

# *California Evidence Code—Federal Rules of Evidence*

## **IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence**

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**T**HIS ARTICLE COMPARES the California, Federal, and Uniform Rules of Evidence approaches to two important and related eviden-

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tiary concepts—the burden of proof that applies to the action being tried and presumptions. The burden of proof is examined first because presumptions can sometimes alter the burdens that the parties must otherwise discharge if they are to avoid a nonsuit in a civil case. Special attention is given to presumptions in criminal cases because of the risk that their use against the accused might undermine the prosecution's burden to prove each element of the offense beyond a reasonable doubt.

## I. Burden of Proof

Neither the Federal Rules of Evidence nor the Uniform Rules of Evidence contain any provisions defining and allocating the burden of proof that applies in civil and criminal proceedings. The California Evidence Code ("Code"), on the other hand, has a number of useful provisions defining and allocating the burden of producing evidence and the burden of persuasion.

California Evidence Code section 110 defines the burden of producing evidence as the "obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue."<sup>1</sup> Section 550, in turn, allocates the production burden as to a particular fact "on the party against whom a finding on that fact would be required in the absence of further evidence."<sup>2</sup>

The burden of persuasion is defined by section 115 of the Code as "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact . . ."<sup>3</sup> This section also defines the three standards of persuasion applicable in California proceedings: proof by a preponderance of the evidence, proof by clear and convincing evidence, and proof beyond a reasonable doubt.<sup>4</sup> Unless otherwise provided by law, section 115 establishes proof by a preponderance of the evidence as the default burden of persuasion.<sup>5</sup>

Section 500 allocates the burden of persuasion; unless otherwise provided by law, the section allocates to a party the burden of persuasion on "each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."<sup>6</sup> However, the

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1. CAL. EVID. CODE § 110 (West 1995).
  2. *Id.* § 550(a).
  3. *Id.* § 115.
  4. *Id.*
  5. *Id.*
  6. *Id.* § 500.

Code does not attempt to specify the facts that may be essential to a party's claim for relief or defense. This task is left to the substantive law, not the law of evidence.<sup>7</sup>

With respect to criminal cases, section 501 provides that "[i]nsofar as any statute, except [s]ection 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code [s]ection 1096."<sup>8</sup> Section 1096 defines proof beyond a reasonable doubt.<sup>9</sup> Evidence Code section 522 places the persuasion burden on the party claiming that any person, including him or herself, is or was insane.<sup>10</sup> Both of these sections are subject to the command of *In re Winship*<sup>11</sup> 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."<sup>12</sup>

The California Evidence Code places the burden of persuasion on the party who claims that a person is guilty of a crime or wrongdoing,<sup>13</sup> or did not exercise a requisite degree of care.<sup>14</sup> The Code also places upon the state the burden of persuasion "on all issues relating to the historic location of rivers, streams, and other water bodies and the authority of the state in issuing the patent or grant," in any action in which the state is a party "where (a) the boundary of land patented or otherwise granted by the state is in dispute, or (b) the validity of any state patent or grant dated prior to 1950 is in dispute . . . ."<sup>15</sup>

Section 502 allocates to judges the duty of instructing the jurors on which party bears the burden of persuasion.<sup>16</sup> It mirrors the language in section 115 regarding the accused's obligation to raise a reasonable doubt about his or her guilt.<sup>17</sup> Consistent with *Winship*'s mandate that the prosecution prove each element of the offense charged beyond a reasonable doubt, one would expect a judge to instruct jurors of the accused's obligation to raise a reasonable doubt about any of the elements. But as will be explained in the discussion

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7. *Id.* § 500 law revision commission's cmt. ("The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.").

8. *Id.* § 501.

9. CAL. PENAL CODE § 1096 (West 1997).

10. *Id.*

11. 397 U.S. 358 (1970).

12. *Id.* at 364.

13. CAL. EVID. CODE § 520.

14. *Id.* § 521.

15. *Id.* § 523.

16. *See id.* § 502.

17. *See id.* §§ 115, 502.

of presumptions, such an instruction can run afoul of *Winship*. The accused has no such obligation, but does have the right if he or she chooses to offer evidence that contests the prosecution's evidence.<sup>18</sup> Consequently, the accused is not required to put on a case-in-chief and may rest without doing so.<sup>19</sup> Exercising this option does not diminish the prosecution's federal obligation to prove each element of the offense beyond a reasonable doubt. Accordingly, the Legislature should delete language from sections 115 and 502 requiring "a party to raise a reasonable doubt concerning the existence or nonexistence of a fact."<sup>20</sup>

The major flaw in the California approach is the Code's insistence on using the term "burden of proof" to refer to the persuasion burden. In fact, the burden of proof consists of two distinct burdens—the burden of producing evidence and the burden of persuasion.<sup>21</sup> Practitioners who are unaware of the Code's unique use of the term might be misled into believing that "burden of proof" refers to both burdens. The Code's use of the term is not only limited to the chapter on burden of proof,<sup>22</sup> but is also used to refer to the burden of persuasion in the chapter on presumptions,<sup>23</sup> and thus can be the cause of additional confusion.

Clarity can be achieved by adding a section to the Code that defines the burden of proof as consisting of both the production and persuasion burdens and by substituting "burden of persuasion" in each instance in which the Code uses "burden of proof" to refer to this burden.

