



6-1-1974

Cupp v. Naughten and the Presumption of Truthfulness: Breath of New Life for a Vanishing Jury Instruction

John H. Kazanjian

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

John H. Kazanjian, *Cupp v. Naughten and the Presumption of Truthfulness: Breath of New Life for a Vanishing Jury Instruction*, 49 Notre Dame L. Rev. 1101 (1974).

Available at: <http://scholarship.law.nd.edu/ndlr/vol49/iss5/12>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

CUPP V. NAUGHTEN AND THE PRESUMPTION OF TRUTHFULNESS: BREATH OF NEW LIFE FOR A VANISHING JURY INSTRUCTION

"Nobody can be ignorant, that belief is susceptible of different degrees of strength, or intensity."

Jeremy Bentham, *A Treatise on Judicial Evidence*

I. Introduction

Hugh Kyle Naughten was tried in the Oregon state court of Multnomah County for the crime of armed robbery. The state's principal evidence consisted of testimony by the owner of a grocery store, James R. Livengood, that Naughten robbed the store at gunpoint and of corroborative testimony by another eyewitness, Larree E. Weissenfluh, a friend of the owner. In addition, two police officers testified that Naughten had been found near the scene of the robbery and that the stolen money was located near his car in a neighboring parking lot. A few items of clothing identified as belonging to the defendant and the stolen money were also introduced. Naughten neither took the stand himself nor called any witnesses to testify in his behalf.¹

After charging the jury that the defendant was presumed innocent "until guilt is proved beyond a reasonable doubt," the trial judge then continued:

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest or motives, by contradictory evidence or by a presumption.²

The jury returned a verdict of guilty and Naughten was sentenced to a term in the state penitentiary.

Naughten's conviction was affirmed by the Oregon Court of Appeals which found, on the basis of *State v. Kessler*,³ that utilization of the presumption of truthfulness instruction was not erroneous.⁴ The Supreme Court of Oregon denied a petition for review. Naughten, his state remedies being exhausted, then sought federal habeas corpus relief in the United States District Court for the District of Oregon, asserting that the presumption of truthfulness charge shifted the State's burden to prove guilt beyond a reasonable doubt and forced him to prove his innocence. The District Court noted that similar instructions had met with disfavor in the federal courts of appeal, but that such cases did not involve

1 Cupp v. Naughten, 94 S. Ct. 396, 398 (1973).

2 *Id.* This instruction is based on the following Oregon statute:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence. Where the trial is by the jury, they are the exclusive judges of this credibility.

ORE. REV. STAT. § 44.370 (1971).

3 254 Ore. 124, 458 P.2d 432 (1969). In this decision, the Oregon Supreme Court held that the presumption of truthfulness instruction neither operated exclusively in favor of the state nor rendered nugatory the presumption of innocence. *Id.* at 130, 458 P.2d at 434-35.

4 *State v. Naughten*, 3 Ore.App. 241, 471 P.2d 830 (1970).

appeals from state court convictions. Recognizing that the instruction was proper under Oregon law, the District Court stated that "[i]n any event, the giving of the instruction did not deprive petitioner of a federally protected constitutional right."⁵

The Court of Appeals for the Ninth Circuit reversed.⁶ Noting that the instruction under discussion "has been almost universally condemned"⁷ and that Naughten had not testified or called witnesses in his own behalf, the court went on to say:

Thus, the clear effect of the challenged instruction was to place the burden on Naughten to prove his innocence. This is so repugnant to the American concept that it is offensive to any fair notion of due process of law.⁸

The United States Supreme Court granted certiorari⁹ to consider whether the giving of this instruction in a state criminal trial so offended established notions of due process as to deprive Naughten of a constitutionally fair trial.

On December 4, 1973, the Supreme Court reversed the Court of Appeals in a six-to-three decision (*Cupp v. Naughten*).¹⁰ The Court, through Justice Rehnquist, acknowledged the widespread criticism of the instruction by the federal courts,¹¹ noting that the courts of appeals "were primarily concerned with directing inferior courts within the same jurisdiction to refrain from giving the instruction because it was thought confusing, of little positive value to the jury, or simply undesirable."¹² However, the Court went on to say that even substantial unanimity among federal courts of appeals that the instruction should not be given in United States district courts in their respective jurisdictions is not by itself authority for declaring that such an instruction will invalidate a conviction. Before a federal court may overturn such a conviction from a state trial, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."¹³

The Court adopted the proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.¹⁴ Although *Cool v. United States*¹⁵ held that an instruction by

5 94 S. Ct. at 398.

6 476 F.2d 845 (9th Cir. 1973).

7 *Id.* at 846. See *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Strobble*, 431 F.2d 1273 (6th Cir. 1970); *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968); *United States v. Dichiarante*, 385 F.2d 333 (7th Cir. 1967); *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967); *United States v. Persico*, 349 F.2d 6 (2d Cir. 1965); see also *United States v. Safley*, 408 F.2d 603 (4th Cir. 1969); *Harrison v. United States*, 387 F.2d 614 (5th Cir. 1968); *Stone v. United States*, 379 F.2d 146 (D.C. Cir. 1967).

