supreme Court struck down the conviction and the statute as unconstitutional.[56] After detailing the long line of cases, both from the United States Supreme Court and Illinois courts, the court found the issue to be well settled.[57] The determination of constitutionality hinged on whether a presumption was permissible, telling the trier of fact it *could* accept it, or mandatory, telling it the presumed fact *must* be accepted.[58] In the endangering statute, nothing about the language of the offense was permissive. The words "there is" signaled the mandatory nature of the presumption.[59]

Recently, in *People v. Woodrum*, the Illinois Supreme Court struck down a mandatory presumption it found in the Illinois' child abduction statute.[60] In *Woodrum*, the defendant was charged with child abduction after he videotaped four girls under the age of sixteen and then lured the girls into his home to watch the videos.[61] The Illinois child abduction statute includes the following language: "the luring or attempted luring of a child under the age of 16 into a . . . dwelling place without the consent of the parent . . . of the child shall be prima facie evidence of [an

51. *Id.*

52. *Jordan*, 218 Ill. 2d at 266, 843 N.E.2d at 877.

53. *Id.* at 259, 843 N.E.2d at 873.

54. *Id.*

55. 720 ILL. COMP. STAT. 5/12-21.6(b) (2006). (stating that "[t]here is a rebuttable presumption that a person committed the offense if he or she left a child 6 years of age or younger unattended in a motor vehicle for more than 10 minutes.").

56. *Jordan*, 218 Ill. 2d at 266, 843 N.E.2d at 877.

57. *Id.* at 265, 843 N.E.2d at 876.

58. *Id.*

59. *Id.* at 266, 843 N.E.2d at 877.

60. *Woodrum*, 223 Ill. 2d at 286, 860 N.E.2d at 259; *see also* 720 ILL. COMP. STAT. 5/10-5(b)(10) (2006) (setting forth a child abduction statute).

61. *Id.* at 293, 860 N.E.2d at 266. The indictment alleged that the defendant intentionally lured L.M., A.T., and S.S., each under 16 years of age, into a dwelling without the consent of a parent. *Id.* at 291-92, 860 N.E.2d at 265.

unlawful purpose]."[62] Observing that such language shifted the burden to the defendant to show that he did have a lawful purpose, the trial court nevertheless accepted it and found the defendant guilty based on it.[63]

Citing the *Black's Law Dictionary* definition of "prima facie," the Illinois Supreme Court found it clear that the child abduction language shifted the burden of production to the defendant making it a mandatory presumption.[64] Specifically, the language:

> [S]hifts the burden of production to the defendant as to the unlawful purpose element of the offense of child abduction by requiring the finder of fact to presume the existence of an unlawful purpose upon proof that the defendant lured a child into a . . . building . . . or dwelling place without the consent of the child's parent.[65]

Moreover, the Court noted its previous holdings that "the word 'shall' connoted a mandatory obligation, unless the statute indicates otherwise."[66] Finally, the court found that the word "presume" means "to suppose to be true without proof."[67] Such language could not be reasonably construed as creating a permissive presumption.[68] Therefore, in accordance with *Watts*, the Illinois Supreme Court struck down the language as creating an unconstitutional mandatory rebuttable presumption.[69]

Despite being deemed per se unconstitutional by the Illinois Supreme Court, mandatory presumptions have yet to be entirely excised from the Illinois criminal code. Today, seventeen criminal statutes still include some form of a mandatory presumption.[70] For example, the Illinois child pornography statute includes language stating "possession . . . of more than one of the same film, videotape or visual reproduction or depiction by computer in which child pornography is depicted shall raise a rebuttable presumption that the defendant possessed such materials with the intent to

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62. 720 ILL. COMP. STAT. 5/10-5(b)(10).

63. *Woodrum*, 223 Ill. 2d at 293, 860 N.E.2d at 265.

64. *Id.* at 310, 860 N.E.2d at 275; *see* BLACK'S LAW DICTIONARY 598 (8th ed. 2004) (defining prima facie as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced;" sufficient to establish a fact or raise a presumption unless disproved or rebutted).

65. *Woodrum*, 223 Ill. 2d at 310, 860 N.E.2d at 275.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. 720 ILL. COMP. STAT. 5/10-5(a)(3) (2006); 720 ILL. COMP. STAT. 5/11-20(e) (2006); 720 ILL. COMP. STAT. 5/11-20.1; 720 ILL. COMP. STAT. 5/12-21.6(b); 720 ILL. COMP. STAT. 5/16-1.1 (2006); 720 ILL. COMP. STAT 5/16-1.2 (2006); 720 ILL. COMP. STAT. 5/16-14 (2006); 720 ILL. COMP. STAT 5/16D-7 (2006); 720 ILL. COMP. STAT. 5/17-1(B)(d) (2006); 720 ILL. COMP. STAT. 5/17-28(b) (2006); 720 ILL. COMP..STAT 5/24-1(d) (2006); 720 ILL. COMP. STAT. 5/26-5 (2006); 720 ILL. COMP. STAT. 5/39-1(b) (2006); 720 ILL. COMP. STAT. 135/1 (2006); 720 ILL. COMP. STAT. 646/20(c) (2006).

disseminate them."[71] This language plainly creates a mandatory rebuttable presumption, contravening the Illinois Supreme Court's position.[72] This language could be easily revised to comport with the Court's holdings. One alternative is as follows:

> *It may be inferred* that a person in possession of more than one of the same film, videotape, or visual reproduction or depiction by computer in which child pornography is depicted, possessed such materials with the intent to disseminate them.

