Structural Features of the Presumption of Innocence. The Quest for a Unified Theory

Kyriakos N. Kotsoglou

> 'Legal notions however fundamental can be elucidated
> by methods adapted to their special character'
> H.L.A. Hart

Abstract

This chapter proposes a novel approach to the presumption of innocence. Section I explains that scepticism regarding the content and function of legal presumptions of fact emanates from our failure to offer a structural analysis. Thereupon, Section II shall detect and articulate the relevant structural components of the presumption of innocence. Following the previous section's conceptual and terminological clarification, Section III briefly explores the area of default logic and shows that defeasibility expresses the core function of legal presumptions in general. Further to that, Section IV will adapt the distilled doctrinal formula to the presumption of innocence. This will allow us not only to articulate the basic function of the presumption of innocence, which is to equip the defendant with a default status, i.e. presumed innocence. It will also enable us to solve doctrinal issues too. E.g. the chapter will show that the presumption of innocence has no implications for substantive criminal law or for the requisite standard of proof.

I. Introduction

This chapter proposes a novel approach to legal presumptions of fact in general and to the presumption of innocence in particular. In view of the persistent difficulties with traditional discourse, *Section I* explains that scepticism regarding the content and function of legal presumptions of fact results from our failure to offer a structural analysis. By focussing on structural components salient in every legal presumption, the study will

illuminate the mechanism at the heart of legal presumptions and track the rule-governed use thereof. For that purpose, I will lay down desiderata which every doctrinal model should satisfy, drawing not on personal preferences but on the work of commentators who are rather sceptical about the chances of a unified approach to legal presumptions of fact. Thereupon, *Section II* shall detect and articulate the said structural components. By approaching legal presumptions of fact from an analytic viewpoint, I shall *a*) show that each member of that large and heterogeneous family contains commonalities which we can approach descriptively, and *b*) introduce the necessary doctrinal vocabulary. Once we are equipped with the indispensable vocabulary which can systematise legal presumptions in their entirety, a number of corollaries will fall into place. This includes the very often ignored distinction between legal presumption on the one hand and presumed fact on the other hand; the structural similarity between rebuttable and irrebuttable presumptions; and, finally, the existence of a juridical rule of weight at the heart of legal presumptions including of course the presumption of innocence. Following the conceptual and terminological clarification, *Section III* briefly explores the area of default logic and shows that defeasibility expresses the core function of legal presumptions. By tailoring default logic and its reasoning patterns to legal presumptions of fact we shall be able to distil the latter – regardless of their staggering multitude – into a doctrinal formula. The said formula will effortlessly express the basic function of legal presumptions of fact which is to attach a juridically fixed evidential weight to the presumed fact upon proof of some other basic fact. In sum, every time that the presumption-raising fact is established to the requisite standard of proof, the fact-finder shall declare the presumed fact as established too. Further to that, *Section IV* will adapt the said doctrinal formula to the presumption of innocence. I will show that upon proof of the basic fact (criminal charges) the fact-finder shall infer that innocence is established by default, pursuant to the juridical rule of proof at the heart of the legal presumption. This will allow us not only to articulate the basic function of the presumption of innocence, which is to equip the defendant with a default status, i.e. presumed innocence. It will enable us to solve doctrinal issues too. It will thus be shown that upon proof of guilt, it is the presumed fact rather than the presumption of innocence itself that is overridden. For it is the latter that serves as legal basis for both tail-ends of the criminal process, i.e. the guilty verdict and the acquittal. Finally, I will show that the structural analysis shows in a clear and convincing way that the presumption of innocence has no implications for substantive criminal

law or for the requisite standard of proof. It is compatible with any offence and with any (high or low) standard of persuasion.

II. One Rule to Capture them All…

Much of the extant discussion regarding the presumption of innocence (hereafter: *PoI*) focusses on particular issues such as the legality of reverse onus clauses, the presumption's scope and its alleged substantive nature. Yet the *PoI* has traditionally been regarded as a minefield. The doctrinal study, systematisation and application of this 'curious item in the baggage of Western legal rhetoric',[1] has caused – across continents and centuries – consternation and pessimism.

Although the *PoI* has been at the centre of lively scholarly debates,[2] it can arguably be seen as *the* perennial conundrum in the law of evidence. Unsurprisingly, the same authors who are suspicious about a unified approach to all legal presumptions of fact, go on to stress 'the confusion and ambiguity that hang over the common talk about the *PoI* in criminal cases'.[3] The so-called 'working definition' of the *PoI*, 'focusing on the most accepted and least contestable formulation' stresses that: 'The [*PoI*] means that, where a person is charged with a criminal offence, the prosecution must bear the burden of proving the elements of the offence, and that proof must be beyond reasonable doubt.'[4] This definition is rather puzzling than helpful. To answer the question about the meaning of the *PoI*, we mobilize other, equally contentious legal principles or procedural devices such as the burden of proof (hereafter: *BoP*) and the standard of proof (hereafter: *SoP*).[5] Although the aforementioned questions have occupied an unusually extensive literature over recent years, few clear answers could emerge.

1 Fletcher, University of California at Los Angeles Law Review 15 (1968), p. 1203.
2 See e.g. a relatively recent Special Issue in the Netherlands Journal of Legal Philosophy (2013 Vol. 3) on the topic. See Mackor/Geeraets, Introduction, 42(3) NJLP 2013, pp. 167-169. See also Stumer, The Presumption of Innocence: Evidential and Human Rights Perspectives, 1/e (2010), reviewed by Roberts, Criminal Law and Philosophy 8 (2014), p. 317.
3 Thayer, A Preliminary Treatise on Evidence at the Common Law, 1/e (1898), p. 185.
4 Ashworth, South African Law Journal 123 (2006), p. 69.
5 Roberts, above n. 2, p. 318, notes that 'common lawyers instinctively equate the presumption of innocence with Woolmington's celebrated golden thread, propagating a tempting fallacy: that the criminal burden and standard of proof just *are* the presumption of innocence in English law'.

