

## The Presumption of Innocence in Irish Criminal Law: Recent Trends and Possible Explanations

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The existence of four contemporary threats to the presumption of innocence in England and Wales has been posited by Ashworth. The aim of this article is to take stock of the law in the Republic of Ireland impacting upon this cornerstone principle of Irish criminal law. The article explores Ashworth's arguments in more detail and examines the justifications for the presumption of innocence generally and in an Irish context. Case law and legislation which may have impacted on its scope and practical import for the accused are considered prior to somewhat mixed conclusions being drawn about the relative health of the presumption in Ireland. The final part of the article briefly examines some arguments which have been advanced for contemporary developments in the field of due process protections.

### I - Introduction

The existence of four contemporary threats to the presumption of innocence in England and Wales has recently been posited by Ashworth.<sup>1</sup> In his examination of legislation and case law impacting on the presumption, he concludes "generally recognised as a fundamental right it may be, but its precise significance for the defendant is so contingent as to raise doubts."<sup>2</sup> In an Irish context, Hamilton too has written of the "growing insignificance of the presumption of innocence for accused persons" such that its "tangible benefits [appear] little in evidence" in our criminal justice system.<sup>3</sup> In light of these rather depressing diagnoses, the aim of this paper is to attempt to take stock of the law in the Republic of Ireland impacting upon the presumption of innocence as well as to search for some possible explanations for recent developments. Part II of this paper explores Ashworth's arguments in more detail and examines the justifications for the presumption of innocence generally and in an Irish context before proceeding in Part III to consider the case law and legislation which may have impacted on its scope and practical import for the accused. Part IV briefly examines some arguments which have been advanced for contemporary developments in the field of due process protections.

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<sup>1</sup> A. Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10 E. & P. 241-279 [hereinafter Ashworth (2006)].

<sup>2</sup> *Ibid.* at 278.

<sup>3</sup> C. Hamilton, *Whittling the Golden Thread: The Presumption of Innocence in Irish Criminal Law* (Dublin: Irish Academic Press, 2007) [hereinafter Hamilton (2007)].

## II - Whither the ‘Golden Thread’?: Confinement, erosion, evasion, side-stepping

The law is replete with encomia to the presumption of innocence. Every law student is also familiar with the poetic flourish of Lord Sankey in *Woolmington v. D.P.P.* on the burden of proof: “[t]hroughout the web of the English law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.”<sup>4</sup> The Irish superior courts too have acknowledged the principle as a ‘fundamental postulate’ of the criminal law which is constitutionally protected as part of the right to fair trial.<sup>5</sup> Indeed, the Supreme Court famously held in *People (A.G.) v. O’Callaghan* that the courts owe more than verbal respect to the principle, being “a very real thing.”<sup>6</sup> Yet, in a legal system which now accommodates preventive detention, the use of silence as evidence against an accused and significantly increased police powers among other developments, the ‘reality’ of the presumption is increasingly placed in question.

In this context Ashworth’s comments about the negative effects of recent criminal justice policies on the presumption in England and Wales merit close scrutiny. He identifies threats deriving from four sources, namely:

... *confinement*, by defining offences so as to reduce the effect of the presumption; *erosion*, by recognising more exceptions; *evasion*, by introducing civil law procedures in order to circumvent the rights conferred on accused persons; and *side-stepping*, by imposing restrictions on the liberty of unconvicted persons that fall only slightly short of depriving them of their liberty.<sup>7</sup>

The first category appears to envisage circumvention of the presumption through the proliferation of absolute/strict liability offences providing for no-fault criminal liability. Ashworth, however, dismisses arguments that absolute/strict liability offences pose a threat to the principle, preferring to view these offences as offending the principle of ‘no criminal liability without fault’ pertaining to the substantive rather than the procedural realm of the criminal law. Taking his point of departure thus, he acknowledges that it is policies falling into the second category, namely

<sup>4</sup> [1935] A.C. 462.

<sup>5</sup> *O’Leary v. Attorney General* [1993] 1 I.R. 102 (HC), [1995] 1 I.R. 254 (SC). [hereinafter *O’Leary*].

<sup>6</sup> [1966] I.R. 501.

<sup>7</sup> Ashworth (2006), *supra* note 1 at 242 [emphasis in original].

reverse-onus provisions, which present the greatest contemporary challenge to the presumption, although mention is also made of possible conflicts arising from the significant incentives to plead guilty through sentence discounts and legislative provisions permitting adverse inferences from pre-trial silence.

The third threat resides in the promotion of legislation which provides for civil orders to control the behaviour of individuals such as anti-social behaviour orders (ASBOs). The significance of these types of order for the presumption is, as Ashworth argues, the evasion of the protection it normally affords defendants to criminal proceedings. This question was considered some years ago by the House of Lords in *R (on the application of McCann) v. Manchester Crown Court* who rejected the contention that ASBO proceedings were, “in reality and in substance” criminal, albeit with the concession that the criminal standard of proof should apply.<sup>8</sup> While this has to some degree mitigated the effect of such provisions, Ashworth voices considerable concern over the panoply of ‘hybrid’ offences making their way onto the statute book in recent years. Indeed, he describes the government’s commitment to the presumption as “so ambivalent that it will try to avoid its application where possible.”<sup>9</sup>

The fourth category of threats to the presumption is related to the third and is formed by the use of use of civil, preventive orders aimed at controlling terrorist activity. These ‘control orders’ were introduced following the decision of the House of Lords in *A v. Secretary of State for the Home Department* holding that indefinite detention without trial for suspected international terrorists was incompatible with the Convention.<sup>10</sup> The difference between these orders and those considered in the third category is that the conditions attached to such orders are so restrictive as to border on a deprivation of liberty. In the absence of any prospect of a criminal trial, the presumption of innocence *stricto sensu* does not apply, but one may wonder with Ashworth whether such “side-stepping may not impress a Strasbourg Court that looks to the substance of the matter.”<sup>11</sup>

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<sup>8</sup> [2003] 1 A.C. 787 at para. 22 [hereinafter *McCann*].