By removing the "rebuttable presumption" language and adding "it may be inferred," the mandatory presumption is converted into a constitutionally acceptable permissive inference. The trier of fact is no longer forced to accept a fact as proof of an element, unless it receives evidence to rebut it. Instead, the trier of fact is instructed that it may accept or a reject a certain fact based upon the evidence presented.

The sixteen other similar Illinois criminal statutes containing mandatory presumptions could be easily updated to comply with the Illinois Supreme Court's mandate. To date, however, they have not. This is likely attributable to the fact that they have not been constitutionally challenged. In actual cases, when such challenges are raised in court, these statutes, like those discussed above, will be viewed unfavorably and stuck down as infringing upon a defendant's due process rights. The Illinois legislature should not wait for such a court declaration to revise these statutes. Considering the already overwhelmingly negative response to and clear position on mandatory presumptions, in any form, the legislature could simply make wholesale updates of all statutes incorporating them. As of this writing, these changes have yet to be made.

III. PERMISSIVE INFERENCES

The other type of presumption, commonly referred to as a permissive inference, does not restrict the trier of fact. The permissive inference allows, but does not require, the trier of fact to accept an elemental fact where certain underlying facts have been established.[73] The trier of fact may accept the inference or reject it where the evidence is insufficient. And while permissive inferences are valuable tools for the fact-finder, they cannot be crafted without limitation. The United States Supreme Court has laid down the following strict test that any inference must meet in order to be constitutional: "[t]o pass scrutiny under a due process analysis . . . a permissive presumption must . . . evidence a sufficient rational connection between the proved and inferred

71. 720 ILL. COMP. STAT. 5/11-20.1(b)(4).
72. *Watts*, 181 Ill. 2d at 150, 692 N.E.2d at 324.
73. Jacobson, *supra* note 4, at 1019.

facts."[74] Illinois courts have grappled with the issue, and through a string of case law, set forth a comprehensive formula for determining permissive inference constitutionality.[75]

The United States Supreme Court, in *County Court of Ulster County v. Allen*, set forth its test for permissive inferences.[76] In that case, the four defendants riding in the same vehicle were charged under a New York statute with illegal possession of a firearm after two loaded handguns were found in one defendant's handbag.[77] At trial, the jury received an instruction, comporting with the statute, that the presence of a firearm in an automobile was presumptive evidence of its possession by all persons occupying the automobile.[78] After receiving this instruction, the jury convicted all four defendants.[79]

In making its determination as to the constitutionality of the statute, the United States Supreme Court first decided whether the language at issue represented a presumption or an inference. The Court recognized that both presumptions and inferences were integral components of the adversarial system, which are often necessary for the trier of fact to determine the existence of an "elemental" or "ultimate" fact based on the existence of one or more "evidentiary" or "basic" facts.[80] The Court noted that these evidentiary devices, in the context of the Due Process Clause, "vary in application from case to case," and constitutionality depends on (1) "the strength of the connection between the basic and elemental facts involved," and (2) "the degree to which the device curtails the fact-finder's responsibility at trial."[81] Moreover, in every case in which such a device is reviewed, the defendant must show that it is invalid as applied to the facts of her case.[82] The defendant must show that the inference impairs the

74. *Id.* at 1020.

75. *See* People v. Dinelli, 217 Ill. 2d 387, 389, 841 N.E.2d 968, 971 (2005) (regarding a permissive inference of Illinois Vehicle Code section 4-103(a)(1)); People v. Funches, 212 Ill. 2d 334, 336, 818 N.E.2d 342, 344 (2004) (questioning whether "special mobile equipment" inference was unconstitutional); People v. Greco, 204 Ill. 2d 400, 404, 790 N.E.2d 846, 850 (2003) (holding 4-103.2(b) of the Illinois Vehicle Code unconstitutional); People v. Housby, 84 Ill. 2d 415, 419 420 N.E.2d 151, 153 (1981) (perplexing problem of a presumption in a burglary case); People v. Bullion, 299 Ill. 208, 213 132 N.E. 577, 579 (1921) (dealing with a presumption and the unexplained possession of goods); Comfort v. People, 54 Ill. 404, 407 (1870) (regarding possession of property soon after it was stolen).

76. *Allen*, 442 U.S. at 140.

77. *Id.* at 143.

78. *Id.* at 145; *see id.* at 143 n.1 (citing New York Penal Law § 265.15)

79. *Id.*

80. *Id.* at 156.

81. *Id.*

82. *Id.* at 157.

application of the "beyond a reasonable doubt" standard.[83] That showing of impaired application of the burden of proof may be shown only if, under the facts of the case, there is "no rational way the trier of fact could make the connection permitted by the inference."[84] Thus, the *County Court* case declared that the test for the constitutionality of permissive inferences was whether the inference was rational as applied to the facts of the particular case.[85] For that reason, the composition of the jury instructions would be the controlling consideration.[86]

The United States Supreme Court found the New York statutory inference rational as applied to the facts of the case.[87] Even where the weapons were in the purse of only one defendant, the facts strongly suggested that she was not the only person in the car who had the ability to exercise dominion over them, and because part of one of the weapons was in plain view inside the car, it was not unreasonable to find that the co-defendants were aware of their presence.[88] The inference, then, satisfied the test that there be a rational connection between the basic facts and the ultimate fact inferred.[89] The ultimate fact, the Court concluded, was "more likely than not to flow from the elemental facts."[90] Where this standard was met, the state was not required to prove the inferred fact beyond a reasonable doubt.[91] This was only true where the inferred fact was not the sole basis for finding guilt. "There is no more reason to require a permissive statutory inference to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force to other relevant evidence before it may be admitted."[92]