8 476 F.2d at 847.

9 *Cert. granted*, 411 U.S. 947 (1973).

10 94 S. Ct. 396 (1973).

11 Such criticism is based on the concept that the presumption of truthfulness instruction conflicts with the defendant's presumption of innocence, shifts the prosecution's burden of proof, and interferes with the province of the jury to determine credibility.

12 94 S. Ct. at 400.

13 *Id.*

14 *Id.*; *Boyd v. United States*, 271 U.S. 104, 107 (1926).

15 409 U.S. 100 (1972).

itself may indeed rise to the level of constitutional error, the Court recognized that a conviction is commonly the culmination of several components of a trial such as testimony by witnesses, the receipt of evidence, and instructions to the jury. Justice Rehnquist therefore concluded that:

[T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.¹⁶

In *In re Winship*¹⁷ the Court held that the due process clause requires states in criminal prosecutions to prove guilt beyond a reasonable doubt. Justice Rehnquist distinguished *Winship* from the instant case by noting that in the former, the trial judge made an express finding that the state was not required in juvenile proceedings to prove guilt beyond a reasonable doubt, whereas the state's burden of proof was emphasized during the course of the complete jury instructions in the latter.¹⁸ The Court asserted, therefore, that the instruction neither shifted the burden of proof nor negated the presumption of innocence. Further, Justice Rehnquist reasoned that:

It would be possible perhaps as a matter of abstract logic to contend that any instruction suggesting that the jury should believe the testimony of a witness might in some tangential respect "impinge" upon the right of the defendant to have his guilt proved beyond a reasonable doubt. . . . The well recognized and long established function of the trial judge to assist the jury by such instructions is not emasculated by such abstract and conjectural emanations from *Winship*.¹⁹

Because the jury was charged with regard to the presumption of innocence and the state's duty to prove guilt beyond a reasonable doubt, the Court concluded that whatever tangential undercutting of such propositions theoretically resulted from the presumption of truthfulness instruction was not of constitutional dimension. In the Court's view utilization of the presumption was neither reversible error in terms of *Winship*'s reasonable doubt mandate nor in terms of *Snyder v. Massachusetts*' requirement of offense against "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁰

Noting that a timely objection was taken to the presumption of truthfulness instruction, Justice Brennan's dissent reasoned that Naughten was denied due process of law because the charge allowed the jury to convict him in spite of the fact that the evidence may not have proven guilt beyond a reasonable doubt.²¹ The dissent also pointed out that prior to the presumption of truthfulness charge, the trial court had instructed the jury that a presumption could be overcome by

16 94 S. Ct. at 400.

17 397 U.S. 358 (1970).

18 94 S. Ct. at 401.

19 *Id.*

20 291 U.S. 97, 105 (1934).

21 94 S. Ct. at 402.

proof which "outweighed or equaled" the presumption, but that in any other event "the law expressly directed" a finding in accordance with the presumption.²² In light of the fact that the state's case rested almost entirely on the testimony of two eyewitnesses and two police officers and that the defendant neither testified nor called any witnesses, these instructions, when considered together, had the effect of transforming the state's burden of proving guilt beyond a reasonable doubt to proving guilt by a preponderance of the evidence.²³ Justice Brennan thus concluded that the presumption violated the command of *Winship* that "every fact necessary to constitute the crime" be proved beyond a reasonable doubt,²⁴ and that the harmless error doctrine of *Chapman v. California*²⁵ was inappropriate in view of the fact that Naughten's right to a fair trial was so completely eroded.

This note will survey the background and rationale of the presumption of truthfulness instruction in light of the Supreme Court's constitutional test for statutory presumptions in criminal proceedings. Within this framework, the alternative available to the Court in its consideration of *Cupp v. Naughten* will be explored along with an analysis of its impact in the field of criminal presumptions.

II. History of the Presumption of Truthfulness Instruction

A. The Background

The rationale for the presumption of truthfulness instruction apparently grew out of safeguards developed by the English courts for the ascertainment of truth—primarily the requirement that all evidence be given under the sanction of an oath:

This imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a wilful violation of the truth exposes him at once to temporal and to eternal punishment.

A judicial oath may be defined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do [sic] not declare the whole truth, as far as he knows it.²⁶

During the nineteenth century many of the common law rules of incompetency were applied to disqualify individuals from testifying.²⁷ This, coupled with the sanction of the oath, provided a sound basis in the minds of nineteenth century commentators for the presumption that witnesses testify truthfully.²⁸

The first reported usage of the presumption of truthfulness in American case law is found in civil proceedings. In *Hewlett v. Hewlett*,²⁹ an 1839 New

22 *Id.*

23 *Id.*

24 397 U.S. at 364.