As has been stated, the Federal Rules of Evidence lack any provisions defining and allocating the production and persuasion burdens. The California provisions are helpful to the bench and bar and, except as noted, should be retained.

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18. See CAL. PENAL CODE § 1093(c) (West Supp. 2003).

19. See *id.* This section requires that the prosecution present a case-in-chief in support of the charge; the accused, however, is simply given the option of presenting a case-in-chief; see also *id.* § 1118.1. If the prosecution makes out a prima facie case, the accused may rest without opening a case-in-chief. If the prosecution fails to make out a prima facie case, the court on its own motion or a defense motion must grant a judgment of acquittal. *Id.*

20. CAL. EVID. CODE § 115. The language in § 502 is almost identical.

21. See MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES—A PROBLEM APPROACH § 18.01 (2d ed. 1999).

22. See generally CAL. EVID. CODE ch. 1, div. 5.

23. See generally *id.* ch. 3, div. 5.

## II. Presumptions and Inferences

### A. Introduction

To understand the California and federal treatment of presumptions, a number of considerations must be kept in mind. First, presumptions must be distinguished from inferences. Second, presumptions may be one of two kinds—rebuttable and conclusive. Third, rebuttable presumptions may be classified as either the Thayer or Morgan type. Finally, federal due process limits the use of presumptions and inferences in criminal cases.

The following three examples illustrate the differences between inferences and presumptions and between Thayer and Morgan rebuttable presumptions:

**Example One—Inferences.** Much has been made of inferences. Simply put, they are the kind of conclusions we draw in everyday problem solving. Technically, they are deductions “of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.”<sup>24</sup>

Assume a breach of contract action in which the plaintiff claims that the defendant failed to perform as promised. The defendant’s position is that no contract existed because the plaintiff failed to accept the defendant’s offer.

To prevail, the plaintiff must prove, among other matters, the existence of the contract. Since the existence of the contract is essential to his breach claim, the plaintiff has the burden of persuasion on this issue.<sup>25</sup> Ultimately, the plaintiff must persuade the jurors of the contract’s existence by a preponderance of the evidence.<sup>26</sup> Moreover, the plaintiff bears the burden of producing evidence proving the existence of the contract. As noted above, under the Code, the production burden is initially on the party having the persuasion burden on a given issue.<sup>27</sup>

The production burden imposes upon the plaintiff “the obligation . . . to introduce evidence sufficient to avoid a ruling against him on the issue.”<sup>28</sup> To avoid an adverse directed verdict at the conclusion of his case-in-chief, the plaintiff must introduce some evidence of the contract’s existence. A sufficiency standard is used in ruling on mo-

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24. *Id.* § 600(b). The Federal Rules do not have a provision defining inferences.

25. *See id.* § 500.

26. *Id.* § 115.

27. *See id.* § 550.

28. *Id.* § 110.

tions for directed verdicts in order to vouchsafe a party's right to jury determinations of material factual issues.<sup>29</sup> Under the sufficiency standard, the judge must deny the defendant's motion for a directed verdict and allow the issue of the contract's existence to go to the jury if the judge concludes that a reasonable jury could find the contract existed from the plaintiff's evidence if believed.

Assume that the defendant's assertion that no contract existed is based on not receiving the plaintiff's written acceptance. In his case-in-chief, the plaintiff produces evidence that he prepared a written acceptance of the defendant's offer and asked his secretary to mail it to the defendant at the address on the defendant's written offer. The plaintiff's secretary testifies that he copied the defendant's name and address from the offer, and after affixing the correct postage, dropped the acceptance in the mailbox outside the office. Assume that the law of contracts provides that an offer is not accepted unless the acceptance is received by the offeror. At the conclusion of the plaintiff's case-in-chief, should the judge grant the defendant's motion for a directed verdict on the ground that the plaintiff failed to produce any evidence that the defendant received the acceptance?

The judge should deny the defendant's motion. In applying the sufficiency standard, the judge must view the evidence in the light most favorable to the party against whom the motion is directed.<sup>30</sup> This standard requires the judge to accept as true the evidence most favorable to the plaintiff, to disregard conflicting evidence, and to draw only those inferences from the evidence which are most favorable to the plaintiff.<sup>31</sup> In this hypothetical, the plaintiff has failed to produce any direct evidence showing that the defendant received the acceptance. However, an inference can be drawn that the defendant received the acceptance because the acceptance letter was correctly addressed, had the appropriate postage, and was deposited with the United States Postal Service. Since a reasonable jury could draw this inference, the question of whether the defendant received the acceptance should go to the jury.

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29. See CAL. CIV. PROC. CODE § 581(c) (West 1997); see also *Salomons v. Lumsden*, 213 P.2d 132, 133 (Cal. Ct. App. 1949); MÉNDEZ, *supra* note 21, § 17.01 (discussing how the role of the judge in screening evidence under CALIFORNIA EVIDENCE CODE section 403 is similarly circumscribed to vouchsafe a party's right to jury determinations of material factual issues).

30. See *Campbell v. Gen. Motors Corp.*, 649 P.2d 224, 227 (Cal. 1982); *Ewing v. Cloverleaf Bowl*, 572 P.2d 1155, 1157 (Cal. 1978).