<sup>9</sup> Ashworth (2006), *supra* note 1 at 274.

<sup>10</sup> [2005] 2 W.L.R. 87.

<sup>11</sup> Ashworth (2006), *supra* note 1 at 276.

Why should such developments concern us? Reiteration of the justifications for fundamental rights such as the presumption of innocence is particularly important if they are to be viewed not as latter-day white elephants but rather as rights which have an intrinsic claim on our attention. Ashworth advances four supporting reasons for the privileged status afforded the presumption, the first (and arguably overarching) of which relates to the fundamental right of an innocent person not to be convicted. Persons placed on trial risk public censure and loss of liberty as well as other serious legal and social consequences. By insisting on a relatively high level of certainty prior to conviction society ensures that the fundamental 'moral harm' (*per* Dworkin) or inherent evil of a mistaken conviction is kept to a minimum.<sup>12</sup> Secondly, risk should be allocated to the prosecution on the basis of the 'fragility of fact-finding at trials' and the difficulty in establishing the truth many months or years after the event.<sup>13</sup> A third reason can be located in the respect which the state ought to have for its citizens in a democratic society, bearing in mind the relative imbalance in power and resources between the citizen and the state. The final justification concerns the standard of proof of beyond all reasonable doubt which Ashworth claims serves to reinforce the previous three values of "proper respect for the right not to be wrongly convicted, the fragility of fact-finding and disparity of resources."<sup>14</sup>

Certain points may be added to Ashworth's eloquent defence of the presumption in light of contemporary criticisms of due process protections such as the presumption of innocence. The first concerns what Kennedy terms the myth of the 'benign state': the view that the enemy is not the essentially benign state but rather the offender in our midst.<sup>15</sup> As she writes: "[w]e should have learned from history that, in the long-run, abuses by the state are far more dangerous to liberty and democracy than individual criminal conduct, dangerous and disturbing as that is."<sup>16</sup> The history lesson is not confined to the bloody feuds of the seventeenth and eighteenth centuries. The miscarriages of justice cases in England involving Irish persons suspected of acts of terrorism are well known. Recent cases in Ireland

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<sup>12</sup> See further R. M. Dworkin, "Principle, Policy, Procedure" in R. Cross, *Crime, Proof and Punishment: Essays in Honour of Sir Rupert Cross* (London: Butterworths, 1981) at 193.

<sup>13</sup> Ashworth (2006), *supra* note 1 at 248.

<sup>14</sup> *Ibid.* at 250.

<sup>15</sup> H. Kennedy, *Just Law: The Changing Face of Justice and Why it Matters to Us All* (London: Chatto and Windus, 2004).

<sup>16</sup> *Ibid.* at 15.

concerning Nora Wall, Pablo McCabe and Dean Lyons serve as salutary reminders of the importance of procedural rights in avoiding an increased violation of individual rights and convictions of the innocent. A related point is that we are *all* at risk of unjust conviction. This requires the explosion of another important myth which acts as a barrier to full appreciation of the importance of the presumption of innocence – that of the ‘other’. It is often assumed that only ‘criminals’ will suffer, that ‘the innocent have nothing to fear’,<sup>17</sup> yet these rights belong to all citizens and our appreciation of their importance is often stymied by viewing them in this way. Consider a scenario in which a family member has been detained by the police. Ashworth (writing elsewhere) poses the question: “[h]ow would you wish them to be treated? Should it be for the police to decide how long and under what conditions they should be kept, or should they have rights?”<sup>18</sup>

Finally, in an Irish context, it is appropriate to consider the broader constitutional framework within which the presumption of innocence is located. While the presumption probably has the strongest association with Article 38.1 of the Constitution, which guarantees that no person shall be tried on a criminal charge except in “due course of law,” it should also be considered in the light of the commitment by the state in the Preamble to promote the common good “with due observance of Prudence, Justice and Charity so that the dignity and freedom of the individual may be assured.” This approach was clearly endorsed by O’Higgins C.J. in *State (Healy) v. Donoghue* who invoked the Preamble in support of the courts’ view of ‘fair procedures’: “[i]n my view the Preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity.”<sup>19</sup>

Given the importance of the principle in Irish law and the existence of trends in Irish society similar to those described above by Ashworth,<sup>20</sup> it is timely to engage in an analysis of the tangible effects of the presumption of innocence for an accused person in Ireland. A framework similar to Ashworth’s will be adopted for

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<sup>17</sup> It is disappointing to note that even the Irish Supreme Court has adopted this view on occasion. See *Heaney v. Ireland* [1994] 3 I.R. 593 and commentary of Campbell *et al.* on this case, *infra.* note 38 at 397.

<sup>18</sup> A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet Maxwell, 2002) at 5-6.

<sup>19</sup> [1976] I.R. 325.