In Illinois, the Supreme Court defined what it would accept as a proper inference in *People v. Housby*.[93] In *Housby*, the defendant was convicted of burglary after the jury received instructions that included a permissive inference.[94] The instruction told the jury that if it found that the defendant had exclusive possession of recently stolen property, and there was no reasonable explanation for his possession, the jury could infer that the defendant obtained

83. *Id.*
84. *Id.*
85. *Id.* at 163.
86. *Id.* at 161-62.
87. *Id.* at 163.
88. *Id.*
89. *Id.* at 165.
90. *Id.*
91. *Id.* at 167.
92. Id.; *see also* Leary v. United States, 395 U.S. 6, 33 (1969) (affirming the rational test for permissive inferences).
93. *Housby*, 84 Ill. 2d at 432-33, 420 N.E.2d at 159.
94. *Id.* at 419, 420 N.E.2d at 153.

possession of the property by burglary.[95] At trial, outside of the possession itself, there was no additional evidence presented on the charge of burglary.[96] The defendant conceded there was sufficient evidence to find him guilty of theft, but he argued that he was only convicted of the burglary charge based on the permissive inference.[97]

While the Illinois Supreme Court did not strike down the use of the inference, it held that it could not be used as the only evidence leading to a conviction, based on *County Court*.[98] While there was an "inherently strong probability" that the inference was accurate, that did not mean that it was "more likely than not" true that the possessor of the property was the burglar.[99] It was just as easily true that the possessor joined together with the burglar after the crime had been committed, or simply received the stolen property from the burglar or some other person.[100] Therefore, the inference standing alone did not prove burglary beyond a reasonable doubt.[101] Nevertheless, the inference itself was not unconstitutional.[102] It could still be used, without infringing upon the defendant's due process rights if:

> (1) there was a rational connection between [a defendant's] recent possession of property stolen in the burglary [and the defendant's] participation in the burglary; (2) [the defendant's] guilt [was] more likely than not to flow from his recent, unexplained and exclusive possession of burglary proceeds; and (3) there was evidence corroborating [the defendant's] guilt.[103]

In *Housby*, the circumstantial evidence, taken together with the inference, established that it was more likely than not that the defendant obtained possession of the recently stolen property by participating in the burglary.[104] As a result, the burglary conviction was affirmed by the Court.[105]

Later, in *People v. Greco*, the Illinois Supreme Court analyzed a statutory inference dealing with stolen special motor vehicles.[106] In *Greco*, the defendant was convicted of stealing a special motor vehicle after the jury was instructed that a person who exercises

95. *Id.*
96. *Id.* at 425, 420 N.E.2d at 156.
97. *Id.* at 419, 420 N.E.2d at 153.
98. *Id.* at 424, 420 N.E.2d at 155
99. *Id.* at 422-23, 420 N.E.2d at 154-55.
100. *Id.* at 423, 420 N.E.2d at 155.
101. *Id.* at 422, 420 N.E.2d at 155.
102. *Id.* at 424, 420 N.E.2d at 155.
103. *Id.*
104. *Id.* at 429, 420 N.E.2d at 158.
105. *Id.*
106. *Greco*, 204 Ill. 2d at 400, 790 N.E.2d at 846. (2003); *see also* 625 ILL. COMP. STAT. 5/4-103(a)(1) (2006) (containing an inference in the special motor vehicle theft statute).

exclusive, unexplained possession of a stolen special motor vehicle has knowledge that the vehicle is stolen or converted.[107] Before analyzing the inference, the court reviewed the statute's legislative history and recognized that the inference was based, in part, on the finding that "the acquisition and disposition of vehicles and their parts was strictly controlled by law and such acquisition and disposition were reflected by many forms of documentation."[108] While the court acknowledged that the use of inferences triggered due process concerns, it reiterated the long-standing notion that they also played a vital role in the expeditious resolution of factual questions.[109] Moreover, Illinois has a long-standing history of upholding inferences that include a recency requirement.[110] In *Housby*, for example, the court upheld an inference focusing on a defendant's recent and exclusive possession of stolen property.[111] In *People v. Comfort*, the court articulated that simple possession of stolen items was not controlling.[112] However, recent possession, in lieu of other evidence, may warrant a conviction.[113] And, in *People v. Bullion*, the court held that "in order for the inference to arise, the possession of the stolen property must be soon after the crime."[114] With regard to the inference at issue in *Greco*, the court found no recency requirement.[115] Therefore, there was no assurance that a person with unexplained pieces of a special motor vehicle, stolen ten years ago, more likely than not knew they were stolen.[116] Hence, the court found the inference at issue was unconstitutional as it was not rational as applied to special motor vehicles.[117]

More recently, the Illinois Supreme Court decided two cases that further illuminate the test for permissive inferences, applying the test based on the specific facts of each case. The first

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107. *Greco*, 204 Ill. 2d at 405, 790 N.E.2d at 850; *see* 625 ILL. COMP. STAT. 5/1-191 (2006) (stating that special mobile equipment is "[e]very vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway . . .").

108. *Greco*, 204 Ill. 2d at 405, 790 N.E.2d at 850.

109. *Id.* at 407, 790 N.E.2d at 851-52.

110. *Id.* at 412, 790 N.E.2d 846, 854.

111. *Housby*, 84 Ill. 2d at 415, 420 N.E.2d at 151.

112. *See Comfort*, 54 Ill. at 407-08 (stating that possession with other circumstances or surroundings should not control).

113. *See id.* at 407 (stating "[w]hile [possession of property soon after it is stolen] is prima facie evidence of guilt, when it is explained by other evidence or the surrounding circumstances, [such possession] should not control. If the possession is recent after the theft, and there are no attendant circumstances, or other evidence to rebut the presumption or to create a reasonable doubt of guilt, the mere fact of such possession would warrant a conviction.").