A usual diagnosis about the *PoI* is that there is no settled meaning thereof.[6] Academicians even submit that the *PoI* lacks normative content and that it should only be understood either as an 'honorific concept' encompassing an amorphous collection of different needs,[7] or even as an auxiliary norm.[8] As a result, the 'conceptual fog'[9] descending on the meaning of the *PoI* only thickens. The disagreement has reached the point where even the question of whether the *PoI* actually *is* a legal presumption, is answered in different ways.[10]

The *PoI* is by no means an outlier as regards the family of legal presumptions of fact. As one of the fathers of the law of evidence, James B. Thayer, put it, 'among things so incongruous as these [legal presumptions of fact] and so beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick his way and walk with caution.'[11] In a similar tone, Edmund Morgan remarked that 'every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic of presumptions with a sense of hopelessness, and has left it with a feeling of despair.'[12] This general feeling of being outpowered by the complexity of legal presumptions of fact replicates itself, as we saw above, in the doctrinal study of particular presumptions, notably: the *PoI* which is a human right with (proto-)constitutional status in several jurisdictions including England and Wales. As academicians have already pointed out, '[p]opularity is not necessarily conducive to conceptual perspicacity or analytical rigour.'[13]

It is thus questionable whether we could describe legal presumptions of fact in the abstract, steering thus clear of what (inevitably?) seems to be the end state for unsolved mysteries: cynicism and ad-hocery. In fact, commen-

6 See Roberts, Roberts & Zuckerman's Criminal Evidence, 3/e (2022), p. 250.
7 Lippke, Taming the presumption of innocence (2016), p. 11.
8 Stuckenberg, Criminal Law and Philosophy 7 (2013), p. 306.
9 Roberts, Synthese 198 (2021), p. 8911.
10 The evidence scholar Richard Glover argues for example that the *PoI* is a typical example of a false presumption, *id*., Murphy on Evidence, 15/e (2017), p. 153. Rules of law, he writes, 'which provide that some fact shall be taken in all cases to be true, without proof of any primary fact, until the contrary is proved [are false presumptions]'. As I will show below, this is wrong insofar, as the presumption of innocence comprises all the essential structural features of a legal presumption. The primary fact to be proved, so that presumed innocence shall be taken to be true, is the existence of 'criminal charges'.
11 Thayer (above n. 3), p. 352.
12 Morgan, Washington Law Review 12 (1937), p. 255.
13 Roberts (above n. 9), pp. 8901–8932.

tators have insisted on their diagnosis that it is an 'unfulfillable promise'[14] to try and provide *one rule* for all presumptions. Since the rationales for presumptions are as diverse as the social areas on which they operate, commentators warn us, the quest for a 'unified theory' of presumptions capable of reducing all legal presumptions to a doctrinal formula is a 'fool's errand'.[15]

This chapter comes thus to take up the challenge of providing a unified theory for all legal presumptions of fact – something which Thayer described as 'a herculean task and an unprofitable one'.[16] Whether the project will turn out to be a 'fool's errand' or not, will be determined *a*) by the methodological approach to this specific problem and *b*) by the ability of our doctrinal formula to capture and systematise the structural features of legal presumptions – indeed by the formula's ability to identify those *features* as structural in nature. As H.L.A. Hart put it pithily, 'the economist or the scientist often uses a simple model with which to understand the complex; and this can be done for the law', by methods adapted to the special character of the target system.[17]

Obviously, the present analysis cannot mark its own homework insofar, as this would be an invitation to self-deception – nemo iudex in casua sua. The litmus test to be applied so that we can determine whether the doctrinal model presented here manages to capture the essential features of legal presumptions of fact in general and the *PoI* in particular, will not express personal methodological preferences. On the contrary, I will lay down desiderata (D_n) drawing on the work of commentators who are rather sceptical about the chances of a *unified* approach to legal presumptions of fact.[18] The three desiderata which any general account of 'legal presumptions of fact' must satisfy, are thus the following:

14 Broun, North Carolina Law Review 62 (1984), p. 697.
15 Roberts, above n. 6, p. 254: 'the quest for a 'unified theory' of presumptions capable of reducing all legal presumptions to a conceptual formula is a fool's errand'.
16 Thayer, Harvard Law Review 3 (1889), p. 141.
17 Hart, in Hart (ed.), Essays in Jurisprudence and Philosophy, Definition and Theory in Jurisprudence, 1/e (1983), p. 42.
18 Roberts, above n. 6, p. 250.

$D_{1.}$ The formula ought to systematise *rules* of evidence.

$D_{2.}$ The formula ought to authorise the fact-finder to draw specified *factual* conclusions.

$D_{3.}$ The said factual conclusions ought to be propositions which are not warranted by the information available to the fact-finder.

In other words, the fact-finder should be authorised by the legal order (D_1) to 'jump' to a conclusion (D_2) which is based on a juridical rule of proof rather than ordinary canons of common-sense reasoning (D_3).

III. Structural Features of Legal Presumptions of Fact

1. Towards a unified approach

We saw above how legal presumptions of fact have traditionally caused confusion.[19] Notwithstanding, legal presumptions are ubiquitous. Legal systems make extensive use of them – in every field of private and public law, from law of torts over family law to criminal law – to quickly and efficiently resolve issues contested in litigation where uncertainty would be deleterious (e.g. paternity cases), and practical considerations override the need for (accurate) information.[20] As the philosopher Nicholas Rescher remarks, 'the obvious and evident advantage of presumption as a cognitive resource is that it enables us vastly to extend the range of questions we are able to answer'.[21] Obviously, caution is needed, since the *juridical cure* that enables us within a system of free proof to treat propositions for which we lack evidence as established, should not be worse than the disease.

Legal presumptions of fact are polymorphic, too. We can distinguish between *rebuttable* and *irrebuttable* ones.[22] For example, it is *rebuttably* presumed (across jurisdictions) that a child born to a woman during her

19 See e.g. Broun, above n. 14, p. 697: 'The legal term "presumption" confuses almost everyone who has ever thought about it. That confusion is fully justified'.

20 Roberts, above n. 6, p. 250.

21 Rescher, Presumption and the Practices of Tentative Cognition, 1/e (2006), p. 48.

22 Terminology can of course vary. Whereas we usually distinguish between rebuttable and irrebuttable presumptions, the UK Parliament used in the Sexual Offences Act 2003 (England and Wales) the terms *evidential* (rebuttable) and *conclusive* (irrebuttable) presumptions instead, deepening thus the issue of terminological inconsistency.

marriage to a man is also the natural child of her spouse. It is *irrebuttably* presumed, according to German law, that a marriage has broken down if *a*) the spouses have lived apart for a year and both spouses petition for divorce, or *b*) the spouses have lived apart for three years.[23]

Painting with a broad brush, we can hold that pursuant to a legal presumption of fact the fact-finder has to accept a proposition in the absence of evidence which would normally be deemed necessary to establish that proposition. To be more precise, the fact-finder shall draw a predetermined conclusion from a given set of facts, but as Thomas Weigend remarks, this conclusion is neither based on those facts nor it is derived from general experience or common sense.[24] The basic fact does *not* confer probative force to the fact which is regarded as established by an operation of law. For example, the presumption of legitimacy is not based on a DNA test or proof of sexual intercourse between the married couple, but on the very fact of an existing wedlock. Notably, presumed innocence is *not* based on evidence objecting the prosecutor's narrative. On the contrary, when someone is charged with a criminal offence the evidence usually points at the direction of guilt. So, what is going on?