31. See *Campbell*, 649 P.2d at 227; *Ewing*, 572 P.2d at 1157.

Nonetheless, defeating the motion does not mean that the plaintiff prevails. In his case-in-chief, the defendant is entitled to produce evidence that he did not receive the acceptance. Since the plaintiff has the burden of persuasion on the contract's existence, the judge must instruct the jury to return a verdict for the defendant unless the plaintiff convinces them by a preponderance of the evidence that the defendant received the acceptance. Whether the jurors find for the plaintiff on this issue depends on their willingness to draw the very inference drawn by the judge when ruling on the defendant's motion for a directed verdict. Their willingness to do so depends in turn on their assessment of all of the evidence, including the credibility of the witnesses.

**Example Two—Thayer Presumptions.** In the example thus far, the resolution of the plaintiff's breach action has not involved presumptions. Presumptions, however, can alter both the production and persuasion burdens in a given action. However, it is important to note that Thayer presumptions do not alter the burden of persuasion. To explore the effects of presumptions, the following example applies one to the plaintiff's case.

In ruling on the defendant's motion for a directed verdict, the judge confronts the question of whether to rule in the defendant's favor in light of the plaintiff's lack of direct evidence proving that the defendant had received the plaintiff's acceptance. Because of the strict limits imposed by the sufficiency standard, the judge has no choice but to deny the defendant's motion—a reasonable jury could find that the defendant received the acceptance if the plaintiff's evidence is believed. The judge's task would be eased substantially if the plaintiff could call to the judge's attention a presumption created by the Evidence Code: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."<sup>32</sup>

Analysis shows that a Thayer presumption, like all presumptions, consists of two elements: the basic facts and the presumed facts.<sup>33</sup> The basic facts are that the plaintiff correctly addressed and properly mailed a letter. The presumed fact is that such a letter is received in the ordinary course of mail. In our example, the plaintiff offered evi-

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32. CAL. EVID. CODE § 641.

33. See *id.* § 600(a) (defining a presumption as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action"). The Federal Rules of Evidence do not define a presumption. See also UNIF. R. EVID. 301(1) (defining a basic fact as "a fact or group of facts that give rise to a presumption"); R. 301(3) (defining a presumed fact as "a fact that is assumed upon the finding of a basic fact").

dence of the basic facts. In denying the defendant's motion for a directed verdict, the judge must assume the truth of the plaintiff's evidence. The judge has no choice but to assume the existence of the presumed fact—namely, that the defendant received the plaintiff's acceptance in the ordinary course of mail. Since the presumed fact supplies the very evidence the defendant claims is missing from the plaintiff's case-in-chief, the judge must deny the defendant's motion for a directed verdict.

A presumption, however, can have a life that extends beyond a motion for a directed verdict. A presumption has the potential to alter a jury's fact-finding function. Its effect depends on the kind of presumption involved and can best be seen by comparing a case without presumptions with a case with presumptions. Take the breach of contract case in which the plaintiff offers no direct evidence that the defendant received the plaintiff's acceptance. In a world without presumptions, if the defendant offers no evidence of failure to receive the plaintiff's acceptance, the plaintiff can win only if the jury believes by a preponderance of the evidence that the defendant received the acceptance. This depends on the jury's willingness to draw the necessary inference from the plaintiff's evidence. But in a world where presumptions operate, that mode of fact-finding can change. Under such circumstances, the judge instructs the jury to find the presumed fact (that the defendant received the acceptance in the ordinary course of mail) if the jury first finds the basic facts (that the acceptance was addressed correctly and mailed properly).<sup>34</sup> Only if the defendant produces some evidence that he did not receive the acceptance does the world revert to one without presumptions. In that situation, the judge says nothing about the presumption and the jury is free to draw whatever inferences it wishes from all of the evidence.<sup>35</sup>

It is crucial to note that the Thayer presumption we are considering does not alter the burden of persuasion. To prevail, the plaintiff must still persuade the jurors by a preponderance of the evidence that the defendant received the acceptance. But the presumption assists the plaintiff in two respects. First, it helps him survive the defendant's motion for a directed verdict since it relieves him of the need to produce direct evidence of the presumed fact. Second, where the defendant produces no evidence that he failed to receive the acceptance, the plaintiff gets the benefit of having the jurors instructed to find the

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34. See CAL. EVID. CODE § 604 and assembly committee on judiciary's cmt.

35. See *id.*; see also *Craig v. Brown & Root, Inc.*, 100 Cal. Rptr. 2d 818, 821 (Ct. App. 2000).



presumed fact if they find the basic facts. But since the presumed fact (that the acceptance was received in the ordinary course of mail) is one of the elements the plaintiff must prove by a preponderance of the evidence, the judge has to instruct the jurors to find the presumed fact only if they first find the basic facts by that standard.

**Example Three—Morgan Presumptions.** Some presumptions, however, do more than just affect the burden of producing evidence. In particular, Morgan presumptions can shift the burden of persuasion on the existence of the presumed fact. The present example illustrates this important point.