114. *Bullion*, 299 Ill. at 208, 132 N.E. at 577.

115. *Greco*, 204 Ill. 2d at 414, 790 N.E.2d at 855.

116. *Id.*

117. *Id.* at 413-414, 790 N.E.2d at 855.

application came with the court's decision in *People v. Funches*.[118] There, in addition to being charged with attempted first degree murder, theft of currency, and theft of a motor vehicle, the defendant also was charged with aggravated unlawful failure to obey a peace officer's order to stop after he stole money from a drugstore and commandeered a car for his getaway.[119] The defendant was charged with a violating section 5/4-103.2 of the Illinois Vehicle Code,[120] which contained an inference that a person who exercised exclusive, unexplained possession of a stolen vehicle had knowledge that the vehicle was stolen, regardless of whether the date when the vehicle was stolen is recent or remote.[121] While *Greco* focused specifically on special motor vehicles,[122] the court's analysis in *Funches* focused on other types of vehicles.[123]

In *Funches*, the court decided that it was dealing with an inference.[124] Where a presumption was a rule of law that required the fact finder to take as established the existence of a fact, an inference was simply a factual conclusion that could be rationally drawn by considering other facts.[125] At issue in *Funches* was an inference that the fact finder could draw at its discretion.[126] The court found permissive inferences are constitutionally permissible if: (1) there is a rational connection between the basic facts and the inferred fact, (2) the inferred fact is more likely than not to flow from the basic fact, and (3) the inference is supported by corroborating evidence.[127] Where such corroborating evidence is not present, the leap from basic to inferred fact must still be proved beyond a reasonable doubt.[128] But such determination was not to be made by the court in a vacuum. No "one-size-fits-all" standard applies in evaluating the constitutionality of a challenged inference. In order to successfully challenge the constitutionality of a permissive inference, the defendant must demonstrate its invalidity as applied to her in the context of all the evidence in the case.[129]

The court then referenced *Greco*, finding that it only applied to special motor vehicles and to the specific crime charged in that case, which was aggravated unlawful possession of special motor

118. *Funches*, 212 Ill. 2d at 334, 818 N.E.2d at 342.
119. *Id.* at 337, 818 N.E.2d at 345.
120. 625 ILL. COMP. STAT. 5/4-103.2(a)(1) (2006).
121. *Funches*, 212 Ill. 2d at 336, 790 N.E.2d at 344.
122. *Greco*, 204 Ill. 2d 409-410, 790 N.E.2d at 853-54.
123. *Funches*, 212 Ill. 2d at 334, 818 N.E.2d at 342.
124. *Id.* at 340, 818 N.E.2d at 346.
125. *Id.*
126. *Id.*
127. *Id.* at 343, 818 N.E.2d at 348.
128. *Id.*
129. *Id.*

vehicles.[130] An attempt by any court to extend that holding to other areas of law was clearly misplaced.[131] Moreover, in *Greco*, the record did not otherwise provide any assurance that the defendant, in possession of a special motor vehicle, knew that it was stolen.[132] Thus, in *Greco*, the inference as applied to his case did violate his due process rights. However, the court found differently in *Funches*.[133] Despite the absence of a recency provision, the defendant could not establish that the inference as applied to the facts of his case violated his due process rights.[134] As a result, the court reversed the lower court holding that the inference was unconstitutional.[135]

Just one year later, the Illinois Supreme Court elaborated on its holding in *Funches* with its decision in *People v. Dinelli*.[136] The defendant in that case was charged with possession of a stolen motor vehicle. She was charged under section 5/4-103 of the Illinois Vehicle Code, with an inference that "a person exercising exclusive unexplained possession over a stolen or converted vehicle or an essential part of a stolen or converted vehicle . . . has knowledge that such vehicle or essential part was stolen or converted, regardless of [the date the vehicle was stolen.]"[137] As in *Funches*, the *Dinelli* Court held the defendant did not have standing to challenge the inference, as she had yet to establish how it was unconstitutional as applied to the specific facts of her case.[138] The record in *Dinelli* had yet to be subjected to an adversarial proceeding.[139] Notwithstanding the lack of standing, the court held that the State provided sufficient evidence allowing for a rational inference, and the defendant could not demonstrate the unconstitutional nature of the statute as it applied to her case.[140]

These cases provide the framework used by the court to evaluate whether a permissive inference is unconstitutional as applied to a particular case. There may be offenses where a permissive inference would rarely allow a rational connection between the inferred fact and the ultimate fact, but courts will likely not declare it unconstitutional on its face. Only when the inference is irrationally applied to a specific defendant in a specific case will an inference be struck down, and only as applied to that

130. *Id.* at 345, 818 N.E.2d at 349.
131. *Id.*
132. *Id.*
133. *Id.* at 345-46, 818 N.E.2d at 349.
134. *Id.* at 345-46, 818 N.E.2d at 349-50.
135. *Id.* at 346, 818 N.E.2d at 350.
136. *Dinelli*, 217 Ill. 2d at 387, 841 N.E.2d at 968.
137. 625 ILL. COMP. STAT. 5/4-103(a)(1).
138. *Dinelli*, 217 Ill. 2d at 401, 841 N.E.2d at 976.
139. *Id.*
140. *Id.* at 402, 841 N.E.2d at 978.

case. Where a permissive inference will almost always be irrationally applied because it will rarely allow a rational leap to an ultimate fact, it could be amended to provide a more rational leap, increasing the likelihood that it will be upheld when applied in a given case.