25 386 U.S. 18, 23 (1967).

26 See 1 T. STARKIE, LAW OF EVIDENCE 22 (6th Am. ed. 1837).

27 See generally 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 177-97 (1926).

28 See 1 B. JONES, THE LAW OF EVIDENCE IN CIVIL CASES 27 (1896).

29 4 Edw. Ch. 7 (N.Y. 1839).

York insolvency proceeding, it was established that the insolvent had in his possession a number of bonds; yet in the statement of his property effected under oath, he omitted mention of the bonds and virtually declared that he owned no such property. The Vice Chancellor held, "We cannot presume that, in his insolvency proceedings, [the insolvent] committed perjury or intended wrong. On the contrary, it must be presumed that he exhibited a just and true account of his debts and credits."³⁰ By the mid-nineteenth century, it was established that in civil actions testimony by one party which was uncontradicted or undisputed by the opposing party would be presumed true.³¹

The first appearance of the presumption of truthfulness instruction in a criminal proceeding is found in an 1892 Georgia case, *Cornwall v. State*.³² In that case the Georgia Supreme Court held that because none of the witnesses who testified were impeached, it was not error to charge the jury in the following manner:

The law presumes all witnesses who testify under oath are credible and worthy of belief. The law presumes *prima facie* that no witness will wilfully, knowingly and absolutely swear to what is false. The law does not impute perjury to a witness, nor are you at liberty to do so. . . . There is no presumption touching the defendant's statement, no presumption that it is true nor any presumption that it is untrue.³³

The effect of this presumption obviously placed the defendant at a serious disadvantage vis-a-vis his accusers.

Early usage of the presumption of truthfulness instruction thus allowed implementation of the presumption to be rendered inoperative only if the witness was impeached or if his testimony was contradicted.

In 1891 the Supreme Court decided two cases, *Aetna Life Insurance Co. v. Ward*³⁴ and *Quock Ting v. United States*,³⁵ in which it explicated the criteria by which the jury could weigh the credibility of witnesses and their testimony. The Court recognized that there are many aspects to the conduct of a witness on the stand, such as the manner in which he answers questions, which may be considered by the jury in determining the weight and credibility of his testimony.³⁶ Even in the absence of any direct, conflicting testimony, there may be certain factors which will lead the jury to disregard his evidence:

He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which

³⁰ *Id.* at 16.

³¹ See *Matthews v. Lanier*, 33 Ark. 91 (1878).

³² 91 Ga. 277, 18 S.E. 154 (1892).

³³ 91 Ga. at 278, 18 S.E. at 154.

³⁴ 140 U.S. 76 (1891).

³⁵ 140 U.S. 417 (1891).

³⁶ 140 U.S. at 88.

should be given to his statements, although there be no adverse verbal testimony adduced.³⁷

The development of the presumption of truthfulness instruction reached its fruition when Judge William C. Mathes integrated the witness-credibility-nuance factors explored by the Supreme Court in *Aetna Life Insurance* and *Quock Ting* with the presumption itself.³⁸ The instruction reads as follows:

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to each side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.³⁹

The presumption of truthfulness instruction apparently became increasingly used in federal criminal prosecutions following the publication of Judge Mathes' jury instructions and forms.

B. Modern Application of the Presumption

The presumption of truthfulness instruction has been used in criminal prosecutions with a variety of results in several states. Georgia is the only state, however, that has continued to apply the presumption without reservation. A series of Georgia cases have cited the *Cornwall* decision with approval.⁴⁰ The Georgia Supreme Court has never enunciated its reason for utilization of the presumption except to say that it is neither "an incorrect statement of the principle of the law" nor "repugnant".⁴¹ However, a lower state court, the Georgia Court of Appeals, has noted:

If this question were being presented to the court as an original proposition, we might be inclined to hold that such a charge was reversible error. However, such a charge as here given has been held not reversible error in *Cornwall v. State*. We therefore think we are bound by that decision of the

37 140 U.S. at 420-21.

38 27 F.R.D. 39, 67-68 (1961).

39 *Id.* at 67. It is significant that in a more recent volume for judges and practitioners by the publishers of Federal Rules Decisions, the wording has been changed to "[o]rdinarily, it is assumed that a witness will speak the truth." W. MATHES & E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 111 (1965).

40 *Tarver v. Silver*, 180 Ga. 124, 178 S.E. 377 (1935); *Humphrey v. State*, 141 Ga. 671, 81 S.E. 1034 (1914); *Georgia Talc Co. v. Cohutta Talc Co.*, 140 Ga. 245, 78 S.E. 905 (1913); *Dollar v. Busha*, 124 Ga. 521, 52 S.E. 615 (1905); *Macon & B. R. Co. v. Revis*, 119 Ga. 332, 46 S.E. 418 (1904); *Seaboard Air Line Ry. v. Walthour*, 117 Ga. 427, 43 S.E. 720 (1903); *Georgia & Alabama Ry. Co. v. Cook*, 114 Ga. 760, 40 S.E. 718 (1902); *Georgia Southern & Florida Ry. Co. v. Thompson*, 111 Ga. 731, 36 S.E. 945 (1900).