The examples provided above make a compelling case for the need of a categorization of various types of legal presumptions of fact. We can only make sense of legal presumptions of fact, if and only if we provide a unifying taxonomy. Any theoretically sophisticated doctrinal approach to the *PoI* must be compatible with the structure of every other legal presumption of fact, too. At first glance this seems to be a hopeless enterprise (see section *I*). Methodological pessimism is grounded insofar as its inductive basis is anything but negligible. But illuminating the mechanism at the heart of legal presumptions of fact is – however demanding – of critical importance to legal adjudication. As the Austrian-British philosopher *Wittgenstein* reminds us, if 'the use of the word is unregulated, the 'game' we play with it is unregulated' too.[25] Only through rigorous analysis of the term 'presumption' we can begin to explore what commentators still (and as I will show: undeservedly) treat as an exotic and opaque procedural device.[26]

23 § 1566 I, II German Civil Code.
24 Weigend, Netherlands Journal of Legal Philosophy 42 (2013), p. 194.
25 Wittgenstein, Philosophical investigations, 2/e (1958), para. 68.
26 See e.g. Fletcher, 15 UCLA L. Rev. (1968), p. 1203.

2. Legal Presumptions and their Mechanism

Commentators have already observed that legal presumptions of fact seem to set some kind of *mechanism* in motion.[27] Although we have a practical understanding of the phenomenology of that mechanism (a legal presumption of fact is a rule of law which provides that if a certain fact has been established, then another fact for which we lack direct evidence is to be deemed established too), we still lack a *synoptic view* thereof. We lack namely the ability to provide a micro-analysis of the very structure of legal presumptions.

To unravel the alleged mystery embracing legal presumptions of fact, we should take a detailed look at some typical examples drawn from legislation. To dissolve the conceptual puzzlement as well as to remedy the inconsistent usage plaguing legal presumptions of fact, I will carefully examine and describe the use of the relevant terms.[28] A caveat can already be pre-emptively answered. Taking the 'use of words' seriously does not mean that we will describe the *actual* use of words and intertwined concepts. It is not my intention to provide a lexical definition of legal presumptions of fact or to report the way in which the term is *actually* understood within the scholar community. For explanations of word-meaning are dictated by *rules*, not by the empirical fact of what the majority of scholars and practitioners think.[29] The question about the meaning of legal presumptions can therefore be understood as a search for the underlying logico-grammatical framework. Rather than applying the old und unsuccessful method of hammering away at single words[30] (e.g. What *is* the 'PoI'? What *is* a 'legal presumption of fact'?) we should instead track the *rule-governed* use of those words. This can only be done by exploring the ramifying web of connections between the relevant concepts: 'presumption', 'innocence', 'unless' etc. At the end of the inquiry, we should be able to describe the rules and standards for the correct (meaningful) doctrinal use of 'presumptions'.

27 Margalit, Journal of Philosophy 80 (1983), p. 149.
28 Bennett/Hacker, Philosophical foundations of neuroscience, 1/e (2003), p. 400.
29 G. P. Baker and P.M.S. Hacker, Wittgenstein, Understanding and Meaning, Part I – Essays, 2/e. (2005), p. 29; see also Hart, in: Hart (ed.) Essays in Jurisprudence and Philosophy (Oxford: Clarendon Pr., 1959), p. 37.
30 Hart, above n. 29, p. 41.

Let us now look at some examples for well-known legal presumptions of fact:

1. The father of a child is presumed to be the man who is married to the mother of the child at the time of the birth (*presumption of legitimacy*).[31]
2. A person will be presumed to be dead when there is no acceptable evidence that the subject has been alive at some time during a continuous period of seven years or more (*presumption of death*).[32]
3. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law (*presumption of innocence*).[33]
4. It is irrebuttably presumed that the marriage has broken down if the spouses have lived apart for three years (*presumption of breakdown*).[34]

Although it is rather clear that legal presumptions have *some* common elements, fundamental questions remain open: What exactly is rebutted? And how? What is the distinctive element of an irrebuttable presumption of fact? Despite apparent similarities, we are not yet in any position to deploy a doctrinal vocabulary which will allow us to describe legal presumptions of fact *in the abstract*, i.e. in a general way.

Notwithstanding, if we approach legal presumptions of fact from an analytic viewpoint, we will see that each member of that large and heterogeneous family contains a – let us temporarily call it– *basic* fact which has to be established. In the examples provided above, the basic fact is:

- the birth of a child in wedlock (1st example),
- a person going missing for at least seven years (2nd example),
- being charged with a crime (3rd example),
- spouses living apart for at least three years (4th example).

Another common feature is the element which must be treated as established upon proof of the respective basic fact. That element is:

31 See e.g. § 1592 Nr. 1 German Civil Code; s. 16(4) Civil Evidence Act 1968; see also s. 26 Family Reform Act 1969.

32 See Thomas v Thomas (1864) 2 Drewry and Smale 298; 62 ER 635. See also section 1(1)(b) Presumption of Death Act 2013. The Act provides for the High Court to make a declaration of presumed death if it is satisfied either that the missing person has died, or has not been known to be alive for the past seven years.

33 Art. 6(2) ECHR.

34 § 1566 II German Civil Code.

- presumed legitimacy (1st example),
- presumed death (2nd example),
- presumed innocence (3rd example),
- presumed breakdown of marriage (4th example).

It is also worth noting that the evidential relationship between

- the birth of a child and presumed legitimacy (1st example),
- the person going missing for at least seven years and presumed death (2nd example),
- the criminal charges and presumed innocence (3rd example),
- spouses having lived apart for at least three years and presumed breakdown of marriage (4th example)

is established pursuant to an evidentiary standard which, I cannot stress this enough, *rigidly* specifies the quality or quantity of evidence required. This is accomplished by assigning weight to pieces of evidence and by thus introducing a juridically fixed probative value. This is obviously identical in terms of structure to the formalistic approach salient in the system of proof of the Romano-canon inquisition process (*Constitutio Criminalis Carolina*) where a specified number of (good) witnesses or a confession were required to obtain 'full proof' of facts. This evidentiary process constitutes a detractor of free proof. We shall come back later to this point (in section *II.3*). Finally, we can also extract the element which, if proven, will override the presumed fact, i.e. the initial legal effect of the basic fact. That element is:

- contestation of the husband's paternity through which it is established that the husband is not the father of the child (1st example),[35]
- signs of life from the missing person (2nd example),[36]
- proof of guilt according to law (3rd example),[37]
- null (4th example).