IV. STRICT LIABILITY IN ILLINOIS CRIMINAL LAW

Historically, the appearance of absolute or strict liability statutes were rare in the Illinois Criminal Code.[141] It is true that as early as 1922, the United States Supreme Court approved the use of strict liability in criminal cases.[142] Although, in the years since, the Court has held that such statutes are generally not appropriate.[143] Moreover, Illinois statutory law provides: a person may be found guilty of an offense without a culpable mental state only under very limited circumstances.[144] Recently, however, following the Illinois Supreme Court's decision in *People v. Pomykala*, which found a mandatory presumption in the State's reckless homicide statute unconstitutional, the Illinois legislature made the same conduct, killing a person while under the influence of alcohol, a strict liability offense.[145] This is not the only recent example of the expansion of strict liability in Illinois. At this point the authors will provide some background.

The United States Supreme Court has clearly approved of the use of strict liability in criminal cases. [146] In *United States v. Balint*, the Court upheld a federal absolute liability statute making it unlawful to sell illicit drugs.[147] In *Balint*, the defendants were indicted for unlawfully selling a certain amounts

141. *See generally* DECKER, *supra* note 3, at § 2.10 (providing a general discussion of strict liability, which this section of this article relies on in part).

142. United States v. Balint, 258 U.S. 250 (1922).

143. *See* Liparota v. United States, 471 U.S. 419 (1985) (recognizing that the use of mens rea is in keeping with longstanding principles of the Court); United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (referring to the requirement of intent as "an indispensible element of a criminal offense"); Morissette v. United States, 342 U.S. 246, 274 (1952) (rejecting the idea that to constitute guilt, criminal intent is not required).

144. Absolute Liability occurs when:

> A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding $500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

720 ILL. COMP. STAT. 5/4-9 (2006).

145. *Pomykala*, 203 Ill. 2d at 198, 784 N.E.2d at 784; *see also* 720 ILL. COMP. STAT. 5/9-3(b) (2006) (setting forth a reckless homicide statute).

146. *Balint*, 258 U.S. at 250.

147. *Id.* at 254.

of opium and coca leave derivatives.[148] The defendants challenged the indictment and the statute because it failed to charge that they sold the drugs knowing them to be such.[149] The Court held that Congress had intended the statute to have a specific purpose:

> Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.[150]

In *Morissette v. United States*, however, the Court made it clear there must be an obvious legislative mandate in order to impose criminal liability without a culpable mental state.[151] In *Morissette*, the defendant was charged with unlawfully, willfully, and knowingly stealing and converting United States property.[152] The defendant had taken metal bomb casings and converted them while he was hunting on government-supported property.[153] At trial, the defense claimed the defendant believed the property was simply abandoned metal.[154] The trial court would not hear of it and barred the defense from arguing it. The fact that the defendant knew he was on government property was enough to show that he knew the casings belonged to the government.[155] The United States Supreme Court disagreed. Unless Congress made it clear that a mental state element was not required for a particular offense, the courts must construe criminal statutes so as to read one into them.[156] In this case, there was no clear congressional

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148. *Id.* at 251.
149. *Id.*
150. *Id.* at 254.
151. *Morissette*, 342 U.S. at 246.
152. *Id.* at 248. The defendant was charged under 18 U.S.C. § 641, which states:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof . . . [s]hall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $ 1,000, he shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 641 (2006).
153. *Morissette*, 342 U.S. at 247.
154. *Id.* at 248.
155. *Id.* at 249.
156. *Id.* at 261.

pronouncement that the common law mental state had been abandoned. As such, in order to convict an individual under the statute, the government must prove beyond a reasonable doubt that he acted with a culpable mental state.[157]

Later, in *United States v. United States Gypsum Co.*, the Court reiterated it's holding in *Morissette*.[158] In *United States Gypsum*, the defendants were charged under the Sherman Anti-Trust Act for, among other things, interseller price verification.[159] This practice found the defendants telephoning competing manufacturers to determine the price being offered on gypsum to specific customers.[160] At trial, the judge instructed the jury that if it found that the effect of verification was to fix prices, then the parties would be presumed to have intended that result.[161] After protracted deliberations, the jury rendered guilty verdicts.[162]

The United States Supreme Court refused to accept that the Sherman Act mandated a regime of strict liability offenses. Instead, the Court held that a defendant's state of mind, or intent, was an element of an anti-trust offense.[163] "[I]ntent generally remains an indispensable element of a criminal offense."[164] Therefore, the "existence of a mens rea was the rule of, rather than the exception to, the principles of Anglo-Saxon criminal jurisprudence."[165] While strict liability offenses were not unknown to the criminal law and did not offend constitutional requirements, their limited use by Congress and infrequent recognition by the Court attested "to their "generally disfavored status."[166] With regard to the offense in question, the Court found *Morissette* instructive. The holding in *Morissette* had established that in dealing with crimes rooted in the common law, there was an interpretative presumption that mens rea was required.[167] The fact that it was omitted from the statute did not eliminate that element from the crimes denounced therein.[168]

The United States Supreme Court continued this tradition with its decision in *Liparota v. United States*.[169] In *Liparota*, the defendant was charged with illegal possession of food stamps.[170]

157. *Id.* at 261-63.
158. *U.S. Gypsum Co.*, 438 U.S. at 422.
159. *Id.* at 426.
160. *Id.*
161. *Id.* at 429-30.
162. *Id.* at 433.
163. *Id.* at 435-36.
164. *Id.* at 437.
165. *Id.* at 436.
166. *Id.* at 437-38.
167. *Id.* at 437.
168. *Id.*
169. *Liparota*, 471 U.S. at 419.
170. *Id.* at 421-22.