<sup>20</sup> See note 7 and accompanying text. See further Hamilton (2007), *supra* note 3.

the purposes of assessing the threats to the presumption, although the fourth category of threat is not reflected in Irish law, as no statutory mechanism exists for effective house arrest akin to the British provisions on control orders.<sup>21</sup>

### **III - Assessing the Buoyancy of the Presumption in Irish Law**

#### **A. Confinement: Reducing the Effect of the Presumption**

As noted above, the view that absolute or strict liability offences conflict with the presumption of innocence is controversial and one which goes to the very definition of the presumption. Space does not permit a detailed discussion of the arguments here.<sup>22</sup> Proceeding however, *ex abundante cautela*, on the assumption that the presumption may have implications for the substantive criminal law, it is unclear whether the presumption of innocence is viewed by the Irish courts as engaged when considering the constitutionality of offences of strict liability or indeed their compatibility with Article 6(2) of the E.C.H.R.<sup>23</sup> The case which has come closest to examining the issue is *C.C. v. Ireland*,<sup>24</sup> where the Supreme Court struck down as unconstitutional section 1 of the *Criminal Law (Amendment) Act 1935* which criminalised ‘unlawful carnal knowledge’ of a girl under 15. The Court did so on the basis that it was a strict liability offence which made no provision for a defence of honest mistake as to the age of the girl. It is notable that Hardiman J., delivering the judgment of the Supreme Court, did not rely on the presumption of innocence protected by Article 38.1 of the Constitution but rather the citizen’s right to a good name and liberty rights under Article 40.4. However, in the course of his judgment he referred to the concept of mental guilt and the criminalisation of a person who is

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<sup>21</sup> However, it is noteworthy that the High Court held in *Brennan v. District Court Judge Brennan* [2009] I.E.H.C. 303 that bail conditions resembling house arrest constituted a breach of Article 5 of the European Convention of Human Rights [hereinafter E.C.H.R.].

<sup>22</sup> See further the opposing views of P. Roberts and R. A. Duff and, for a ‘third way’ those of V. Tadros, “Rethinking the Presumption of Innocence” (2007) 1 *Criminal Law & Philosophy* 193, P. Roberts “Strict liability and the presumption of innocence: An exposé of functionalist assumptions” in A. P. Simester, ed., *Appraising strict liability* (Oxford: Oxford University Press, 2005) [hereinafter Simester, ed.], R. A. Duff, “Strict liability, legal presumptions, and the presumption of innocence” in A. P. Simester, ed., *ibid.*

<sup>23</sup> The English courts have found no incompatibility with the Convention. In *R. v. G.* [2008] U.K.H.L. 37 the English House of Lords, affirming the earlier decision of the Court of Appeal, held that a strict liability offence which prohibited intercourse with a child under 13 was compatible with the Convention (incidentally, a statutory rape provision very similar to the proposed Irish provision discussed in Part III.B. below), they held that the interpretation and content of domestic substantive law is not engaged by Article 6.

<sup>24</sup> [2006] 4 I.R. 1.



'mentally innocent'. The issue is of more than mere academic interest given recent moves in Ireland to amend the Constitution to allow offences of strict or absolute liability to be enacted where they are in some way connected to minors aged under 18.<sup>25</sup> While the government's proposals for a constitutional amendment have been abandoned in favour of legislative reform,<sup>26</sup> their successful passage into Irish law would have amounted to a sea change in our legal system, as hitherto offences of strict liability (with the obvious exception of offence of unlawful carnal knowledge) have been for regulatory type offences with minimal punishments.<sup>27</sup> It is submitted that the proposed provisions would have represented a *de facto* if not *de jure* interference with the presumption of innocence. The practical effect for the defendant is clearly much worse than if s/he is afforded a defence of mistake as to age and asked to prove it, as is the case under the *Criminal Law (Sexual Offences) Act 2006* (enacted after the C.C. decision), although it is not clear from the wording or schema of this statute whether the burden on the accused is a legal or evidential one.

On a more positive note, however, it is salutary to observe that the submissions made to the Joint Oireachtas Committee on the Constitutional Amendment which appeared to influence them in their decision not to proceed with constitutional reform placed great emphasis on the injustice of punishing someone who was morally innocent or blameless. As Dr Gerard Hogan SC wrote:

... if one accepts the contrary argument to that of the Supreme Court, one might as well, for example, equally accept the constitutionality of a statutory offence which provided that every motorist who is involved in a car accident causing death is, by reason of this fact alone, automatically guilty of manslaughter.<sup>28</sup>

Such comments, and the ultimate recommendation arrived at by the Committee, bode well for the influence of the presumption in this jurisdiction, despite the

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<sup>25</sup> The relevant sections of the abortive *Twenty Eighth Amendment to the Constitution Bill 2007* stated as follows:

Art. 42A.5.2 No provision of the Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.

Art. 42A.5.3. The provisions of the section of this Article do not in any way limit the powers of the Oireachtas to provide by law for any other offences of absolute or strict liability.

<sup>26</sup> See Joint Oireachtas Committee on the Constitutional Amendment on Children, *Second Interim Report on the Twenty-Eight Amendment to the Constitution Bill 2007* (Dublin: Stationery Office, 2009) [hereinafter Joint Oireachtas Committee on the Constitutional Amendment on Children, *Second Interim Report*].

<sup>27</sup> One major exception is the statutory offence of riot created by the *Criminal Justice (Public Order) Act 1994* which contains no *mens rea* requirement and which attracts a penalty of up to ten years' imprisonment. See Hamilton (2007), *supra* note 3.

<sup>28</sup> Joint Oireachtas Committee on the Constitutional Amendment on Children, *Second Interim Report*, *supra* note 26 at 36.

Committee's call for legislation to definitively place the legal burden of proving mistake on an accused charged with sexual defilement.