Assume a personal injury action in which the plaintiff seeks to recover for injuries she suffered when the defendant allegedly hit her while driving a car at an excessive speed. To recover, the plaintiff must prove, among other matters, that the defendant did not exercise the degree of care required under the circumstances. Ordinarily, the plaintiff has both the production and persuasion burdens on this issue.<sup>36</sup> Assume that to avoid an adverse directed verdict on this issue, the plaintiff offers evidence in her case-in-chief that the defendant was driving in excess of the speed limit posted by a city ordinance. Since a reasonable jury could draw an inference that the defendant did not exercise the degree of care required under the circumstances, this evidence allows the plaintiff to get to the jury under the directed verdict standard on this issue. In a world without presumptions, the judge simply instructs the jury to return a verdict for the defendant unless the plaintiff convinces them by a preponderance of the evidence that the defendant failed to exercise the degree of care required under the circumstances.

Enter now the concept of negligence per se. The Evidence Code provides that the failure to exercise due care is "presumed" if the person violates an ordinance that, among other matters, is designed to prevent the kind of injuries suffered by the plaintiff.<sup>37</sup> Unlike the Thayer presumption, the Morgan presumption alters the burden of persuasion.<sup>38</sup> The burden shifts to the defendant to convince the jury by a preponderance of the evidence that he exercised due care, i.e., that his violation of the ordinance was reasonable and justified under the circumstances.<sup>39</sup>

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36. CAL. EVID. CODE §§ 521, 550.

37. *Id.* § 669(a).

38. *See id.* § 669.

39. *See id.* law revision commission's cmt.

This presumption does not alter the plaintiff's burden in proving the basic facts.<sup>40</sup> Since the presumed fact is one of the elements of the plaintiff's cause of action, the plaintiff must still establish the basic facts by at least a preponderance of the evidence. At the close of the evidence, the judge instructs the jurors to find the presumed fact (that the defendant was negligent) if they first find the basic facts by this standard. In addition, the judge instructs the jury to find for the plaintiff on this issue unless the defendant persuades them of the non-existence of the presumed fact by a preponderance of the evidence.<sup>41</sup>

The effects of the presumptions in examples Two and Three can be summarized as follows in an action in which the plaintiff must prove element B by a preponderance of the evidence and in which B is also a presumed fact:

Example—Thayer presumption: (1) If the plaintiff establishes the basic facts by a sufficiency standard, the judge must deny the defendant's motion for a directed verdict based on the absence of evidence of B. (2) If the defendant fails to introduce any evidence disproving B, then the judge instructs the jurors to find B if they first find the basic facts by the standard of persuasion that applies to the action. (3) But, if the defendant disproves B by a sufficiency standard, the judge says nothing to the jurors about the presumption.

Example—Morgan presumption: (1) If the plaintiff establishes the basic facts by a sufficiency standard, the judge must deny the defendant's motion for a directed verdict based on the absence of evidence of B. (2) If the defendant fails to introduce any evidence disproving B, then the judge instructs the jurors to find B if they first find the basic facts by the standard of persuasion that applies to the action. (3) But, if the defendant disproves B by a sufficiency standard, the judge directs the jurors to find B if they first find the basic facts by the appropriate standard, unless the defendant persuades them of B's nonexistence by the applicable persuasion standard.

Both Thayer and Morgan presumptions are advantageous to the party in whose favor they operate. The Morgan presumption is more beneficial, since it shifts to the opposing party the burden of disproving the presumed fact. Since their effects differ, it is important to dis-

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40. The basic facts are whether the defendant violated the ordinance and whether the violation contributed to or caused the plaintiff's injuries. *See id.* law revision commission's cmt. (explaining that whether the ordinance was designed to prevent the injury the plaintiff complains of and whether the plaintiff was among the class of persons for whose protection the ordinance was adopted are questions for the judge, not the jury).

41. *See id.* § 606 and assembly committee on judiciary's cmt.

tinguish whether a given presumption is of the first or second type. The Thayer presumption derives from California Evidence Code sections 603 and 604, the Morgan Presumption, from sections 605 and 606. Understanding the origin of these Code sections aids in distinguishing between the two types of presumptions.

## B. Distinguishing Between Rebuttable Presumptions

The two types of presumptions described in the previous section are known as rebuttable presumptions.<sup>42</sup> The opposing party is entitled to introduce evidence “rebutting” the presumed fact by offering evidence disproving the presumed fact. Returning to the second example introducing Thayer presumptions, the defendant could undermine the presumed fact (that the plaintiff’s acceptance was received in the ordinary course of mail) by evidence that he did not receive the acceptance.<sup>43</sup>

Over one hundred years ago, Professor James Thayer described the first kind of presumption, the one found in sections 603 and 604 of the Code. He believed that a presumption merely shifted to the opposing party the burden of producing evidence rebutting the presumed fact.<sup>44</sup> If the opposing party produced sufficient evidence to persuade the judge of the nonexistence of the presumed fact, then the presumption “burst” and the jury was told nothing about the presumption.<sup>45</sup> Half a century later, Professor Edmund Morgan challenged Thayer’s view of presumptions. Professor Morgan believed that presumptions should also shift to the opposing party the burden of persuading the jurors of the nonexistence of the presumed fact.<sup>46</sup> According to Professor Morgan, producing sufficient evidence of the nonexistence of the presumed fact was not enough; the jury should be

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42. See *id.* § 602 (“A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.”).