At the close of evidence at trial, the trial judge rejected a "specific intent" instruction, choosing instead to instruct the jury that it may convict the defendant if it found he acted "knowingly."[171] Defense counsel objected to these instructions on the basis that giving them would allow for a conviction if the jury believed that the defendant merely knew that he was in possession of food stamps.[172] The court overruled the objection, and the jury returned a guilty verdict.[173] The Supreme Court reversed the defendant's conviction.[174] As it had previously done in *Morissette* and *United States Gypsum Co.*, the Court held that the absence of a clear mental state within the statute did not mean that one did not need to be found in order to convict the defendant.[175] There was no clear legislative determination that Congress intended to punish the crime of illegal possession of food stamps without a culpable mental state.[176] Without such a mandate, the Court would not depart from the basic "assumption" in criminal law that a wrongful mens rea was required.[177]

Finally, in *United States v. Staples*, the United States Supreme Court examined a federal statute that outlawed a firearm having some characteristics of a machine gun.[178] The government attempted to argue that under the statute, which reflected no mental state requirement, it was not required to prove scienter on the part of the defendant.[179] The Court disagreed by stating where a Congressional enactment includes no mental

171. *Id.* at 438. The judge instructed the jury as follows:

> [(1)] When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by defendant's conduct and by all the facts and circumstances surrounding the case . . . [(2)] the government had to prove that 'the Defendant acquired and possessed food stamp coupons for cash in a manner not authorized by federal statute or regulations' and that 'the Defendant knowingly and willfully acquired the food stamps.'

Id.

172. *Id.* at 422.

173. *Id.* at 423.

174. *Id.*

175. *Id.* at 424-26.

176. *Id.* at 425.

177. *Id.* at 426; *see also* Staples v. United States, 511 U.S. 600 (1994) (pointing to a case where a defendant charged with possession of machine gun argued that State must prove that he knew that his gun, which was a semi-automatic rifle, had been modified in order to be a machine gun. The United States Supreme Court agreed, holding that silence, by itself, . . .did not suggest that Congress intended to dipose of the mens rea element. The Court concluded that without clear legislative intent to not require mens rea, such was demanded of the statute. The defendant's conviction was reversed).

178. *Staples*, 511 U.S. at 600.

179. *Id.* at 606.

state, in the absence of clear legislative intent to treat the offense as one permitting strict liability, a criminal law must follow the common law model requiring the unity of mens rea and actus reus.[180]

A. Strict Liability Contravenes the Requirement of a Criminal Mind

At common law, the essence of criminal liability was establishing the existence of a criminal mind. In other words, proof of moral blameworthiness was a critical element of criminal culpability. For instance, one noted scholar commented the development of the mens rea doctrine left "no common law offenses which mens rea is not required, notwithstanding an insignificant number of badly reasoned cases to the contrary."[181] Another commentator explained, "[t]he mens rea requirement is consistent with the retributive principle that one who does not choose to cause social harm, and who is not otherwise morally to blame for its commission, does not deserve to be punished."[182]

The utilization of strict liability in a penal code runs contrary to the United States Supreme Court's position which presumes mens rea is as a matter of law a requirement in any criminal law. The cases discussed earlier, *Morissette*, *United States Gypsum Co.*, *Liparota*, and *Staples*, make this point abundantly clear. Although the Supreme Court has recognized strict liability in a few instances, the Court has only done so where a legislative declaration to abandon mens rea appears in the legislative history behind the statute.[183]

In addition, the Illinois legislature's use of strict liability in a penal measure contravenes the legislative intent of 720 Ill. Comp. Stat. 5/4-3(b). Section 4-3(b) states:

> If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element. If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Sections 4-4 [(intent)], 4-5 [(knowledge)] or 4-6 [(recklessness)] is applicable.[184]

In other words, where a crime has no mental state, the state

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180. *Id.* at 618-19.

181. Gerhard Mueller, *On Criminal Law Mens Rea*, 42 MINN. L. REV. 1043, 1101 (1955).

182. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 11.02[A] (4th ed. 2006) (emphasis omitted).

183. *See supra* notes 146-50 and accompanying text (discussing *United States v. Balint* and the Supreme Court's use of strict liability).

184. 720 ILL. COMP. STAT. 5/4-3(b) (2006).

is required to prove intent, knowledge or recklessness. Thus, in enacting the Criminal Code of 1961, the Illinois General Assembly, like the United States Supreme Court, presumed a mens rea must be established as a predicate to a conviction.

While there is provision allowing for absolute liability in Illinois law, the applicable statute provides a crime is to be treated as in the nature of strict liability only if it is a misdemeanor not punishable by incarceration or a fine exceeding $500.[185] Moreover, if one examines the Illinois criminal law legislation that is found in Chapter 720, one is hard-pressed to find any example of where the legislative intent was to abandon the mens rea in a particular Illinois crime.[186]

Most scholars agree that strict liability offenses should play no part in any criminal code.[187] They believe that the abandonment of mens rea cannot be justified for philosophical reasons because it is the requirement of moral blameworthiness that provides the justification for penal sanctions, promoting both deterrence and retribution.[188] Professor Herbert Packer pointed out:

> [T]o punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. [189]

In addition, strict liability is seen as a means of excising an important burden on the government, which is to prove the defendant acted with a culpable mental state.[190] As Professor Rollin Perkins, the author of the leading criminal treatise[191] stated in an "essay" in the Iowa Law Review: "[w]ithout fault there is no crime, and to inflict imprisonment on one who has committed no

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185. 720 ILL. COMP. STAT. 5/4-9.

186. *See* DECKER, *supra* note 4, at § 2.10 (c)(discussing "Strict Liability: Its Disfavor in Illinois").