41 *Coates v. State*, 192 Ga. 130, 136-37, 15 S.E.2d 240, 244 (1941).

Supreme Court and are constrained to hold that the charge here excepted to was not reversible error.⁴²

On the other hand, a number of states have declared that the law raises no presumption one way or the other as to the credibility of a witness, and that a contrary instruction constitutes an invasion of the province of the jury.⁴³ In *State v. Halvorson*⁴⁴ the Minnesota Supreme Court observed that "[t]he question of credibility is for the jury. It is not a matter upon which it should be guided and controlled by general statements of inferences and rules of logic announced by the court."⁴⁵ It has been held to be error in Connecticut to tell a jury that they are bound to believe a witness who was neither impeached nor contradicted, whose story was credible, and in whose manner there was nothing to shake their confidence.⁴⁶ The South Carolina Supreme Court has ruled that in a criminal case, the error is emphasized where the presumption of credibility is placed on a level with that of innocence.⁴⁷

Other state courts have held that while the presumption of truthfulness instruction is not error, it is preferable that the instruction not be given. In a 1972 case, *People v. Fountain*,⁴⁸ the Michigan Court of Appeals found no error in the instruction itself, yet observed:

[W]e think the trial court should not give the instruction upon retrial. Such an instruction has been held to derogate from the jury's sole right to determine the credibility of witnesses, and to conflict with the presumption of innocence of a defendant. . . . Additionally, it has been said that it shifts the prosecution's burden of proving guilt beyond a reasonable doubt upon the presentation of even the slightest incriminating testimony.⁴⁹

Even *State v. Kessler*,⁵⁰ cited by the Supreme Court in *Cupp v. Naughten* as upholding the validity of the presumption of truthfulness instruction in Oregon against constitutional attack, recognizes that:

Although it might be preferable not to instruct the jury in criminal cases where defendant does not take the stand that a witness is presumed to speak the truth, we find no error in giving the instruction if accompanied by an explanation of how the presumption can be overcome.⁵¹

On the federal level the United States Courts of Appeals have generally held it improper for a trial judge to instruct the jury that witnesses are presumed

42 *Eidson v. State*, 66 Ga.App. 765, 768-69, 19 S.E.2d 373, 375 (1942).

43 See e.g., *Mullaney v. C.H. Goss Co.*, 97 Vt. 82, 122 A. 430 (1923); *State v. Halvorson*, 103 Minn. 265, 114 N.W. 957 (1908); *State v. Taylor*, 57 S.C. 483, 35 S.E. 729 (1900); *Isely v. Illinois Central R. Co.*, 88 Wis. 453, 60 N.W. 794 (1894).

44 103 Minn. 265, 114 N.W. 957 (1908).

45 *Id.* at 267, 114 N.W. at 958. See also *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N.E. 341 (1905); *Hauser v. People*, 210 Ill. 253, 71 N.E. 416 (1904).

46 *Bradley v. Gorham*, 77 Conn. 211, 58 A. 698 (1904).

47 *State v. Taylor*, 57 S.C. 483, 35 S.E. 729 (1900).

48 43 Mich. App. 489, 204 N.W.2d 532 (1972).

49 *Id.* at 499, 204 N.W.2d at 538.

50 254 Ore. 124, 458 P.2d 432 (1969).

51 *Id.* at 130, 458 P.2d at 435.

to tell the truth. In *United States v. Bilotti*⁵² the court observed that the instruction serves no useful purpose, may be misleading, and trial courts should abstain from using it. The court held in *United States v. Persico* that:

This charge presents a confusing conglomeration of presumption of innocence of a defendant, reasonable doubt, and credibility of witnesses. The standards for evaluating the guilt or innocence of a defendant are not applicable in determining the credibility of a witness. We do not have a trial within a trial on the question whether witnesses are guilty of committing perjury. The charge seems to place a burden on the defense to prove beyond a reasonable doubt that the Government's witnesses are guilty of perjury.⁵³

In *United States v. Meisch*, the Court of Appeals for the Third Circuit ruled that, "In addition to derogating from the jury's sole right to determine the credibility of witnesses, [this instruction] conflicts with the presumption of innocence of a defendant."⁵⁴

In some cases, however, the federal courts, although expressing disapproval of instructions that witnesses are presumed to tell the truth, have nevertheless stated that such instructions do not constitute error. In *Stone v. United States*⁵⁵ Chief Justice Burger, who joined with the majority in *Cupp v. Naughten*, expressed the following viewpoint while sitting as a judge on the United States Court of Appeals for the District of Columbia Circuit:

[S]uch a charge has a tendency to impinge on the presumption of innocence. Lurking in such an instruction is the risk that the jury might conclude that they were required to accept the testimony of the prosecution's witnesses at face value, particularly when it is not contradicted by other witnesses. . . .