43. See *United Sav. & Loan Ass’n v. Reeder Dev. Corp.*, 129 Cal. Rptr. 113, 124 (Ct. App. 1976). The opponent can also attack the basic facts by evidence of their nonexistence. In the example above, the defendant could challenge the basic facts by evidence, for instance, that the plaintiff’s secretary admitted prior to the trial to having no recollection of having mailed the acceptance. As will be seen, however, introducing evidence of the nonexistence of the basic facts does not dispel (rebut) the presumed fact. Such evidence simply places upon the jury the burden of determining the existence of the basic facts. *Id.*

44. See JAMES THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 346 (1898); see also MCCORMICK ON EVIDENCE § 344 (John William Strong ed., 4th ed. 1992).

45. See THAYER, *supra* note 44, at 346 (explaining that when “other facts” rebutting the presumption are introduced, “[a]ll is then turned into an ordinary question of evidence, and . . . the rule of presumption has vanished”).

46. See EDMUND MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 80–81 (1956).

instructed to find the presumed fact unless persuaded otherwise by the opposing party under the appropriate persuasion standard.<sup>47</sup>

Unlike Professor Thayer, who viewed presumptions mainly as a device for allocating the burden of producing evidence supporting the existence or nonexistence of the presumed fact, Professor Morgan recognized that presumptions often reflect the considerations of fairness, policy, and probability that initially allocate the various elements of any case between the plaintiff's prima facie case and the defendant's affirmative defenses.<sup>48</sup> In his view, if these considerations warrant imposing the risk of nonpersuasion on the party with the burden of producing evidence on a given element, then those same considerations should place the risk of nonpersuasion on the party with the burden of producing evidence rebutting the presumed fact.<sup>49</sup>

Dean Charles McCormick noted that the kinds of presumptions Professor Morgan had in mind often advance desirable social goals, irrespective of whether the presumed fact has an underlying basis in probability and logical inference.<sup>50</sup> An example is the presumption that a person not heard from in five years is dead.<sup>51</sup> Though the presumption of death from a five-year absence may conflict with the inference that life continues for its normal expectancy, the policies favoring distributing estates, settling titles, and permitting life to proceed normally justify the presumption.<sup>52</sup>

Faced with two opposing views of presumptions, the framers of the California Evidence Code opted to adopt both. Sections 603–604 describe Thayer presumptions while sections 606–607 describe Morgan ones. Presumptions, however, whether created by statute or case law, do not usually indicate whether they come within Thayer's or Morgan's view. In the absence of an explicit classification, the judge must decide whether a given presumption is designed to promote some social policy (and hence is governed by sections 606–607) or merely to facilitate the allocation of the production burden with respect to the existence or nonexistence of the presumed fact (and hence is governed by sections 603–604).

According to the Law Revision Commission, section 603:

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47. *See id.*

48. *See id.*

49. *See id.*

50. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 827–28 (Edward Cleary ed., 2d ed. 1972).

51. CAL. EVID. CODE § 667 (West 1995).

52. *See id.* §§ 667 law revision commission's cmt., 605 law revision commission's cmt.

[P]resumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases . . . . Typical of such presumptions are the presumption that a mailed letter was received . . . and presumptions relating to the authenticity of documents . . . .<sup>53</sup>

Section 605 presumptions, on the other hand, are established to effectuate some public policy other than, or in addition to, facilitating the trial of actions.<sup>54</sup>

What makes a presumption one affecting the burden of [persuasion] is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of [persuasion] from a presumption affecting the burden of producing evidence . . . . Frequently, too, a presumption affecting the burden of [persuasion] will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the probability that most marriages are valid. However, an underlying logical inference is not essential. In fact, the lack of underlying inference is a strong indication that the presumption affects the burden of [persuasion]. Only the needs of public policy can justify the direction of a particular presumption that is not warranted by the application of probability and common experience to the known facts.<sup>55</sup>

To help parties and judges distinguish between section 603 (Thayer) and section 605 (Morgan) presumptions, the Code provides a list of common presumptions. Section 603 presumptions include the following: “[m]oney delivered by one to another is presumed to have been due to the latter”;<sup>56</sup> “[a] thing delivered . . . to another is presumed to have belonged to the latter”;<sup>57</sup> “[a]n obligation delivered up

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53. *Id.* § 603 law revision commission’s cmt.

54. *See id.* § 605 and law revision commission’s cmt.

55. *Id.* § 605 law revision commission’s cmt.

56. *Id.* § 631.

57. *Id.* § 632.

to the debtor is presumed to have been paid";<sup>58</sup> "[a] person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly";<sup>59</sup> "[a]n obligation possessed by the creditor is presumed not to have been paid";<sup>60</sup> "[t]he payment of earlier rent or installments is presumed from a receipt for later rent or installments";<sup>61</sup> "[t]he things which a person possesses are presumed to be owned by him";<sup>62</sup> "a person who exercises acts of ownership over property is presumed to be the owner of it";<sup>63</sup> "[a] judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined";<sup>64</sup> "[a] writing is presumed to have been truly dated";<sup>65</sup> "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail";<sup>66</sup> "[a] trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest";<sup>67</sup> "a deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it [i]s at least 30 years old; is in such condition as to create no suspicion concerning its authenticity; [w]as kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found, and [h]as been generally acted upon as authentic by persons having an interest in the matter";<sup>68</sup> "[a] book, purporting to be printed or published by public authority, is presumed to have been so printed or published";<sup>69</sup> "[a] book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases";<sup>70</sup> "[p]rinted materials, purporting to be a particular newspaper or periodical, are

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58. *Id.* § 633.