35 See § 1600d BGB.
36 See e.g. section 5(1) Presumption of Death Act 2013.
37 Art. 6(2) ECHR ad fine.

3. Introducing the Doctrinal Vocabulary

Now that we have identified commonalities among different types of legal presumptions of fact, we can *a*) approach them descriptively and *b*) introduce the necessary doctrinal vocabulary. For that purpose, we, fortunately, do not have to reinvent the wheel. The philosopher *Edna Ullman-Margalit* introduced in her seminal paper on presumptions, general terms which we can adapt to the analysis of legal presumptions of fact.[38] More specifically, we can speak of the following five (5) doctrinal terms:

1. presumption formula
2. presumption-raising fact
3. presumed fact
4. rebuttal clause, and
5. the rule assigning a juridically fixed probative value to specific classes of information.

The aforementioned vocabulary is important – for a number of reasons.

First, it becomes apparent that the legal presumption of fact (*presumption-formula*) on the one hand, and the *presumed fact* on the other hand, are two separate things, and should thus not be conflated. For example, whenever the rebuttal clause applies, it is the *presumed fact* and not the legal presumption of fact (presumption-formula) as such that is overridden.[39] I mention that for the simple reason that those two elements are widely and persistently misidentified and conflated. Let us look at a few examples. The evidence scholar Richard Glover, among many others, writes in a well-established textbook on the law of evidence that '[a] presumption is a rule of law which provides that on proof of fact A (the primary fact) fact B (the presumed fact) shall also be taken to be proved *unless the presumption is rebutted*.'[40] The same structural error can be found in philosophical approaches too. The philosopher of law Anthony Duff writes: 'If we are to understand the meaning and implications of this presumption […] we must address several questions […] What can defeat it?'[41] Elsewhere, in

38 Ullmann-Margalit, above n. 27, p. 149.

39 Similarly, Roberts, above n. 9, p. 8923, notes 'the presumption of innocence is 'defeated' in these examples only in the trivial, and explanatorily superfluous, sense that the presumption is always by definition exhausted when all offence elements have been proved to the requisite standard authorising a guilty verdict.

40 Glover, above n. 10, p. 152 – emphasis added.

41 R. A. Duff, Netherlands Journal of Legal Philosophy, 42/3 (2013), p. 170.

the context of the Food Safety Act, Duff writes: '[For example] the Food Safety Act gives legal force to an expectation that shopkeepers who sell food should not only take appropriate precautions to make sure that the food they sell is safe [...] Given such expectations, proof that a shopkeeper sold unsafe food creates a presumption that she was negligent, and *defeats* the *PoI*.'[42] Similarly, the philosopher R.L. Lippke, writes: 'Instead of trying to make the [*PoI*] do more work than it is capable of or suited for, I argue that we ought to tame it: We should confine it to the trial context, where what it means, how it functions, and what are the consequences of *its rebuttal* can be tolerably well-defined and defended'.[43]

Sadly, albeit unsurprisingly, the conceptual confusion outlined above has infiltrated the very fabric of the law in the United Kingdom. To name but one example, section 26 of the Family Reform Act 1969 provides that: *'Any presumption* of law as to the legitimacy or illegitimacy of any person may in any civil proceedings *be rebutted* by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order *to rebut the presumption*' (emphasis added).

As I showed above, the *presumed fact* which can be rebutted is not the same as the *legal presumption of fact*, i.e. the legal rule which authorizes the rebuttal. The former is merely a component of the latter. For example, whenever we have proof of all the elements of the offence to the requisite *SoP*, it is the presumed innocence, and not the *PoI* itself that is overridden. To give an example: Whenever we have sufficient evidence that a person missing for more than 7 years is alive, then it is the *presumed death* that shall be overridden, and not the presumption of death. The rebuttal of the presumed fact takes place within, and pursuant to, the respective rule of law introducing a legal presumption of fact. Among other things, this helps us understand that it is the *PoI* the rule of law which authorises the fact-finder to issue not only an acquittal but also a conviction. In other words, the legal basis for both an acquittal and conviction is the *PoI*.

Secondly, the doctrinal vocabulary introduced above allows us to express, in a more detailed way, the insight that *rebuttable* presumptions are not intrinsically different from *irrebuttable* ones. Some commentators even argue that the term irrebuttable presumption is a misnomer. For example

42 R. A. Duff, in: L. Zedner & J. V. Roberts (eds.), Principles and values in criminal law and criminal justice, 1/e (2012), p. 55.

43 R. L. Lippke, Taming the presumption of innocence, 1/e (2016), p. 4.

Richard Glover argues that '[t]hough sometimes termed "irrebuttable" or "conclusive" presumptions, [irrebuttable presumptions] are clearly not presumptions at all. An irrebuttable presumption is a contradiction in terms'.[44] But that scepticism is clearly not warranted. An irrebuttable presumption is just a legal presumption of fact whose set of rebuttal clauses is empty. It is the prerogative of parliaments to introduce rules of law assigning weight to pieces of information in a non-defeasible way also known as irrebuttable legal presumptions of fact. We shall come back to this point later.

Thirdly, the fact-finder's forensic belief regarding the presumed fact is based on a juridical rule of proof, not on relevant evidence which would increase or decrease the probability of the presumed fact.[45] For example, the fact that a child was born in wedlock does indeed make it more probable that the child's father is the mother's husband. But fatherhood is not assigned on that *empirical* and common-sense derived basis. It is the *presumption of legitimacy* that confers, in a defeasible way, juridically fixed probative force to the probandum of fatherhood. The fact-finder must treat the proposition 'the husband is the father' as established. This remark merits further discussion.

The idea that the law should *not* assign probative weight to specified classes of evidence (e.g. two witnesses or, notably, a confession) is, *Damaška* reminded us in his seminal paper on free proof, 'widely extolled as one of the cornerstones of enlightened factfinding in adjudication'.[46] The fact that legal systems are unable to anticipate the future and regulate the probative effect of evidence, is what legal history taught us at least since the collapse of continental systems of proof such as the one embedded in the *Constitutio Criminalis Carolina*. In a constantly evolving world juridical rules of weight have for good reasons been eliminated from the law of evidence. As *Damaška* notes, 'the probative force of evidence is too contextual to be properly determined *ex ante* by categorical rules'.[47] The law's retreat from the business of assigning weight to classes of evidence ushered us into the *Age of Free Proof*. The latter, however, has caused hitherto unidentified collateral damage too.