Other legal practices and reforms which Ashworth views as potentially conflicting with the presumption include the guilty plea discount and certain provisions curtailing the accused's right to silence. Taking the former practice first, it is interesting to note that the Irish discount is roughly in line with estimations of the amount of the discount in England and other common law jurisdictions. While received wisdom places it at approximately a third of the sentence, this figure may also be adjusted to take into account the stage at which the plea of guilty was entered.<sup>29</sup> Concerning the compatibility of the presumption with the discount, Ashworth makes reference to Strasbourg caselaw where a substantial incentive to plead guilty has been found to breach the presumption.<sup>30</sup> In Ireland, the potential for improper inducement is particularly marked in certain types of cases. The introduction in 1999 of a mandatory minimum sentence of ten years' imprisonment in respect of persons charged with possession of drugs valued at over €13,000 has placed considerable pressure on such defendants to plead guilty.<sup>31</sup> This is on account of the fact that judges have interpreted the legislation in such a way as to disapply the mandatory minimum where a defendant enters an early plea of guilty or provides material assistance to the Gardaí. In this situation, a typical sentence would probably be in the range of six to seven years (there remains considerable variation among Circuit Court judges). This is problematic as the greater the differential between the sentence which would be received after trial and the sentence received on a plea, the greater the coercive power of the discount.

Some comment must also be reserved for recent legislative developments impacting on the right to silence. While the relationship between this right and the presumption is a contested one in the academic literature,<sup>32</sup> it has been recognised by

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<sup>29</sup> *Criminal Justice Act 1999*, s. 29 provides that the sentencing court, if it considers it appropriate to do so, shall take account of the stage at which the person indicated an intention to plead guilty and the circumstances in which this indication was given.

<sup>30</sup> Ashworth (2006), *supra* note 1 at 256. He cites *Deweert v. Belgium* (1980) 2 E.H.R.R. 439.

<sup>31</sup> *Misuse of Drugs Act 1977*, s. 15A as inserted by *Criminal Justice Act 1999*, s.4.

<sup>32</sup> The argument taken by those who do not see a connection between the two rights is that an accused may still enjoy the benefit of reasonable doubt at trial as the drawing of adverse inferences relates only to the means by which evidence is gathered by the state. This is the position which has been taken by the Irish Supreme Court in *Rock v. Ireland* [1997] 3 I.R. 484, [1998] 2 I.L.R.M. 35 and is also one which is argued for by various legal commentators such as I. Dennis "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-



Ashworth and others<sup>33</sup> that, in a practical sense, inference drawing provisions may affect the ‘principled asymmetry’ between the state and the accused. Ashworth argues that this balance is particularly affected at the pre-trial stage when the power differential between the state and accused may be at its greatest and the state has not yet made out a case to answer. Applying his observations to newly enacted Irish provisions in the *Criminal Justice Act 2007 (2007 Act)* and the *Criminal Justice (Amendment) Act 2009 (2009 Act)* strong concerns must be voiced about their impact on the presumption. Section 30 of the *2007 Act* inserts section 19A into the *Criminal Justice Act 1984 (1984 Act)* allowing a court to draw an adverse inference from an accused person’s failure during questioning to mention a fact which s/he later relies on in defence. A number of safeguards exist for a suspect in these circumstances, including the right to be cautioned as to the effect of the provisions, to have the interview electronically recorded and (perhaps most significantly) the right to consult with a solicitor immediately prior to answering the relevant questions. Yet, to recall Ashworth’s comments, it is a matter of some anxiety that inferences may be drawn in a situation where the suspect and his/her solicitor is not fully apprised of the state case against him/her and where the solicitor is not present during interviews.<sup>34</sup> This important power differential raises questions about the extent to which adverse inference provisions compromise (at least at the level of ‘tangible consequences’<sup>35</sup>) evidential guarantees of prosecutorial proof beyond all reasonable doubt. New provisions aimed at those involved in organised crime are even broader in their import. Section 9 of the *2009 Act* inserts section 72A into the *Criminal Justice Act 2006 (2006 Act)* so that adverse inferences can be drawn against such suspects where they fail to answer any question “material to the investigation of the offence” during the pre-trial period.<sup>36</sup> As noted by the Irish Human Rights Commission,<sup>37</sup> this is defined very broadly to include potentially all questions on a person’s movements, actions, activities or associations. Additionally, unlike the adverse

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Incrimination” (1995) 54(2) C.L.J. 342 and P. Roberts & A. Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2002).

<sup>33</sup> See, for example J. E. Stannard, “A Presumption and Four Burdens” (1994) 51(4) N.I.L.Q. 560 and S. Easton, *The Case for the Right to Silence*, 2<sup>nd</sup> ed. (Aldershot: Ashgate, 1998).

<sup>34</sup> *D.P.P. v. Healy* [1990] 2 I.R. 73, *Lavery v. Member in Charge, Carrickmacross Garda Station*, [1999] 2 I.R. 390.

<sup>35</sup> To use Tribe’s term. See L. Tribe “Trial by Mathematics: Precision and Ritual in the Legal Process” (1971) 84 Harv. L. Rev. 1329 at 1370.

<sup>36</sup> *Criminal Justice Act 2006*, s.72A as inserted by *Criminal Justice (Amendment) Act 2009*, s.9.

<sup>37</sup> Irish Human Rights Commission, *Observations on the Scheme of the Criminal Justice (Amendment) Bill 2009* (Dublin: Irish Human Rights Commission, 2009).

inference provision in the *2007 Act*, there is no provision that the circumstances at the time clearly called for an explanation from the accused.