187. DRESSLER, *supra* note 182, at § 11.02 [A]. *See also* Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (1962) (examining the constitutional requirement of mens rea); *see also* Richard G. Singer, *The Resurgence of Mens Rea: III – The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989) (providing a critical assessment of strict liability).

188. *See, e.g.*, Packer, *supra* note 187, at 109 (discussing the philosophical importance of mens rea).

189. *Id.*

190. Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983).

191. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW (3d ed. 1982).

crime is cruel and unusual punishment, in violation of the eighth amendment and of the due process clause of the fourteenth amendment."[192] For disciples of Perkins, of which there are many, strict liability intrudes upon the foundational criminal law notion of "innocent until proven guilty."

The view that strict liability has no place in a penal code is reflected in the Model Penal Code, which insists a criminal measure should reflect a mental state requirement of intent, knowledge, recklessness or negligence.[193] The Model Penal Code does contain a narrow exception that would allow for strict liability for "violations,"[194] which are offenses not subject to imprisonment sanctions.[195] For both philosophical and constitutional reasons, the prestigious American Law Institute, the drafters of the Model Penal Code, made "a frontal attack on . . . strict liability in the penal law."[196]

B. The Elimination of Criminal Offense Elements and Mental State Requirements In Order To Avoid Unconstitutional Presumptions May Violate Apprendi

Finally, abandoning the classic requirement of mens rea for a crime carrying a serious penalty, such as imprisonment, may run counter to the principles behind *Apprendi v. New Jersey*,[197] the United States Supreme Court's landmark decision, which demands a jury of one's peers must be convinced beyond a reasonable doubt that the state has proved all of the elements of a crime, including a wrongful mens rea.[198] In *Apprendi*, the Court held the government to its burden of proof beyond a reasonable doubt with respect to establishing any fact that increases the criminal penalty beyond the statutory maximum for the offense charged.[199] In other words, any fact that increases the defendant's criminal sentence beyond the statutory maximum range must be proven by the state to the trier of fact beyond a reasonable doubt.[200] *Apprendi* and its progeny were based on the United States Constitution's Due Process and Presumption of Innocence provisions.[201] One of the statements in the *Apprendi* plurality

192. Perkins, *supra* note 190, at 1081.
193. MODEL PENAL CODE § 2.02(1) (1962).
194. *Id.* at § 2.05(1)(a).
195. *Id.* at § 1.04(5) (defining a "violation" as an offense not carrying a sentence other than a fine, forfeiture, or other civil penalty).
196. MODEL PENAL CODE § 2.05, cmts. at 282 (1980).
197. Apprendi v. New Jersey, 530 U.S. 466 (2000).
198. *See id.* at 497 (holding that a person charged "has an absolute entitlement to jury trial on all the elements of the charge").
199. *Id.* at 490.
200. *Id.*
201. *See generally id.* at 484 (discussing due process protections to safeguard the presumption of innocence).

provides a window that may lend credence to the argument that strict liability may raise *Apprendi* concerns. In a footnote, Justice Thomas, a member of the plurality of the Court, impliedly warned states against reacting to *Apprendi* by systemically increasing statutory maximum penalties, thereby circumventing the special proof requirements in *Apprendi*.[202]

Now let's return to *Pomykala*. In that opinion, the Illinois Supreme Court found a presumption in the state's reckless homicide statute unconstitutional.[203] Specifically, a provision had stated that being under the influence of alcohol or other drugs at the time of an alleged violation involving a fatality "shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary."[204] The *Pomykala* Court held that the provision was an unconstitutional presumption because "a reasonable juror could conclude [it] requires a finding of recklessness without any factual connection between the intoxication and the reckless act, unless this connection is disproved."[205] In other words, where the state had established that the defendant was intoxicated, the reasonable juror would *have* to conclude the state had proved recklessness.[206]

Following this decision, the Illinois General Assembly created a new felony proscription, Aggravated DUI, in the Illinois Motor Vehicle Code containing no mental state requirement, which measure could be used against a driver where a person is killed in a vehicle mishap where the driver was intoxicated.[207]

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202. *Id.* at 500-01 (Thomas, J., concurring). The footnote states:

> Sentencing enhancements may be new creatures, but the question that they create for courts is not. Courts have long had to consider which facts are elements in order to determine the sufficiency of an accusation (usually an indictment). . . . This authority establishes a crime includes every fact that is by law a basis for imposing or *increasing punishment* . . . . Thus, if the legislature defines some core crime and then provides for *increasing the punishment* of that crime upon a finding of some aggravating fact — of whatever sort . . . the core crime and the aggravating fact together constitute an aggravated crime . . . . The aggravating fact is an element of the aggravated crime. . . . One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. (emphasis added).

203. *Pomykala*, 203 Ill. 2d at 198, 784 N.E.2d at 784.

204. *Id.* at 202, 784 N.E.2d at 787.

205. *Id.* at 208, 784 N.E.2d at 790.

206. *Id.*

207. *See* 625 ILL. COMP. STAT. 5/11-501 (2006) (including "driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof").