Whilst crucial for the fact-finder's freedom of assessing the probative value of evidence, emphasis on free proof especially in the context of

44 Glover, above n. 10, pp. 153-154.
45 Ullmann-Margalit, above n. 27, p. 149.
46 Mirjan Damaška, The American Journal of Comparative Law, 43 (1995), p. 343.
47 Damaška, above n. 46, p. 344.

examining the criminal process, has muddled our clarity of thought on crucial features of the law of evidence. As we saw above, such (defeasible) rules can be found at the heart of every legal presumption of fact. Our failure to take account of such structural features (which can be better understood/articulated through the lens of juridical rules of weight) has made it difficult to see *how* legal presumptions operate. As Paul Roberts remarks, 'these presumptions are dubbed "legal" because they work by operation of law, rather than according to the ordinary canons of common-sense inferential reasoning'. But they are, he adds, 'presumptions "of fact" because they authorize factual conclusions rather than propositions of law'.[48] To use our doctrinal vocabulary, the respective fact-finder will have to draw a particular factual inference from the presumption-raising fact to the presumed fact. For example, the fact-finder will have to draw an inference from the fact that there are criminal charges against someone to the latter's presumed innocence, pursuant to a juridical rule of weight lying at the heart of the *PoI*.

This insight is nothing new insofar, as the legal scholar James F. Stephen in his classical definition writes that a presumption is 'a rule of law that Courts and judges *shall* draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.'[49] Juridically fixed rules of weight embedded in legal presumptions of fact are of course a major departure from the fundamental rule in the law of evidence which defers to logic. The law, as Thayer famously declared, 'furnishes no test of relevancy. For this, it tacitly refers to logic'.[50] Here, however, it is a rule of law that, defeasibly,[51] assigns not just relevance but also probative weight to classes of evidence. To go back to our examples: absence for seven years does not prove death as a matter of common-sense based inferential reasoning; criminal charges do not prove innocence – on the contrary. Nevertheless, legal presumptions operate to authorise defeasible *factual* conclusions for which no ordinary evidence is available. As we shall see below, the said presumed innocence will become the defendant's default status and will, ultimately, lead to his acquittal, un-

48 Roberts, above n. 6, p. 250.

49 James F. Stephen, A Digest of the Law of Evidence, 1876, art. I.

50 Thayer, above n. 16, p. 144.

51 Thayer, above n. 16, p. 165, described defeasibility as 'prima facie imputation: The legal presumptions' effect 'results necessarily from their characteristic quality. This quality imputes to certain facts or groups of fact a certain prima facie significance or operation'.

less there is sufficient proof of guilt (i.e. of all the elements of the offence) to the requisite *SoP*. To use another example, the fact-finder in a family court will be normatively forced to establish the husband's presumed innocence pursuant to a juridical rule of proof lying at the heart of the presumption of fatherhood.

IV. Legal presumptions and Default Logic

1. Default logic

It is time to take stock by putting all the jigsaw pieces together. Our doctrinal formula can be expressed in the following way:

> Every time the presumption-raising fact is established,
> then the fact-finder shall infer that the presumed fact is established.

Obviously, the story does not end here. The respective presumed fact which will be established by an operation of law, can be overridden in two ways:

a) by evidence showing that the presumption-raising fact is not proven (e.g. that there is no valid marriage; that there are no criminal charges against the defendant etc.) or
b) by rebuttal clauses. Whenever the law provides for rebuttal clauses, the presumed fact will maintain its validity, *unless* the rebuttal clause is proven. For example, when someone has been criminally charged, then he or she shall keep his/her status of (presumed) innocence, unless the latter is rebutted through 'proof of guilt'. So much is clear. But *how* does this rebuttal mechanism work in detail? Describing this mechanism or, to begin with, showing that such mechanism actually exists, is no easy task. So where do we start from? We saw above that the main element of legal presumptions of fact in general and the *PoI* in particular is that the presumed fact depends solely on establishing the basic, presumption-raising fact. The fact-finder is authorised, indeed required to treat the presumed fact as established, pursuant to a juridical rule assigning full probative weight to the basic fact. The presumed fact will be regarded as proven, *unless* one of the rebuttal clauses apply.

Default logic, which is the new vogue in formal reasoning, seems to capture all the structural features which are salient in legal presumptions of fact. Both defeasibility and legal presumptions pivot around a defeasible (pre-

sumed) fact. In order to understand how default logic works, we can use the well-known example of Tweety (a random bird) – nota bene: we should not conflate structural simplicity with triviality.

If the only available information is that

a) Tweety is a bird, and
b) we do not know whether Tweety is a flightless bird or not,

then, as the logician Raymond Reiter suggested, we could authorise the fact-finder to draw the defeasible conclusion that Tweety can fly – by default.[52]

Tweety's ability to fly would thus not be an empirically established truth, but, as Rescher explains, 'merely something that holds only provisionally, as long as no counter-indicatively conflicting information come to light', i.e. a form of tentative cognition. In the same example: Whenever we have the information that *x* is a bird and it is consistent to presume that *x* can fly, then *in the absence of any information to the contrary*, we are allowed to infer that *x* can fly – by default.[53]

Default reasoning rests on predetermined inferences which can be seen as a 'fall-back position' in terms of conclusion-drawing.[54] In other words, the key idea underlying *default logic* is the use of rules allowing us to 'jump' to conclusions – conclusions for which we lack evidence.[55] The importance of this move cannot be overstated. Default logic[56] formalises reasoning patterns in which we do not require information about, say, Tweety being a flightless bird or not. A fact-finder is authorised to draw a valid inference which has the same status as an empirical belief.[57] The latter is not warranted by the information available. The presumed fact's validity is a direct result of the set of rules which constitute the normative framework of default logic.

52 R. Reiter, Artificial Intelligence, 13 (1980), 81 (82); N. Rescher, in: D. M. Gabbay / P. Thagard / J. Woods (eds.) Philosophy of Logic, 1/e (2007), p. 1164.
53 Reiter, above n. 52, p. 82.
54 For a comprehensive introduction to deontic logic see Rescher, above n. 52, p. 63.
55 G. Antoniou and K. Wang, Default Logic, in: Don Gabbay, John Woods (eds.), Handbook of the History of Logic, Vol. 8 (2006), pp. 517–555.
56 For reasons of simplicity I use here singular, although we should rather talk of a whole family of default reasoning methods. See Antoniou and Wang, above n. 55, p. 517.
57 Reiter, above n. 52, p. 82.