## B. Exceptions to the Presumption

As in England and Wales, statutory exceptions to the presumption in the form of reverse onus provisions are occurring with increasing frequency. Campbell *et al* cite at least three significant statutory presumptions and reverse onus clauses enacted in the last ten years or so,<sup>38</sup> relating to liabilities of company law officers under the *Companies Acts 1965-2009*, possession of drugs and duties under health and safety legislation. Further, these provisions join a long list of statutory exceptions in the terrorist realm of the type at issue in cases such as *O'Leary*<sup>39</sup> and *Hardy v. Ireland* (considered below).<sup>40</sup> Part of the problem, it is submitted, stems from the overly deferential approach taken by the judiciary to legislative encroachments such that “scant, almost dismissive, attention” is afforded the arguments of those pleading unconstitutionality.<sup>41</sup>

The first of these cases, *O'Leary*,<sup>42</sup> turned on the interpretation of section 24 of the *Offences Against the State Act 1939* which provides that possession or proof of possession by an accused of certain “incriminating documents” shall be “evidence, without more, until the contrary is proved” that the accused was a member of an unlawful organisation. Costello J. in the High Court concluded that section 24 only imposed an *evidential* burden of proof on the defendant, not a legal burden. Thus, the defendant could elect not to call evidence in the case and would still be entitled to an acquittal if the evidence did not establish his guilt beyond a reasonable doubt. His decision was upheld on appeal to the Supreme Court. O'Flaherty J. held that the effect of the section was to amount to evidence only, the value of which could be shaken by cross examination, or by pointing to the mental capacity of the accused or circumstances by which he or she came to be in possession of the document.

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<sup>38</sup> L. Campbell, S. Kilcommins & C. O'Sullivan, *Criminal Law in Ireland: Cases and Commentary*. (Dublin: Clarus Press, 2007) [hereinafter Campbell *et al.*].

<sup>39</sup> *O'Leary*, *supra* note 5.

<sup>40</sup> *Hardy v. Ireland*, [1994] 2 I.R. 55 [hereinafter *Hardy*]. For further discussion of this case see note 43 and accompanying text.

<sup>41</sup> Campbell *et al.*, *supra* note 38 at 349.

<sup>42</sup> *O'Leary*, *supra* note 5.

The second decision on statutory presumptions and the presumption of innocence was *Hardy*,<sup>43</sup> which this time related to section 4 of the *Explosive Substances Act 1883*. The section provides that it is an offence for:

... any person who makes or has knowingly in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, *unless he can show that he made it or had it in his possession or under his control for a lawful object*.<sup>44</sup>

A majority of the Supreme Court (Hederman, O'Flaherty and Blayney JJ. concurring) held that the section merely placed an evidential burden on the accused and therefore did not violate the presumption. The minority, on the other hand, acknowledged that the legal burden had moved but did not proffer persuasive argument as to why this did not meet with constitutional difficulties.

It is possible to view the above decisions in two lights. First, one could argue that the Supreme Court has 'read down' the impugned sections in a manner akin to the English courts discussed below so as to maximise the protection provided to the presumption of innocence. This does not appear to be the case, however, as there was no acknowledgement in either of the cases that the statutory provision did in fact reverse the probative burden (a truer reading of the section in *Hardy*,<sup>45</sup> it is submitted). Moreover, a less benign view of the judgments laments the complete lack of guidance in an area impacting directly on the parameters of a cornerstone principle of the criminal law. In relation to these decisions Ní Raifeartaigh has remarked:

[t]he presumption of innocence and its ramifications are barely touched on; ... . No indication is given of whether there are limits to statutory restrictions of the presumption of innocence or what these limits might be; indeed, the approach of the majority almost appears to envisage that statute may restrict the presumption at will. If so, it is difficult to see any difference between the Irish position and that in England, where there is no constitutional guarantee of the presumption of innocence.<sup>46</sup>

A coda may be added to Ní Raifeartaigh's argument. English law has moved on since the publication of her article with the incorporation of the E.C.H.R. and a number of challenges to various statutory provisions. In two important cases the House of

<sup>43</sup> *Hardy*, *supra* note 40.

<sup>44</sup> *Explosive Substances Act 1883*, s. 4 [emphasis added].

<sup>45</sup> *Hardy*, *supra* note 40.

<sup>46</sup> U. Ní Raifeartaigh "Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence" (1995) 5 I.C.L.J. 135 at 153.

Lords has used its interpretive power under the *Human Rights Act 1998* to convert many persuasive or legal burdens into mere evidential burdens.<sup>47</sup> While different views continue to be taken of different statutory provisions,<sup>48</sup> a number of principles can be derived from the case law, namely: that a statute may place a legal *or* evidential onus on the defence depending on the gravity of the conduct; the seriousness of the offence; the precise justification for placing the burden on the accused; and the degree of difficulty that the accused may have in discharging that burden.<sup>49</sup> In Ireland, *Hardy* is authority for the proposition that reversals of the evidential and, potentially, legal burden of proof (and therefore *prima facie* breaches of the presumption of innocence) are constitutionally permissible but little else.<sup>50</sup> Given the existence in English law of criteria which can be said to afford some protection to the accused, at least in relation to more serious criminal offences, it would appear, paradoxically, that the golden thread in Ireland enjoys a level of protection not dissimilar to that which it is afforded in a jurisdiction where it is without constitutional *imprimatur*.

While the above threat to the presumption (constituted by an absence of protective principles) cannot be minimised, by far the most significant development in this area in Ireland in recent years derives from a series of judgments delivered in the context of historic sexual abuse allegations where an order of prohibition has been sought on the grounds of delay. As Campbell *et al* rightly observe this jurisprudence represented a serious challenge to the ‘normative legitimacy’ of the principle.<sup>51</sup> A line of authority developed by the Irish Supreme Court — formulated in the decisions of *P.C. v. D.P.P.*,<sup>52</sup> *J.O’C. v. D.P.P.*<sup>53</sup> and *P.O’C. v. D.P.P.*<sup>54</sup> — mandated a temporary assumption of guilt in relation to the charge of sexual abuse when the review court is considering the reasons advanced for the long periods of delay by complainants in revealing and reporting these offences. The former

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<sup>47</sup> *R. v. Director of Public Prosecutions, ex parte Kebilene* [2000] 2 A.C. 346, *R. v. Lambert* [2002] 2 A.C. 545 [hereinafter *Lambert*].