However, here no objection was made to the instruction, and, in addition, the trial judge supplemented the challenged paragraph with further instructions for the jury's use in measuring the credibility of witnesses. Taking the instruction as a whole, we find no error. . . .

*In our view the form of instruction used here should be discontinued in the future.*⁵⁶

Under certain circumstances, such as where the presumption that witnesses told the truth operated exclusively in favor of the prosecution's witnesses, it has been held reversible error to instruct the jury that such a presumption existed. Thus, in *United States v. Johnson*,⁵⁷ where the entire case was based on testimony of the government's witnesses and defense counsel objected to the presumption of truthfulness instruction, the court held that the error was substantial; and that since it was maintained over defendant's specific objection,

52 380 F.2d 649, 656 (2d Cir. 1967), cert. denied, 389 U.S. 944 (1967).

53 349 F.2d 6, 11 (2d Cir. 1965).

54 370 F.2d 768, 773-74 (3d Cir. 1966). Attempts to weaken the presumption of innocence have been nullified by the courts. See *Morissette v. United States*, 342 U.S. 246 (1952); *Reynolds v. United States*, 238 F.2d 460 (9th Cir. 1956).

55 379 F.2d 146 (D.C. Cir. 1967).

56 *Id.* at 147 (emphasis added); See also *United States v. Gray*, 464 F.2d 632 (8th Cir. 1972); *United States v. Reid*, 469 F.2d 1094 (5th Cir. 1972); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *Knapp v. United States*, 316 F.2d 794 (5th Cir. 1963).

57 371 F.2d 800 (3d Cir. 1967).

the conviction must be reversed and a new trial granted.⁵⁸ Further, it has been held that even in the absence of a timely objection such an instruction could be grounds for reversal under the doctrine of plain error.⁵⁹ In *McMillen v. United States*⁶⁰ the defendant's substantial rights were invaded when the trial court combined use of the presumption of truthfulness instruction with a failure to caution the jury regarding the testimony of accomplice witnesses when such was the only evidence linking the defendant to the crime. It should be noted, however, that the court went on to say:

All that we have said indicates that a trial judge in a criminal case ought not to refer to a "presumption of truthfulness." It does not indicate that in the absence of objection, this instruction is "plain error". . . . As is always so, the particular circumstances of each case must be carefully surveyed before such an unusual step is taken.⁶¹

Where the presumption of truthfulness instruction is accompanied by an adequate explanation of how the presumption may be overcome and especially where the defendant either testifies himself or calls witnesses in his behalf so that the presumption applies also to defense witnesses, it has been held that utilization of the instruction is not so prejudicial as to require reversal. In *United States v. Boone*⁶² the court ruled that the instruction, although suspect because of its detrimental effect on the presumption of innocence, constituted harmless error in view of the fact that the trial judge properly instructed the jury how to determine the credibility of witnesses and that the defendant introduced substantial testimony in his behalf.⁶³ Also, where no exception was taken, it has been held that the instruction did not constitute plain or reversible error when the testimony and other evidence upon which the convictions rested were adequate under the circumstances.⁶⁴

Cupp v. Naughten is therefore unique in that it presents a situation where the defendant neither called any witnesses in his own behalf nor testified himself; the prosecution called two eyewitnesses and two police officers; defense counsel made a timely objection to the presumption of truthfulness instruction; and yet the Court, in the face of overwhelming authority concerned with the maintenance of constitutional guarantees, sustained the use of the instruction.

III. The Constitutional Test for Criminal Statutory Presumptions

The United States Supreme Court has created a long-evolved constitutional test for criminal statutory presumptions.⁶⁵ This test has been utilized in de-

⁵⁸ *Id.* at 805.

⁵⁹ FED. R. CRIM. P.52(b); see *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

⁶⁰ 386 F.2d 29 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968).

⁶¹ *Id.* at 33. See also *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Evans*, 398 F.2d 159 (3d Cir. 1968).

⁶² 401 F.2d 659 (3d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969).

⁶³ *Id.* at 661. See *United States v. Dichiarante*, 385 F.2d 333 (7th Cir. 1967).

⁶⁴ See *United States v. Harper*, 443 F.2d 911 (9th Cir. 1971), *cert. denied*, 404 U.S. 851 (1971); *United States v. Safley*, 408 F.2d 603 (4th Cir. 1969); *Harrison v. United States*, 387 F.2d 614 (5th Cir. 1968).