This is of course highly pertinent for doctrinal purposes too. For the respective presumed fact might not otherwise be warranted by the information available to the fact-finder. The presumption-raising fact and the presumed fact are connected inferentially by an operation of law, i.e. a juridical rule of proof. As commentators stress: 'Where a presumption operates to establish the presumed fact, the judge will, in a civil case, find the presumed fact proved or, in a criminal case, direct the jury to find the presumed fact proved. No evidence is then required to establish the presumed fact'.[58]

In all, the reasoning pattern underpinning legal presumptions of facts, is a major departure from the 'normal' inferential process of free proof. Required is information that a) *Tweety* (x) is a bird and *b*) that it is consistent to assume (*M*) that birds can fly. Tweety's ability to 'fly' can thus be seen as a presumed fact which is inferred from the generic feature 'BIRD', i.e. the presumption-raising fact. This inference pattern can be formally represented as follows:

$$\frac{\text{Bird}\,(x) : M\ \text{Fly}(x)}{\text{Fly}\,(x)}$$

The presumption-formula authorises (in a technical, juridical sense) the fact-finder to hold that the respective presumed fact is established by an *operation of a rule* (i.e. based on a rule of proof) upon proof of a basic, presumption-raising fact.

Obviously, this is not the end of the story. Presumed facts based on default conclusions can, indeed have to be overridden, when certain defeaters / rebuttal clauses apply; presumptions validate presumed facts but only as a starting point. Since rebuttal clauses are allowed, we need to integrate them in our formal reasoning pattern. The set of rebuttal clauses – we shall call this: Set of Epistemic Defeaters (SED) – will inform us each time, whether and how many epistemic defeaters come into play.[59] So let us assume that the SED which can rebut the presumed fact (again: not the

58 Glover, above n. 40, p. 152.

59 The set of epistemic defeaters can be open (infinite), closed or empty. One of the most common misrepresentations und misunderstandings relates to the cardinality of the SED. Among others, Richard Holton (in: A. Marmor / S. Soames (ed.), Philosophical Foundations of Language in the Law (2011), p. 14), notes that there is nothing wrong with the motivation behind Reiter's model of default logic which enables us to move forward in the absence of information. The main problem, he contends, is the fact that default logic does not provide us with a decision-making procedure to determine 'membership of the conclusion set'. Reiter's default logic, Holton adds, is 'even worse off th[a]n first order predicate calculus' because there is no procedure for demonstrating that a possible defeater is in or out (at 14, footnote nr.

legal presumption itself), has a relatively small cardinality: Penguins and ostriches are the only known cases of flightless birds [¬FLY(x)].

SED: {penguin, ostrich}
(x.). PENGUIN(x) → ¬ FLY(x)
(x.). OSTRICH(x) → ¬ FLY(x).

In plain language: If Tweety is a penguin or an ostrich, then the presumed fact is overridden. This reasoning pattern expresses in an axiomatized way our basic intuitions about legal presumptions of fact.

More specifically, the reasoning pattern set out above satisfies all three desiderata. I remind that according to the commentators who are sceptical of the very enterprise of providing one rule for all presumptions, the fact-finder should be empowered (D_1) to 'jump' to a conclusion (D_2) which is based on a juridical rule of proof and not on ordinary canons of common-sense reasoning (D_3).

Our doctrinal formula authorises (D_1) the fact-finder to draw a defeasible conclusion (D_2) and treat the presumed fact as established upon proof of the presumption-raising fact alone (D_3). Default logic provides us thus with a doctrinal formula for all presumptions. To put it in a more technical way, we can extract our 'doctrinal formula' from the abovementioned reasoning pattern.

---

27). Holton poses a very important question: *How* do we determine the cardinality of the SED? Uncertainty about the number of defeaters could lead ultimately to structural instability. Yet, this (common) view is flawed. For there is one thing that we know with certainty about (all kinds of) logic. They only introduce axiomatized ways of sound reasoning. More specifically, logic has a distinctive tautological character. Its task is to show us how to move from certain premises to a valid – in the case of default logic: defeasible – conclusion. The question of which premises may come into play, in other words: which defeaters will or even should 'gain' membership to the SED, is not for the logician to decide – this is a point that Reiter is at pains to stress. Logicians are construction engineers of reasoning processes, not architects. Reasoning patterns deal with questions of logically valid deducibility, not with empirical issues. As H.L.A, 71 Harv. L. Rev. (1957), p. 610, puts it pithily: 'Logic is silent on how to classify particulars […] Logic does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of an expression. Logic only tells you hypothetically that if you give a certain term a certain interpretation then a certain conclusion follows'. In terms of our example: Ornithologists (i.e.: not logicians) will work out which species may count as flightless birds. Similarly, Parliaments will decide for example whether and in how many ways a (third) person has standing to dispute the (presumed) legitimacy of a child. See K.N. Kotsoglou, Law, 12 Probability and Risk (2013), p. 296.

2. Presumed facts as default conclusions

We can now apply our doctrinal formula to legal presumptions of fact. We can hold that every time the presumption-raising fact (e.g. criminal charges) is established to the requisite *SoP*, the fact-finder shall declare the presumed fact (e.g. innocence) as established too. In other words, the fact-finder shall infer (*M*) that innocence is established by default, pursuant to the juridical rule of proof at the heart of the legal presumption. Schematically:

$$\frac{\text{presumption raising fact(x)}: M\text{presumed fact}(x)}{\text{presumed fact }(x)}$$

At this point, we need to make the following distinction: For all *irrebuttable* presumptions of fact, the SED will be empty. For example, pursuant to s. 76 SOA 2003[60] (*M*), it will be an irrebuttable ('conclusive') presumed fact, that the complainant 'did not consent to the activity and the defendant did not reasonably believe that the complainant consented', when either of the following two presumption-raising facts applies:

- The defendant intentionally deceived the complainant as to the nature or the purpose of the act (not the nature and quality of the act).
- The defendant intentionally induced the complainant to consent by impersonation of a person known personally to the complainant.

Since the legal presumption of fact enshrined in s. 76 SOA 2003 is irrebuttable, the cardinality of the SED will be null. Nothing can override the presumed facts. On the contrary, for all *rebuttable* presumptions of fact, the cardinality of the SED will by definition not be null. To use a similar example as above, the SOA 2003 introduces in section 75 a series of rebuttable ('conclusive') presumptions. Pursuant to s. 75(2)(a-f) SOA 2003, if any of the circumstances listed there applies, then the complainant is to be

a) taken not to have consented to the relevant act [presumed fact], unless sufficient evidence is adduced to raise an issue as to whether he consented [rebuttal clause], and
b) the defendant is to be taken not to have reasonably believed that the complainant consented [presumed fact] unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it [rebuttal clause].