<sup>48</sup> As Ashworth (2006), *supra* note 1 observes there are a number of decisions which appear to prioritise public safety over the presumption of innocence. See, for example, *R. v. Johnstone* [2003] 1 W.L.R. 1736, *Sheldrake v. D.P. P.* [2005] 1 A.C. 264.

<sup>49</sup> *Lambert*, *supra* note 47. Peter Murphy notes that, despite differing decisions by the House of Lords on the legal and evidential burden, these principles have been applied fairly consistently, P. Murphy, *Murphy on Evidence*, (Oxford: Oxford University Press, 2007) at 94.

<sup>50</sup> *Hardy*, *supra* note 40.

<sup>51</sup> Campbell *et al.*, *supra* note 38 at 332.

<sup>52</sup> [1999] 2 I.R. 25.

<sup>53</sup> [2000] 3 I.R. 478 [hereinafter *J.O’C.*].

<sup>54</sup> [2000] 3 I.R. 87 [hereinafter *P. O’C.*].

Supreme Court outlined a three prong test when considering whether an order prohibiting the trial should be made. The first question concerned whether the delay is so long that the trial should be prohibited on account of the delay alone in the absence of specific prejudice. This requirement was rarely, if ever, satisfied. The second question required an assessment of the reasons for the delay and at this stage the defendant was to be presumed guilty of the offences, allowing an inquiry into whether “the delay in making [the complaint] was referable to the accused’s own actions.”<sup>55</sup> At the third stage of the test the usual protections applied in determining whether the delay has prejudiced the defence to such an extent that there is a real and serious risk of an unfair trial. As pointed out by members of the minority in *J.O’C.* and *P.O’C.*,<sup>56</sup> these decisions — in turning the presumption on its head — represented an unacceptable interference with the rights of the accused. Hardiman J. opined in *J.O’C.* that “there is in my view no basis whatever for assuming the truth of the allegations against the defendant, prior to conviction, for any purpose or in any proceedings.”<sup>57</sup> Similarly, Murray J. in *P.O’C.* held that an assumption of guilt, however contingent, is “inconsistent with the fundamental rights of a citizen.”<sup>58</sup> For both judges the only relevant inquiry in such cases was whether the accused ran a real and serious risk of an unfair trial.

While it should be noted that the Supreme Court clearly viewed this abrogation of the presumption as highly exceptional, the fact that efforts were made to limit the reversal of the presumption of innocence to a discrete process and area of law does not provide an answer to the argument that due process protections were being denied to the very defendants who needed them most. Society is understandably uncomfortable with child sex offenders but it is precisely at this juncture that the rules of evidence and due process guarantees are “necessary to counterbalance our prejudices as fact-finders.”<sup>59</sup> In any event, in a reconstituted Supreme Court (Murray C.J. presiding) the law has been restated and the presumption reasserted. In the decision of *S.H. v. D.P.P.* the Supreme Court moved

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<sup>55</sup> *J. O’C.*, *supra* note 53 at 478.

<sup>56</sup> *J. O’C.*, *ibid.*, *P.O’C.*, *supra* note 54.

<sup>57</sup> *J.O’C.*, *ibid.* at 517.

<sup>58</sup> *P.O’C.*, *supra* note 54 at 104.

<sup>59</sup> C. Fennell “The Culture of Decision Making: A Case for Judicial Defiance through Evidence and Fact-Finding” [2001] J.S.I.J. 25 at 65 [hereinafter Fennell].

away from the issue of culpability of the accused in explaining the delay to focus on the overriding issue of the accused's right to a fair trial.<sup>60</sup>

### C. Evasion: Recourse to the Civil Law

The contemporary preoccupation with risk and the reorientation of the criminal justice system towards the control of offenders thought to pose particular risks to social order and security is seen by Ashworth as productive of effects inimical to the presumption of innocence. It has been noted elsewhere that Ireland has remained relatively immune to risk analysis in its penal discourse and practice at least in its narrow computational sense.<sup>61</sup> Certainly, we have not witnessed the proliferation of civil orders which have been introduced in recent years in the UK such as football banning orders, violent offender orders, *etc.* To some degree, however, the state's preoccupation with certain risk groups is evident through the recent introduction of anti social behaviour orders and the introduction in 2001 of sex offender orders.<sup>62</sup>

The *2006 Act* made provision for 'civil orders' similar to the English ASBO but with a slightly narrower definition and lesser penalties for breach.<sup>63</sup> As discussed in Part II, hard questions must be asked concerning whether the procedure is being used as a means of subverting the strictures of the criminal law, including the presumption of innocence. Irish defendants without the benefit of the presumption in civil order proceedings can face penalties of up to six months' imprisonment for breach of the order. Section 115(9) of the *2006 Act* states clearly that the standard of proof required is the civil standard of the balance of probabilities. In relation to the cognate issue of the admissibility of hearsay evidence the *2006 Act* is silent; however, given that the proceedings are civil in nature it would appear that hearsay evidence may be admitted to the extent that it is permitted in civil proceedings and in

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<sup>60</sup> [2006] 3 I.R. 575 at 620.

<sup>61</sup> S. Kilcommins, I. O'Donnell, E. O'Sullivan and B. Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Dublin: International Publishers Association, 2004) at 256 write: "it could not be said that risk analysis, in its narrow computational sense, is coming to dominate penal discourse or practice in Ireland."

<sup>62</sup> *Sex Offenders Act 2001*, Part 3.