⁶⁵ See generally Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 344-47 (1970); Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A.L. REV. 157 (1970).

termining the constitutionality of a legislatively created presumption which operates as an element of a criminal offense. For example, if the prosecution establishes facts A and B, fact C will be statutorily presumed to have been proved. Thus A and B are referred to as the "facts proved" while C is the "fact presumed." If sufficient evidence is proffered to render the presumption inoperative, the presumption is said to have been overcome or rebutted. The test requires that the legislatively prescribed "fact presumed" must comport with certain standards in order to be constitutionally acceptable. The Supreme Court avoided reference to this constitutional test throughout the course of the majority opinion in *Cupp*; however, examination of the test is essential for determining the significance of the case since it involved a *statutorily* created presumption that witnesses testify truthfully. In this respect *Cupp* is unique among both state and federal decisions which have considered the presumption of truthfulness.

Early decisions of the Supreme Court set forth a number of different standards by which the validity of statutory presumptions were to be measured. Since the decision of *Mobile, J. & K. C. R.R. v. Turnipseed*,⁶⁶ it has been fairly certain that the due process requirements of the fifth and fourteenth amendments will void the operation of presumptive language which works in an unreasonable and capricious manner. Since the decision of *Bailey v. Alabama*⁶⁷ it has likewise been clear that presumptive language may not be used to circumvent constitutional rights.⁶⁸ Although the Court has occasionally indicated in dicta that more stringent scrutiny will be given to presumptions operating against criminal defendants than to those operating in civil cases,⁶⁹ the Court has used the same formulae to judge the legitimacy of presumptions in both areas.⁷⁰

In the *Turnipseed* case the Court held that a presumption was constitutional so long as there was a "rational connection" between the fact to be proved and the fact presumed.⁷¹ The first criminal case to adopt the *Turnipseed* formula was *Yee Hem v. United States*.⁷² Since *Yee Hem*, at least two other tests for the constitutionality of statutory presumptions have been applied;⁷³ in *Tot v. United States*,⁷⁴ however, one of the two tests was explicitly rejected and the other was reduced to the status of a corollary.⁷⁵ The *Tot* decision left the rational connection test as the primary test for the validity of statutory presumptions.

Two subsequent cases which influenced the development of the rational connection test adequately indicate its application. In one, *United States v. Gaine*,⁷⁶ the defendant was convicted for carrying on the business of an un-

66 219 U.S. 35 (1910).

67 219 U.S. 219 (1911).

68 Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

69 Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

70 Ashford & Risinger, *supra* note 68, at 166.

71 219 U.S. at 43.

72 268 U.S. 178 (1925).

73 One was whether the legislature might have made it a crime to do the thing from which the presumption authorized an inference. See *Ferry v. Ramsey*, 277 U.S. 88 (1928). A second was whether it would be more convenient for the defendant or for the prosecution to adduce evidence of the presumed fact. See *Morrison v. California*, 291 U.S. 82 (1934).

74 319 U.S. 463 (1943).

75 *Id.* at 469. The *Ferry v. Ramsey* test was rejected, while the *Morrison v. California* rule was construed as a corollary. See Note, *supra* note 65, at 345 & n.32.

76 380 U.S. 63 (1965).

bonded distiller. A presumption permitted the jury to infer from a defendant's presence at an illegal still that he was carrying on the business of a distiller. Since it was well known that bootleggers hid their stills in covert places and that few people not engaged in such illegal activity were to be found at these hideaways, the Court held that there was a rational connection between participation in the illegal business and presence at the site sufficient to validate the presumption.⁷⁷ The second case, *United States v. Romano*,⁷⁸ involved a presumption identical to that in *Gainey* except that it authorized the jury to infer from the defendant's presence at an illegal still that he had possession, custody, or control of the still. The Court held that there was not a requisite rational connection between presence at the site and the crime of possession in order to uphold the presumption because many people might be present at the site without being guilty of possession.⁷⁹

In *Leary v. United States*,⁸⁰ the defendant Timothy Leary had been convicted for violating federal marijuana laws by possessing marijuana that had been illegally imported into the United States with knowledge that it had been illegally imported. Two presumptions aided the prosecution. First, any marijuana discovered in the United States was presumed to be illegally imported; and secondly, any person possessing the marijuana was presumed to know that it was illegally imported. By means of the rational connection test the Court held this second presumption invalid.⁸¹ The Court went on to explain:

The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, *unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.*⁸²

Thus, in *Leary* the Court committed itself to the proposition that rational connection means "more likely than not."

In *Turner v. United States*⁸³ the defendant was convicted for violating a statute similar to the one in *Leary* except that it involved heroin. In *Turner*, again as in *Leary*, the prosecution only introduced evidence of possession although the offense was possession of imported heroin with knowledge that it had been illegally imported. Turner's conviction was upheld on the ground that unless it has been illegally imported, heroin, unlike marijuana, is virtually never found in the United States. The Court took notice of the facts that no heroin may be imported legally and that heroin is domestically produced in minute quantities. From this premise the Court concluded that:

Concededly, heroin could be made in this country, at least in tiny amounts. But the overwhelming evidence is that heroin consumed in the United

⁷⁷ *Id.* at 67-68.

⁷⁸ 382 U.S. 136 (1965).