60 Sexual Offences Act 2003 (England and Wales).

V. The Presumption of Innocence Revisited

1. On Presumed innocence

At this point we can finally apply our doctrinal formula to a more central (and problematic) legal presumption of fact, i.e. the *PoI*, Art 6(2) ECHR. The *PoI*, I remind, provides that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

One might retort that the very diction of Art 6(2) ECHR especially the use of the conjunction 'until' would hinder our analysis which pivots around defeasibility. One might also think that this is yet another reason that the *PoI* is not a typical presumption. But is it? The criminal process is not a social or religious ritual with a predetermined outcome. It is a densely regulated decision-making process *under uncertainty*. In other words: The outcome of the criminal process is uncertain. It is certain of course that there will be a verdict. However, whether the said decision will be an acquittal or a conviction, is not simply a matter of time. On the contrary, a criminal conviction is a function of a complex procedural and evidential set of norms. In that sense, we need to read the conjunction 'unless' into the *PoI* – despite the latter's diction. Art 6(2) ECHR should thus be read as follows:

> 'everyone charged with a criminal offence shall be presumed innocent. The defendant will retain his presumed innocence, unless proved guilty according to law.'

The logical structure of the *PoI* will be the following:

$$\frac{\text{criminal charges } (X) : M \text{ presumed innocence}}{\text{presumed innocence}}$$

The cardinality of the SED will be one (1) insofar, as there is a single rebuttal clause which can override the presumed fact, i.e. presumed innocence. The rebuttal clause is 'proof of guilt to the requisite standard of proof'.

$$SED \rightarrow \{\text{Proof of Guilt}\}$$

Now, the question is twofold. *First*, what is the *SoP* in criminal adjudication (Q_1)? *Secondly*, what needs to be proven for the rebuttal clause to apply (Q_2)? Let's start in reverse order: The rebuttal clause applies if and only if every element of the offence has been established. The number and content of those elements varies widely and depends on the particular offence. It is thus *substantive* law that determines the content of 'legal proof'.

$$\text{Legal Proof} \rightarrow \begin{cases} X1 \\ X2 \\ X3 \\ Xn \end{cases}$$

For the offence of, say, murder (in England and Wales) the (actus reus and mens rea) elements which must be proven are the following:

- the killing
- of a human being
- with intent.

Relevant to the question regarding the remit of the rebuttal clause, is also the perennial question regarding defences especially the procedural mechanism for proving those elements. The fact-finder will take a defence into account – and in the Crown Court the judge will include, say, self-defence in his/her summing up of the case, only when that defence has become a live procedural issue.[61] In other words, fact-finders will not occupy themselves with any defence, unless the latter has been turned into a live issue – another example of how defeasibility and default structures permeate the fabric of the criminal process. Going back to our example: Full proof of the offence would include for example disproving self-defence as well.

- the killing
- of a human being
- with intent
- no self-defence.

This answers Q_2. What about Q_1 and the alleged links between the *SoP* on the one hand and the PoI on the other hand? Is the *PoI* inextricably linked to a specific *SoP*?[62] More specifically, is the *PoI* the principle that sets high barriers to the conviction of the defendant?[63] This question is highly relevant since, as we saw above, the *PoI* is widely viewed as synonymous to

61 Interestingly, we see another default rule at play here.

62 See e.g. A. Stumer, above n. 2, p. xxxvii: 'The presumption of innocence tilts the scales of justice in favour of a defendant by requiring the prosecution to establish guilt to a high standard of certainty.'.

63 For a similar approach see Ashworth, above n. 4, p. 74; 'many discussions about the presumption of innocence assume or stipulate that proof beyond a reasonable doubt is a necessary part of the presumption of innocence'.

the duty of the state to prove the accused's guilt beyond reasonable doubt. The answer is: No.

Liberal legal orders (which will opt for a presumption of *innocence*, rather than a presumption of *guilt*) will probably opt for a demanding *SoP* too. The latter will minimise the risk of wrongful convictions. As Justice Harlan explained in his seminal opinion in the case *In Re Winship*, the *SoP* influences the relative frequency of two types of erroneous outcomes (i.e. convicting someone who has not committed the crime and acquitting someone who has).[64] The choice of the *SoP*, he added 'should, in a rational world, reflect an assessment of the comparative social disutility of each.'[65] But the *PoI* is compatible with more standards than one. Parliaments and legal orders have the prerogative of gauging the level of acceptable risk for wrongful convictions/acquittals. It is theoretically possible that presumed innocence could be overridden by a mere suspicion or an anonymous phone call. The relationship between the *PoI* and a demanding *SoP* is thus epiphenomenal insofar, as both procedural devices are enacted within liberal legal systems aiming at minimising wrongful convictions. The *PoI* is not conceptually or procedurally indebted to a specific let alone to a demanding *SoP*. On the contrary, it is compatible with *any* standard including a low one.

2. Procedural or Substantive in Nature?

Another contentious issue concerns the implications that the *PoI* allegedly has for substantive law. Can the *PoI* function as an impediment to the creation of new offences or to the conviction of the morally blameless? Whilst some theorists have insisted that the *PoI* is equipped with this kind of substantive effect,[66] courts, at least in England and Wales, consistently deny that. As Lord Hope remarked in *R v G*, the *PoI*

> 'as a whole is concerned essentially with *procedural* guarantees to ensure that there is a fair trial, not with the substantive elements of the offence with which the person has been charged [...] It is concerned with the

64 In re Winship, 397 U.S. 358 (1970), at 397.
65 In re Winship, 397 U.S. 358 (1970), at 397.
66 P. Tomlin, Journal of Political Philosophy, 21 (2013), 44; V. Tadros, Criminal Law and Philosophy, 1 (2007), 193.

> procedural fairness of the system for the administration of justice in the contracting states, not with the substantive content of domestic law'.[67]

The ECtHR holds a similar view too. In *G v. UK* the applicant (G) complained that his conviction for rape of a child under section 5 of the Sexual Offences Act 2003, despite the fact that he had believed that the girl was willing to have sex and was 15 years old, was incompatible with the *PoI*. The Strasburg Court reiterated that it was not within the remit of Article 6(1 and 2) ECHR to contour criminal law offences. The UK Parliament created the offence of rape under section 5 of the 2003 Act which introduces strict liability as regards the victim's age. It did so, as the ECtHR accepted, to protect children from sexual abuse and the consequences of premature sexual activity.[68]

Academicians on the other hand lament that courts 'offer no arguments for restricting the presumption of innocence to evidential rather than substantive matters'.[69] Whilst the discussion has been going on for a long time now, we can offer here a brief structural analysis of this problem. As it was shown above, the *PoI*'s main function is *a*) to provide a legal basis for both a conviction and an acquittal, and *b*) to equip the defendant with the default-status of presumed innocence, which will be maintained, unless there is proof of guilt. This, i.e. the defendant's default status is the most fundamental structural component of the criminal process.