<sup>63</sup> Anti-social behaviour capable of triggering an order is defined in s. 113(2) as:

[behaviour] in a manner that caused or, in all the circumstances, was likely to cause to one or more persons not of the same household: (a) harassment (b) significant or persistent alarm, distress, fear or (c) significant or persistent impairment of their use or enjoyment of their property.



practice, the rule is applied with less vigour in civil rather than criminal matters. *McCann* may certainly prove persuasive authority for the Irish courts should issues arise in relation to the compatibility of the legislation with Article 6 of the E.C.H.R.<sup>64</sup> subject, of course, to a ruling by the European Court of Human Rights on the issue.<sup>65</sup> On the other hand, section 115(9) is difficult to reconcile with the *dicta* of their Lordships in *McCann* as to the standard of proof.<sup>66</sup>

A related matter is the constitutionality of the legislation in the light of Article 38.1 (the right to a trial in due course of law) which enshrines the presumption of innocence for persons charged with a criminal offence. Should the courts find that the relevant provisions of the *2006 Act* were in reality criminal and the necessary safeguards had therefore been avoided, they would be struck down as unconstitutional. Key to such a determination is the issue of whether the courts will consider the initial application for an ASBO as capable of separation from the later proceedings for breach. Despite the conclusion reached by their Lordships in *McCann*,<sup>67</sup> there are compelling reasons for finding that they are inextricably linked: the initial hearing defines the scope of the order and therefore determines the extent of the defendant's criminal liability, indeed, it is impossible to defend proceedings for breach without harking back to the terms of the original order. As argued by Binchy "there is an integration between each stage: the civil element is a necessary precondition of the criminal element: it defines the outer limits – and indeed may well define the full scope – of the conduct that can constitute a crime."<sup>68</sup>

Another point, cogently made by McDonald,<sup>69</sup> is that a person sentenced for breach of a civil order will in all likelihood be punished, not just for one act of defiance of the order, but for the previous anti-social acts committed by that person which led to the imposition of the order. It must be said, however, that cause for optimism that the courts will adopt an approach of 'substance over form' would not be derived from a brief survey of the Irish case law on the characterization of

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<sup>64</sup> *McCann*, *supra* note 8.

<sup>65</sup> The decision is under appeal to the European Court of Human Rights.

<sup>66</sup> *McCann*, *supra* note 8.

<sup>67</sup> *Ibid.*

<sup>68</sup> W. Binchy "Anti-Social Behaviour Orders and the Constitution" (Conference on Anti-Social Behaviour Orders: Social Policy and Human Rights, Trinity College Dublin, 22 June 2005).

<sup>69</sup> S. McDonald "The Nature of the Anti-Social Behaviour Order – *R (McCann & Others) v. Crown Court at Manchester*" (2003) 66 M.L.R. 630.

proceedings as civil or criminal. The High Court in *Gilligan v. Criminal Assets Bureau* held that since the civil forfeiture procedure introduced under the *Proceeds of Crime Act 1996* was labelled and operated as a civil process, it did not have “all the features of a criminal prosecution.”<sup>70</sup> This decision was followed by O’Higgins J. in *M.F. Murphy v. G.M., P.B., P.C. Ltd., G.H.*<sup>71</sup> and both these decisions were upheld by the Supreme Court in a joint appeal.<sup>72</sup> The crux of the Supreme Court’s reasoning was that the indicia of criminal proceedings such as arrest, detention and admission to bail were not present. The narrow interpretation of ‘criminal’ adopted in these decisions, focusing on the labels and procedures of the procedure itself, is redolent of the House of Lords’ approach in *McCann*,<sup>73</sup> and would suggest that the hybrid structure of which ASBOs are comprised may well pass the constitutional litmus test.

#### **IV - Possible Explanations**

The above analysis seems to suggest at a minimum some cause for concern as to the practical effect of the presumption of innocence for suspects and accused persons in Ireland thus inviting questions as to the causes of this trend on both sides of the Irish Sea. In an Irish context several explanations have been advanced which merit scrutiny. Walsh, employing Packer’s normative models, argues that the dramatic alteration of the criminal justice landscape in Ireland since the *Criminal Justice Act 1984* marks a progressive shift away from a ‘due process’ to a ‘crime control’ model.<sup>74</sup> Packer’s framework is valuable as an interpretive device directing attention to recent trends in criminal justice but his models are not a substitute for an explanatory analysis of the processes at work in criminal justice policy. In this regard, Campbell’s arguments concerning the challenges to liberal constitutionalism in Ireland from the communitarian model hold much interest.<sup>75</sup> The Irish Constitution, which protects due process rights such as the presumption of

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<sup>70</sup> [1998] 3 I.R. 185.

<sup>71</sup> Unreported, High Court, O’Higgins J., 4 June 1999 [hereinafter *Murphy*].

<sup>72</sup> *Ibid.*; *Gilligan v. C.A.B.* [2001] 4 I.R. 113.

<sup>73</sup> *McCann*, *supra* note 8.

<sup>74</sup> D. Walsh, “The Criminal Justice Bill: Completing a Crime Control Model of Criminal Justice?” (Conference on the *Criminal Justice Bill 2004: Implications for Human Rights and Legal Practice*, Trinity College Dublin, 20 April 2005), citing H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

<sup>75</sup> L. Campbell “From Due Process to Crime Control: the Decline of Liberalism in the Irish Criminal Justice System” (2007) 25 I.L.T. 281.

innocence by virtue of Article 38.1, is firmly rooted in the liberal democratic tradition. However, Campbell detects in recent political statements advocating the striking of a balance between the rights of the accused and the 'rights of society' a tacit endorsement of communitarian principles. For example, she notes that in the context of the debate surrounding reforms of the right to silence, strident opposition was mounted to the principle on the basis that "it does not acknowledge the right of society as being equal to the right of the individual regarding a criminal prosecution."<sup>76</sup> Her arguments hold much merit and indeed can be applied to judicial decision making. As Fennell has observed, such rhetoric is also often employed in judicial decisions which seek to identify the community or public interest with that of the victim, often to the detriment of the accused.<sup>77</sup> This type of communitarian reasoning renders the rights of the individual indivisible from the (variable) wishes of majority and, in so doing, neglects the interest which the community itself possesses in imposing limits on state power (to recall the arguments on the 'myth of the other' in Part II above).