The pertinent provision in Aggravated DUI now reads as follows:

> Every person convicted of committing a violation of this section shall be guilty of aggravated driving under the influence of alcohol, other drugs . . . if: the person, in committing a violation . . . was involved in a motor vehicle, snowmobile, all-terrain vehicle, or watercraft accident that resulted in the death of another person, when the violation . . . was a proximate cause of the death.[208]

A person convicted of this crime faces up to fourteen years imprisonment, where the violation resulted in the death of one person.[209] Where the violation results in the death of two or more people, the person faces up to twenty-eight years imprisonment.[210]

The United States Supreme Court's admonitions in *Apprendi*, regarding holding the government to its obligation at trial of proof beyond a reasonable doubt as to the elements and substance of criminal offenses, are consistent with and stem from the same constitutional prohibitions that led to the Court's abhorrence of mandatory presumptions. The underlying concern expressed by the Court is requiring prosecutors to prove every part of an offense, including the existence of mens rea, beyond a reasonable doubt.[211] It is the crossroad between strict liability and relieving the prosecution of its burden that is most disconcerting if one examines the Illinois legislature and Governor's response to *Pomykala*. The legislative reaction to *Pomykala* was to remove the offending presumption in the reckless homicide statute and, in the same bill, add a special sentencing enhancement to the Aggravated DUI statute requiring the same increased penalty in that offense as was attached to the reckless homicide presumption. This change effectively circumvented the ruling of the Illinois Supreme Court in *Pomykala* by adding the offending penalty enhancement to the strict liability offense of Aggravated DUI, effectively removing the prosecutions obligation to prove recklessness in order to get the enhanced sentence.

The enactment of Public Act 93-213[212] is exactly the type of legislation Justice Thomas warned against in his concurring opinion in *Apprendi*. It amends the Illinois law by creating a strict liability offense, namely, Aggravated DUI, with the same penalty enhancement that appeared in the reckless homicide measure. In other words, the Act substantively accomplishes what the unconstitutional mandatory presumption in the reckless homicide statute had attempted to do, which was to ease the state's burden

208. 720 ILL. COMP. STAT. 5/11-501(D)(1)(F).
209. 720 ILL. COMP. STAT. 5/11-501(D)(2).
210. *Id.*
211. *See Apprendi* 530 U.S. at 497 (concluding that a person charged "has an absolute entitlement to jury trial on all the elements of the charge").
212. Pub. Act 93-213, § 5, 93rd Gen. Ass. (Ill. 2003).

of proof by introducing the strict liability Aggravated DUI statute. Now, where a death occurs in a fatal mishap and the driver is "over the limit," the Aggravated DUI stricture requires no proof at all of criminal culpability or a criminal mind because that element was essentially eliminated from the offense. This seems like an unwarranted and possibly unconstitutional attack on the accused's presumption of innocence that the both the Illinois and United States Supreme Court's have railed against over the last several decades. Simply put, it allows the prosecution to avoid its historical burden of proof regarding an offender's culpability. More disconcerting is the fact that employment of strict liability in a penal code seems a perfect stalking horse for incursions into the defendant's presumption of innocence. While well-intended, the Illinois General Assembly chose the path of abandoning a standard element of criminal liability as the easiest means of diminishing the prosecutions' burden of proof while retaining the same penalty as was found in the earlier version of reckless homicide.

Another criminal offense, found in Section 5/24-5 of the Illinois Criminal Code, dealing with defacing identification marks of firearms,[213] used to have a prima facie rule that stated: "[p]ossession of a firearm upon which any such mark shall have been changed, altered, removed or obliterated shall be prima facie evidence that the possessor had changed, altered, removed or obliterated the same.[214] This provision was later removed after it was found unconstitutional in *People v. Quinones*.[215] In that case, the court held that statutory language which incorporates the term "prima facie," established a mandatory presumption.[216] As such, the court recognized the statute placed a burden on the defendant to show that he, in fact, did *not* knowingly or intentionally deface a firearm. The court said: "[t]he placement of such an evidentiary burden on the defendant [was] always unconstitutional."[217] As such, the provision in question was ruled to be an impermissible mandatory rebuttable presumption.[218]

The revised provision now reads: "[a] person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony."[219] Similar to the legislative

213. 720 ILL. COMP. STAT. 5/24-5(b) (2006).

214. *Compare* 720 ILL. COMP. STAT. 5/24-5(b) (2002), *with* 720 ILL. COMP. STAT. 5/24-5(b) (2004) (illustrating the change from a mandatory presumption to strict liability language).

215. People v. Quinones, 362 Ill. App. 3d 385, 395, 839 N.E.2d 583, 590 (1st Dist. 2005).

216. Id. at 395, 839 N.E.2d at 590.

217. *Id.*

218. *Id.*

219. 720 ILL. COMP. STAT. 5/24-5(b) (2006); *see* Pub. Act 93-906, § 5, eff. Aug.

maneuvering following *Pomykala*, Public Act 93-906 converted an offense containing an unconstitutional mandatory presumption into a strict liability offense, which is yet another example of legislative overreaching. Instead of requiring the state to either prove the defendant's guilty mind through evidence or through the use of a constitutionally permissive inference based on the conduct of the accused, that element was simply discarded. In other words, no mandatory presumption was needed because the element no longer exists.

V. CONCLUSION

In American criminal law, presumptions and inferences have been used on a regular basis, permitting the trier of fact to presume or infer an ultimate fact based on the existence of certain proven facts. This article pointed out a presumption is a legal device that *requires* the finding of an ultimate fact, or presumed fact, be taken as established where other facts have been proven. An inference is a conclusion that *may* be adopted by the trier of fact after considering the existence of a proven fact. Inferences do not require the fact finder to accept the conclusion without question. If one considers the United State Supreme Court and Illinois opinions reviewing presumptions and inferences, they essentially provide a roadmap for legislatures to remedy constitutional problems that these devices raise, many of which remain in Illinois criminal law. In addition, although criminal law has historically shunned strict liability because it abandons the requirement of moral blameworthiness, the recent employment of strict liability by the Illinois legislature to avoid the impact of Illinois court decisions setting aside mandatory presumptions may violate the dictates of *Apprendi* and its intolerance for the circumvention of a prosecutor's burden of proof.

11, 2004 (changing the statutory language).