⁷⁹ *Id.* at 141.

⁸⁰ 395 U.S. 6 (1969).

⁸¹ *Id.* at 37.

⁸² *Id.* at 36 (emphasis added).

⁸³ 396 U.S. 398 (1970).

States is illegally imported. To possess heroin is to possess imported heroin. Whether judged by the more-likely-than-not standard applied in *Leary v. United States* or by the more exacting reasonable doubt standard normally applicable in criminal cases, [the presumption] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.⁸⁴

Therefore, the Court approved an inference of knowledge from the fact of possessing smuggled heroin because "[c]ommon sense" . . . tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled. . . ."⁸⁵ At the same time, the court rejected the presumption that possession of unstamped cocaine was prima facie evidence that the drug was not purchased in or from the original stamped container because a "reasonable possibility" existed that the defendant "stole the cocaine himself or obtained it from a stamped package in possession of the actual thief."⁸⁶

In *Turner*, therefore, the Court appeared to be indicating that it was moving toward an application of the reasonable doubt standard to statutory criminal presumptions in lieu of the rational connection test.⁸⁷ It seemed implicit in *Turner* that the rational connection test could be successfully challenged when applied to criminal presumptions, and even more probable after the decision of *In re Winship* where the Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁸⁸

IV. *Cupp v. Naughten* and the Presumption of Truthfulness Within the Framework of the Constitutional Test

Taken in consideration with the standards enunciated by the Court in *Leary* and *Turner*, *Cupp v. Naughten* provides a unique opportunity to analyze the constitutionality of a statutory presumption of truthfulness and the contemporary logic of the presumption itself.

As we have seen, during the nineteenth century many of the common law rules of incompetency were applied to disqualify individuals from testifying.⁸⁹ This, along with the solemn oath, was viewed as the fundamental justification for the presumption that witnesses testify truthfully. However, the common law rules of incompetency have undergone for a century a process of piecemeal revision by statutes so that today most of the former grounds for excluding a witness altogether have been converted into mere grounds for impeaching his credibility.⁹⁰ Therefore to the extent that the presumption of truthfulness found its roots in antiquity, contemporary developments in the law of evidence have stripped it of its *raison d'être*.

In commenting upon a witness' knowledge, Wigmore says:

84 *Id.* at 415-16 (emphasis added).

85 *Id.* at 417 (emphasis added).

86 *Id.* at 423-24 (emphasis added).

87 Note, *supra* note 65, at 352-53.

88 397 U.S. at 364.

89 See text accompanying note 27, *supra*.

90 C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 139 (2d ed. 1972).

It is obviously impossible to speak with accuracy of a witness' "knowledge" as that which the principles of testimony require. If the law received as absolute knowledge what he had to offer, then only one witness would be needed on any one matter; for the fact asserted would be demonstrated. When a thing is *known* to be, it *is*; and that would be the end of the inquiry. . . .

Hence, a witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows. . . .

The practical tests, then, and the detailed rules, are in strictness concerned with Observation and not with Knowledge.⁹¹

If we accept the validity of Wigmore's observation, our next inquiry involves the determination of variables which comprise the probability that a witness testified accurately.

In computing the probability that a witness testified accurately, we are faced with many of the same problems which arise in computing the ultimate probability of guilt. The probability that a witness testified accurately is a product of all the independent probabilities that go into the reliable communication of information.⁹² It has been suggested that this may be expressed as the product of the probabilities:

(1) that the witness was not mistaken in what he saw; (2) that he has remembered what he thinks he saw; (3) that he has meant to tell us what he remembered; (4) that he has actually been able to communicate what he intends to tell us; and (5) that we have correctly understood what he has communicated.⁹³

This methodology suggests that an attempt to compute so amorphous a determination as the credibility of witnesses involves nuances and imponderables so elusive as to doom any such attempt.

At this point, it becomes obvious that a statutory presumption of truthfulness cannot meet the constitutional standards prescribed by *Leary* and *Turner*. In view of the above it would be difficult to reasonably contend that there is a "rational connection" between credibility itself on the one hand and the status of a sworn witness on the other. It would strain logic to assert that it is "more likely than not" that a witness will testify truthfully. The presumption fares even worse under the more exacting reasonable doubt standard hypothesized in *Turner*. The dissent in *Cupp* recognized that the presumption cannot meet such a standard by noting that:

In the instant case, common sense does not dictate that a prosecution witness who has sworn or affirmed to tell the truth will *inevitably* do so, and there is surely a *reasonable possibility* that he will fail to do so.⁹⁴

It is significant that the dissent's analysis of *Cupp* in relation to *Turner* is the

91 2 J. WIGMORE, EVIDENCE § 650 (3d ed. 1940).

92 Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1088 (1968).