- If the *SoP* has been met, then presumed innocence is overridden and the defendant is convicted.
- If the *SoP* has not been met, then presumed innocence is not overridden and the defendant keeps his default status.

In both cases, the *PoI* serves as the legal basis for the verdict.

It becomes thus apparent that the *PoI*'s main function has nothing to do with the particular elements or the remit of the respective offence. The actus reus and mens rea elements of the offence, whatever they are, will have to be proven to the requisite *SoP*, for the presumed innocence to be rebutted. In extremis, an offence which becomes akin to a thought-crime,

67 R v G [2009] 1 AC 92, [2008] UKHL 37 [27].

68 G v UK (application no. 37334/08).

69 See among others V. Tadros, Criminal Law and Philosophy, 8 (2014), 449. The author even goes on to characterise a ruling by the ECtHR (*G v UK* [2011] ECHR 1308) 'depressingly argument-free', for it rejected the argument that Article 6(2) of the European Convention of Human Rights has implications for the substantive law.

or is too broad, is a serious issue from the point of view of criminal policy and of the principle of legality (lex certa). However, the *PoI* does not enter *that* discussion.

3. PoI and / as the Burden of Proof

As I showed above the analysis presented here is not purely theoretical. On the contrary, it has deep doctrinal consequences too. According to the mainstream view, the main function of the burden of proof is to provide guidance about the correct way to resolve uncertainty. The burden of proof, we read, shall inform decision-makers about how they can avoid a procedural cul-de-sac: If the criminal charges have neither been proved or disproved (this situation is generally known as non-liquet),[70] then what should we do? A careful look at the structural features of the *PoI* will, however, pay good dividends insofar, as from a doctrinal point of view there is nothing which could meaningfully be described as non-liquet in the criminal process.

Pursuant to the *PoI*, the defendant shall maintain his or her default status of (presumed) innocence, unless the latter is rebutted through proof of guilt according to law. The question allegedly answered by the burden of proof, namely 'what will happen in case we do not have sufficient evidence to prove all the elements of a criminal offence', can be asked only because we traditionally misunderstand *a*) the meaning of the conjunction 'unless', *b*) the procedural architecture of the criminal process.

The question of what should happen *if* the rebuttal clause (proof of guilt) does not apply, has no meaningful use within the criminal process. The defendant would then keep the default status of presumed innocence and will ultimately be acquitted, *unless* the fact-finder believes that all the elements of the offence have been proven to the requisite *SoP*.

VI. Conclusions. Doctrinal Overreach or Conceptual Precision?

We saw above that according to the mainstream view, the *PoI* means that, whenever a person is charged with a criminal offence, then

70 The phrase 'non liquet' comes from Roman law and means 'it is not clear.'.

a) the prosecution must bear the burden of proving the elements of the offence
b) and that proof must be beyond reasonable doubt.

The mainstream approach is not merely a competitor to the one presented here or other similar ones. Crucially, the *PoI* –the way that it is commonly understood– morphs into a sweeping 'all in one' doctrine. As commentators have expertly explained, the main problem with such a one-tool-for-everything doctrinal interpretation, is the worry that the *PoI* being 'such an amorphous and protean notion' can mean 'just about anything (presumptively positive) that a particular speaker wants it to mean'.[71] One could perhaps, if he really wanted, use a dentist's drill to dig in a wall, but the more emphasis we put on efficiency and analyticity, the more we realize that we might want to save such expensive medical instruments for situations where they are more fit for purpose. If a procedural device is used in an all-encompassing manner, rather than be reserved for a specific and narrowly defined task, then it undergoes an inflationary process in which it subsumes substantive, procedural and evidential functions which are alien to it. To put it differently: The mainstream approach is guilty of an intellectual malady recently coined as 'conceptual overreach'[72] – an idea that goes back to Nietzsche's aphorism that 'seeing things as similar and making things the same is the sign of weak eyes'.[73]

This article showed that the *PoI* is neither a vacuous rule of *savoir juger* nor an empty phrase which allegedly encompasses more and more functions. The analysis conducted here described the structural features of the *PoI* indeed of any legal presumption of fact, and helped us not lose sight of the latter's normative function. There is a juridical rule of weight at the heart of the *PoI* assigning fixed probative value to classes of evidence (here: 'criminal charges').

I have also highlighted the structural features salient across all legal presumptions. By describing the reasoning pattern at the heart of legal presumptions, I essentially drew on an insight offered by Thayer. The great evidence scholar wrote in year 1889 that '[legal presumptions] belong rather to the much larger topic of legal reasoning in its application to particular

71 Roberts, above n. 9, p. 8904.
72 John Tasioulas, Aeon 2021, online available: https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason (last accessed: 12/05/2023).
73 F. Nietzsche, The Gay Science, transl. by Walter Kaufmann, 1974, para 128.

subjects'.[74] Whilst I do not agree that legal presumptions are *not* part of the law of evidence, it certainly pays good dividends to broaden our horizon by looking at the concept of defeasibility as well, an originally jurisprudential concept introduced by H.L.A. Hart.[75]

Gaining a better understanding of defeasibility on the one hand and of legal presumptions of fact on the other hand, will allow us to illuminate one of the most fundamental features of procedural architecture for criminal law: The *default status* of the defendant who, once charged with a criminal offence, will retain his presumed innocence, unless he is proved guilty either by the criminal court in continental jurisdictions or by the prosecution in common law jurisdictions. The same insight enables us to grapple with another perennial problem in the law of evidence, the function of the burden of proof. Remember that according to mainstream scholarship the burden of proof breaks the logjam and overcomes the stalemate in situations where the fact-finder, having heard all the evidence, thinks that an element of the offence has neither been proved nor disproved. However, the *PoI* provides, nay presupposes, that such a stalemate cannot really come about.

- If and only if the rebuttal clause applies (legal proof), then the defendant's presumed innocence is overridden.
- Whenever this is not the case, the defendant retains his or her default status.

These are the two tail-ends of the criminal process. Tertium non datur.

74 Thayer, above n. 16, p. 142.
75 H. L. A. Hart, 49 Proceedings of the Aristotelian Society (1948-1949), p. 171.