59. *Id.* § 634.

60. *Id.* § 635.

61. *Id.* § 636.

62. *Id.* § 637.

63. *Id.* § 638.

64. *Id.* § 639.

65. *Id.* § 640.

66. *Id.* § 641.

67. *Id.* § 642.

68. *Id.* § 643.

69. *Id.* § 644.

70. *Id.* § 645.

presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months";<sup>71</sup> the defendant in a personal injury action is presumed to have been negligent if the plaintiff establishes the conditions giving rise to the doctrine of *res ipsa loquitur*;<sup>72</sup> and the facts stated by a registered process server in his return are presumed to be true.<sup>73</sup>

Section 605 (Morgan) presumptions include the following: "[t]he owner of the legal title to property is presumed to be the owner of the full beneficial title";<sup>74</sup> "[a] ceremonial marriage is presumed to be valid";<sup>75</sup> official duties are presumed to have been regularly performed;<sup>76</sup> "[a] person is presumed to intend the ordinary consequences of his voluntary act";<sup>77</sup> any California or federal court or any court of general jurisdiction, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction when the act of the court is under collateral attack;<sup>78</sup> "[a] person not heard from in five years is presumed to be dead";<sup>79</sup> "an unlawful intent is presumed from the doing of an unlawful act";<sup>80</sup> the defendant in a personal injury action is presumed to have been negligent if the plaintiff establishes the conditions giving rise to the doctrine of negligence *per se*;<sup>81</sup> and any ordinance enacted by local government entities limiting the number of building permits for residential construction or changing the standard of residential development on vacant land is presumed to have an impact on the supply of residential units.<sup>82</sup>

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71. *Id.* § 645.1.

72. *See id.* § 646(c).

73. *See id.* § 647.

74. *Id.* § 662. This presumption can be rebutted only by clear and convincing evidence. *Id.*

75. *Id.* § 663.

76. *Id.* § 664. This presumption does not apply to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant. *Id.*

77. *Id.* § 665. *See Sandstrom v. Montana*, 442 U.S. 510 (1979), *remanded to* 603 P.2d 244 (Mont. 1979) (striking a similar presumption as unconstitutional); *see also infra* text accompanying note 112; CAL. EVID. CODE § 665 (explaining that this presumption is inapplicable in a criminal action to prove the specific intent of the accused where specific intent is an element of the offense charged).

78. *See* CAL. EVID. CODE § 666.

79. *Id.* § 667.

80. *Id.* § 668. *See infra* text accompanying note 112, for a discussion of the constitutionality of this presumption. This presumption is inapplicable in a criminal action to establish the accused's specific intent where that intent is an element of the crime charged. *Id.* § 668.

81. *See id.* § 669. *See id.* § 669.1 for additional limitations on this presumption.

82. *Id.* § 669.5. *See id.* for additional limitations on this presumption.

### C. Conclusive Presumptions

The California Evidence Code also recognizes the existence of conclusive presumptions.<sup>83</sup> These differ from rebuttable presumptions in one crucial respect: the judge must tell the jurors that if they find the basic facts by the requisite standard, they must find the presumed fact irrespective of the strength of the opposing evidence.<sup>84</sup>

In rare instances, however, courts decline to apply conclusive presumptions where doing so defeats the policies supporting them. An example is the presumption that, subject to certain limitations, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is the child of the marriage.<sup>85</sup> In *County of Orange v. Leslie B.*,<sup>86</sup> a biological father sought to use this presumption to avoid supporting his child. At the time he fathered the child, the mother was married to and living with another man who subsequently divorced her. Since the policies underlying the presumption—to preserve the integrity of the family unit, protect children from the legal and social stigma of illegitimacy, and promote individual rather than state responsibility for child support—would not be served by applying the presumption, the court declined to do so.<sup>87</sup>

Among the conclusive presumptions listed in the Code are the following: “[t]he facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest, [but not facts in] the recital of . . . consideration”;<sup>88</sup> “whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing [is] true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it”;<sup>89</sup> and “[a] tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.”<sup>90</sup>

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83. See *id.* §§ 601, 620.

84. See *id.* § 601 law revision commission's cmt. For examples of conclusive presumptions in criminal cases, see *infra* note 114.

85. See CAL. FAM. CODE §§ 7540–41 (West 1994). CAL. EVID. CODE § 621 created this exception. It was repealed in 1994 and placed in the Family Code without substantive change.

86. 17 Cal. Rptr. 2d 797 (Ct. App. 1993).

87. See *id.* at 801; see also *Comino v. Kelley*, 30 Cal. Rptr. 2d 728, 731 (Ct. App. 1994) (refusing to apply the presumption where the mother sought to have the presumption applied against her husband in order to defeat the claims of the biological father who was the only father the child knew).

88. CAL. EVID. CODE § 622.

89. *Id.* § 623.

90. *Id.* § 624.