Yet, it is questionable to what degree the liberal model itself is above reproach. Examining contemporary penal developments in Australia and elsewhere, Brown has sought to connect such developments with exclusionary themes inherent within the structure of liberal doctrine.<sup>78</sup> He draws attention to the conditional nature of political liberty as originally formulated by Mill.<sup>79</sup> 'Barbarous' or 'rude peoples' for example, were considered incapable of self discipline and 'autonomy' was thus recognised by Mill as a precondition to full political participation. Colonial rule, conceptualised in this way within the bounds of liberalism, facilitated the constitution of a distinct type of political subject: the colonial subject of exclusion. Brown's arguments find a resonance in Irish criminal justice policy as it applies to subversive offenders and, more recently, 'organised' or 'gangland' criminals.<sup>80</sup> As with the colonial subject, the character of those suspected of involvement in paramilitary activity was so suspect that their incapacity to function as a political subject was assumed. The result was a denial of key political rights such as jury trial

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<sup>76</sup> *Ibid.* at text accompanying note 86.

<sup>77</sup> C. Fennell, *supra* note 59.

<sup>78</sup> M. Brown, "Liberal exclusions and the new punitiveness" in J. Pratt *et al.*, eds., *The New Punitiveness: Trends, Theories, Perspectives*, (Devon: Willan, 2005) at 272-289.

<sup>79</sup> J. S. Mill, *Utilitarianism, Liberty, Representative Government, including Selections from Auguste Comte and Positivism* (London: J.M. Dent and Sons, 1972).

<sup>80</sup> See further C. Hamilton, "Organised Criminals as Agents of Obligation: The Case of Ireland" *European Journal on Criminal Policy and Research* [forthcoming].

and the privilege against self incrimination.<sup>81</sup> Given that this *exclusionary* form of liberal constitutional model forms our inheritance today, it is perhaps only in this context that we can fully appreciate the renegotiation of the relationship between the state and the citizen currently at play, especially as it relates to those accused of serious offending. As argued elsewhere, it is often only through examination of national level political, legal and institutional factors that we can fully appreciate the factors influencing the determination of criminal justice policy.<sup>82</sup>

## **V - Conclusion**

It may, not unreasonably, be expected that the presumption of innocence would be better protected in a jurisdiction such as Ireland where it is afforded constitutional standing. The reality is much more nuanced, however, with both positive and negative features. Certain of Ashworth's threats to the presumption are also discernible in Ireland, particularly with regard to incentives to plead guilty, legislative curtailment of the right to silence and the growing legislative tendency of imposing burdens on the defence. In other respects the approach of the two jurisdictions to the presumption differs considerably. At least with regard to the principles governing the validity of exceptions to the presumption, the much more structured approach taken by the English courts means that a comparison with recent English jurisprudence is unfavourable. This divergence is perhaps surprising given the recent incorporation of the E.C.H.R. in both jurisdictions. While it may be expected that the Irish case law will evolve as further challenges are brought under Article 6(2) of the Convention, this may be some distance away given the conservative, even defensive approach taken by the Supreme Court to the Convention in the recent case of *McD. v. L.*<sup>83</sup> It is to be hoped that in the near future a full consideration of the ramifications of reverse onus provisions, particularly those governing the drugs and terrorism areas, will eventually be undertaken in Ireland in light of the important normative principles inherent in the presumption. Better

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<sup>81</sup> Through the establishment of the non-jury special criminal courts and legislation such as s. 52 of the *Offences Against the State Act 1939* which allows a Garda to demand an account of a suspect's movements and actions during any specified period and all information in his or her possession in relation to the commission of specified offences. Failure to comply constitutes a criminal offence punishable by up to six months' imprisonment.

<sup>82</sup> See further C. Hamilton, *Reconceptualising penalty: An examination of the 'new punitiveness' in Ireland, Scotland and New Zealand* (PhD thesis, UCD, 2010).

<sup>83</sup> [2009] I.E.S.C. 81.

efforts should be made to clarify the existing law and, through the development of normative principles, to secure the constitutional status on the presumption of innocence. This task assumes particular urgency given the short-lived, yet egregious, reversal of the presumption in a series of historic sexual abuse cases since the mid-1990s.

There are, however, other regards in which a cleaner bill of health may be given for the presumption in Irish law. While the entrenchment in Irish law of preventive civil orders represents a clear attempt at a deliberate blurring of the lines between civil and criminal process, there is an important gap here between the law in books and in practice. In relation to anti-social behaviour, for example, only six civil orders have been issued since the legislation was introduced.<sup>84</sup> This failure of implementation combined with the lesser enthusiasm shown by the Irish government for the introduction of hybrid orders effectively evading the presumption, renders this threat to the presumption in Ireland less urgent than that posed by the other categories. Finally, one may note with some sense of satisfaction the recent decision by the Irish government not to pursue a constitutional amendment facilitating the introduction of absolute/strict liability offences. The strong objection taken to the criminalisation of the ‘morally innocent’ by commentators opposed to the amendment speaks to the continued potency of liberal constitutionalism and a paradigm of criminal law with the presumption of innocence at its core.

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<sup>84</sup> M. O'Halloran, "Ahern rejects claim that Asbo system is a 'failure'" *Irish Times* (26 February 2009).