93 *Id.*

94 94 S. Ct. at 403.

only reference to the constitutional test throughout the course of the decision. Nowhere in the text of the majority opinion is there even a recognition of the constitutional test for statutory presumptions. The Court merely sustained the presumption by citing *McNabb v. United States*⁹⁵ which declared that "review by [the Supreme] Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction."⁹⁶ The Court thus bypassed an opportunity to expand upon further application of the reasonable doubt standard to criminal statutory presumptions as suggested in *Turner*. Consideration of the presumption in the framework of the constitutional test would most surely have dictated a determination of its unconstitutionality.

Yet *Cupp v. Naughten*, unlike other cases demonstrating the presumption of truthfulness instruction, involved utilization of a *statutory* version of the presumption. Although it may be argued that the statute merely permits the presumption of truthfulness instruction to be given and does not mandate its use, it must be remembered that *all* presumptions of elements of a crime in criminal prosecutions are permissive.⁹⁷ Therefore at least a recognition of the constitutional test for statutory presumptions would have been more in keeping with previous decisions of the Court.

Aside from indicating the Court's disinclination to void a statutory presumption by means of the constitutional test, the *Cupp* decision may portend that the Court is unwilling to go beyond the "rational connection" test toward the "reasonable doubt" standard. Evidence of this unwillingness is the Court's attempt to distinguish *In re Winship*. Although *Winship* held that the fourteenth amendment requires the states to prove guilt beyond a reasonable doubt as to every element of the offense, Justice Rehnquist reasoned that whatever "tangential undercutting" of the beyond a reasonable doubt guarantee may result from a presumption of truthfulness instruction is not of "constitutional dimension."⁹⁸ From this we may infer that the rational connection test for statutory presumptions is here to stay. *Cupp*'s greatest impact therefore lies not in what the Court said but in what it did not say.

V. Conclusion

The presumption of truthfulness served to provide the jury with a foundation of certainty in the performance of its fact-finding process. Substantial changes in the development of the law have rendered the rationale for the presumption questionable at best. The presumption operates full force against a defendant such as Naughten who neither calls witnesses in his own behalf nor takes the stand himself. The following constitutional arguments can be made on his behalf: (1) the defendant no longer enjoys any benefits from the presumption of

95 318 U.S. 332 (1943).

96 94 S. Ct. at 401.

97 A permissive presumption allows the jury to find the presumed fact when the fact from which it is presumed is proved, but does not require such a finding.

98 94 S. Ct. at 401-02.

innocence; (2) the defendant is no longer provided a jury trial upon the elements of the crime established by the prosecution witnesses because he is deprived of the untrammelled response of the jury as to that element; (3) the province of the jury to determine credibility is invaded; (4) the prosecution's burden of proof is lessened from "beyond a reasonable doubt" to a mere "preponderance of the evidence"; (5) the defendant may be punished not as a result of all elements of the crime having been proved beyond a reasonable doubt, but for not having risen to his own defense.⁹⁹

Aside from the Court's disinclination to weigh the statutory presumption of truthfulness by the standards of *Leary* and *Turner*, *Cupp v. Naughten* is significant because it reflects a somewhat inflexible approach. Nowhere in the course of his opinion does Justice Rehnquist recognize that the presumption may work more harm to a defendant who presents no case as opposed to one who calls witnesses in his own behalf. Even the Oregon courts have asserted that the claim of error resulting from utilization of the instruction merits serious consideration when the defendant does not put on a case.¹⁰⁰ Also, there is no recommendation in the majority opinion to the effect that the instruction ought not be used in the future. This is a significant omission in view of the "universal condemnation" of the instruction by not only the federal courts, but also most of the state courts which have considered the matter.¹⁰¹ By stamping the presumption of truthfulness instruction with its imprimatur of approval, the Court has foreclosed consideration of situations in which use of the instruction may have a deleterious effect on the administration of criminal justice.

In his dissenting opinion in *United States v. Gainey*, Justice Black observed that:

[S]tatutes creating presumptions cannot be treated as fungible, that is, as interchangeable for all uses and all purposes. The validity of each presumption must be determined in the light of the particular consequences that flow from its use. When matters of trifling moment are involved, presumptions may be more freely accepted, but when consequences of vital importance to litigants and to the administration of justice are at stake, a more careful scrutiny is necessary.¹⁰²

The due process clause of the fourteenth amendment does not operate to enforce upon the states a uniform code of criminal procedure. The states may "choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures."¹⁰³ The Court's approach in *Cupp v. Naughten* serves neither the best interests of the states nor the fundamental guarantees of criminal defendants.

John H. Kazanjian

99 See Ashford & Risinger, *supra* note 68, at 176.

100 *State v. Smith*, 1 Ore. App. 153, 165, 458 P.2d 687, 693 (1969); *State v. Kessler*, 254 Ore. 124, 130, 458 P.2d 432, 435 (1969).

101 See text accompanying notes 43-60, *supra*.

102 380 U.S. 63, 78 (1965).

103 *Carter v. Illinois*, 329 U.S. 173, 175 (1946).