The last two examples aptly illustrate the Law Revision Commission's observation about conclusive presumptions: they "are not evidentiary rules so much as they are rules of substantive law."<sup>91</sup>

#### D. Presumptions Under the Federal Rules

As submitted by the United States Supreme Court, the Federal Rules of Evidence adopted Morgan's view of presumptions in civil cases.<sup>92</sup> The original rule placed on "the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it."<sup>93</sup> The Advisory Committee favored Morgan over Thayer presumptions on the ground that Thayer presumptions accorded "presumptions too 'slight and evanescent' an effect."<sup>94</sup> But Congress changed the recommended rule and instead adopted a variant of Thayer's view of presumptions. Federal Rule of Evidence 301 "imposes on the party against whom [the presumption] is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."<sup>95</sup>

But the instructions given to the jury about the effect of the presumption differ from those given under the Code with respect to Thayer presumptions. In California, if the opponent disproves the presumed fact by a sufficiency standard, the presumption disappears, and the judge will tell the jury nothing about the presumption.<sup>96</sup> But under the Federal Rules, the judge may "instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts."<sup>97</sup> In effect, the judge is permitted to treat a rebutted presumption as an inference.<sup>98</sup> Where the opponent fails to produce evidence rebutting the presumption, California judges will instruct the jurors to

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91. *Id.* § 620 law revision commission's cmt.

92. FED. R. EVID. 301 report of senate committee on the judiciary.

93. *Id.*

94. *Id.* advisory committee's note, deleted and superseded materials (West 2002-03). The Uniform Rules of Evidence also adopt Professor Morgan's view of presumptions. See UNIF. R. EVID. 302(a) ("In a civil action or proceeding, unless otherwise provided by statute, judicial decision, or these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.").

95. FED. R. EVID. 301.

96. See *supra* text accompanying note 34.

97. FED. R. EVID. 301 conference report.

98. See *supra* text accompanying note 31 for a discussion of inferences.

find the presumed fact if they first find the basic facts by the appropriate persuasion standard.<sup>99</sup> Federal judges, however, give a more limited instruction. They will instruct the jurors that they "may presume the existence of the presumed fact" if they find the basic facts.<sup>100</sup> The use of the permissive "may" might suggest to some that an inference is intended and not a Thayer presumption, despite the use of the term "presume."

Rule 301 presumptions apply in all civil actions and proceedings unless a different presumption is prescribed by an Act of Congress or the Rules.<sup>101</sup> An Act of Congress can include presumptions created by courts construing federal statutes.<sup>102</sup> Rule 301 presumptions may not apply to cases governed by *Erie*.<sup>103</sup> Rule 302 provides that "the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law."<sup>104</sup>

### E. Comparison of California and Federal Presumptions

California should retain its approach to presumptions. The Advisory Committee was wrong in rejecting the utility of Thayer presumptions. They are useful in dispensing with unnecessary proof of facts that are likely to be true as a matter of logic if not disputed.<sup>105</sup> Similarly, Congress was mistaken in rejecting Morgan presumptions and opting instead for a modified form of Thayer presumptions. Courts, and especially legislatures, should be free to create presumptions that advance public policy. The Code recognizes that presumptions are created for a variety of reasons and that "no single theory or rationale of presumptions can deal adequately with all of them."<sup>106</sup>

Allowing both types of presumptions does raise the problem of distinguishing between them. It may not always be readily apparent to the parties and the judge whether a presumption has been "established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is"

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99. See *supra* text accompanying note 33.

100. See FED. R. EVID. 301 conference report.

101. See *id.* R. 301.

102. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), for an example of the Morgan type presumption created by the United States Supreme Court in disparate impact cases brought under Title VII of the 1964 Civil Rights Act.

103. See *Erie v. Tompkins*, 304 U.S. 64 (1938).

104. FED. R. EVID. 302.

105. See CAL. EVID. CODE § 604 assembly committee on judiciary's cmt. (West 1995).

106. *Id.* § 601 law revision commission's cmt.

invoked.<sup>107</sup> But the cases construing the Code do not disclose reasons for undue concern. It may be that the Code's useful listing of common Thayer and Morgan presumptions has substantially reduced the potential for disputes in distinguishing between the two kinds of presumptions.

The Code's approach to presumptions is flawed in one respect. In defining Morgan presumptions, section 605 uses the term "burden of proof"<sup>108</sup> to mean the "burden of persuasion." As mentioned above,<sup>109</sup> the burden of proof consists of two distinct burdens—the burden of producing evidence and the burden of persuasion.<sup>110</sup> Practitioners who are unaware of the Code's unusual use of the term might be misled into believing that "burden of proof" refers to both burdens. As has been suggested, clarity can be achieved by including a new section which defines the burden of proof as consisting of both the production and persuasion burdens and by substituting "burden of persuasion" in each instance in which the Code uses "burden of proof" to refer to this burden.<sup>111</sup>

## F. Presumptions in Criminal Cases

When the United States Supreme Court held in *In re Winship* that due process requires the prosecution to prove the accused's guilt beyond a reasonable doubt, the Court laid the basis for a constitutional attack on any presumption that threatens to lighten the prosecution's burden of proof.<sup>112</sup> Thus far, the Court has struck two kinds of presumptions as unconstitutional—conclusive presumptions and rebuttable Morgan presumptions.<sup>113</sup>

Conclusive presumptions are unconstitutional because they relieve the prosecution from proving the presumed fact beyond a rea-

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107. *Id.* § 605.

108. *Id.* § 606.

109. *See supra* text accompanying note 21.

110. *See id.*

111. Sections that would have to be amended in the California Evidence Code include section 601 (classifying presumptions), section 605 (defining Morgan type presumptions), section 606 (describing the effect of Morgan type presumptions), and section 607 (describing the effect of Morgan type presumptions in criminal cases). In addition, the comments to sections 601, 603, 605, and 606 also need to be changed in each instance in which "burden of proof" refers to "burden of persuasion."

112. *See In re Winship*, 397 U.S. 358, 364 (1970).

113. For a discussion of the nature of conclusive presumptions, see *supra* text accompanying note 83; of Morgan presumptions, see *supra* text accompanying note 36.

sonable doubt.<sup>114</sup> They impermissibly withdraw the issue of the existence of the presumed fact from the jury<sup>115</sup> and prevent the accused from raising a reasonable doubt about the existence of the presumed fact.

For example, assume that an offense consists of elements A and B. If the judge instructs the jurors that if they find A, they must find B, then the prosecution is relieved of its *Winship* obligation of proving B beyond a reasonable doubt. The jurors are not given an opportunity to determine the existence of B, and the accused is prevented from winning an acquittal by raising a reasonable doubt about the existence of B. Instructing the jurors that they must first find A beyond a reasonable doubt will not cure the constitutional infirmity. The prosecution is still relieved of its *Winship* burden of proving B beyond a reasonable doubt; the jurors are still denied a chance to consider the existence of B; and the accused is still deprived of an opportunity to raise a reasonable doubt about the existence of a fact essential to conviction.<sup>116</sup>

Rebuttable presumptions of the Morgan variety have also been declared unconstitutional by the United States Supreme Court.<sup>117</sup> Assume again that an offense consists of elements A and B. If the judge instructs the jurors that if they find A, they must find B unless the accused disproves B at least by a preponderance of the evidence, then the presumption shifts the burden of disproving an element of the

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114. See *Carella v. California*, 491 U.S. 263, 266 (1989), *reh'g denied*, 492 U.S. 937 (1989). The United States Supreme Court struck as unconstitutional two California conclusive presumptions. One presumption required the jurors to find that a person intended to commit theft by fraud if, following the expiration of the lease or rental agreement, the person failed to return leased or rented personal property within twenty days after the owner demanded its return by certified or registered mail; the other required the jurors to find that a lessee embezzled a vehicle if the lessee willfully or intentionally failed to return the vehicle to its owner within five days of the expiration of the lease or rental agreement. *See id.* at 264-66; *see also Sandstrom v. Montana*, 442 U.S. 510, 523 (1979), *remanded to* 603 P.2d 244 (Mont. 1979). The presumption stricken in *Sandstrom* provided that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, 442 U.S. at 512. *Cf.* CAL. EVID. CODE § 665 ("A person is presumed to intend the ordinary consequences of his voluntary act.").

115. See *Carella*, 491 U.S. at 266.

116. See *People v. Forrester*, 37 Cal. Rptr. 2d 19, 21 (Ct. App. 1994), for an example of a conclusive presumption stricken as unconstitutional by the California Supreme Court, where the court disapproved a presumption that required the jurors to find that a defendant who fails to appear within fourteen days of the date assigned for his or her appearance intends to evade the process of the court.

117. See *Sandstrom*, 442 U.S. at 523. In *Sandstrom*, the Court referred to Morgan type presumptions as "mandatory presumption[s]." *Id.* at 515. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Court used the term "mandatory presumptions" to refer to Morgan type and conclusive presumptions. *See id.* at 314 n.2.

offense to the accused. As the Court held in *Sandstrom v. Montana*, *Winship* is violated because the prosecution is relieved of proving B beyond a reasonable doubt.<sup>118</sup> *Winship* is also violated because the accused is burdened with disproving B by a standard higher than that of merely raising a reasonable doubt about the existence of the presumed fact.

So long as the presumption requires the accused to disprove B by at least a preponderance of the evidence, instructing the jurors that they must find B beyond a reasonable doubt will not remedy the problem. Such instructions would be hopelessly conflicting. Belief beyond a reasonable doubt necessarily vanishes when the fact-finder entertains a reasonable doubt about the matter.

The California Supreme Court has applied *Sandstrom* broadly. The courts have held that the presumption is not saved even when the jurors are informed that the accused's only obligation is to raise a reasonable doubt about the existence of the presumed fact.<sup>119</sup> Jurors might construe such an instruction as compelling them to find the presumed fact as a matter of law when the accused fails to offer evidence rebutting the presumed fact, and as a logical matter, the basic facts do not compel the finding of the presumed fact.<sup>120</sup> As the California Supreme Court stressed in *People v. Roder*, "[i]f that was the jury's understanding, the presumption would not have operated merely as a permissive inference."<sup>121</sup>

In *Roder*, the court, in effect, construed California Evidence Code section 607 as creating merely permissive inferences.<sup>122</sup> Section 607 provides:

When a presumption affecting the burden of [persuasion] operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.<sup>123</sup>

To prevent jurors from being compelled to find the presumed fact as a matter of law if the accused fails to introduce evidence disproving the presumed fact, the judge should tell the jurors only that

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118. See *Sandstrom*, 442 U.S. at 523-24.

119. *People v. Roder*, 658 P.2d 1302, 1311 (Cal. 1983).

120. See *id.*

121. *Id.*

122. *Id.* at 1309 & n.11.

123. CAL. EVID. CODE § 607 (West 1995).

they may find the presumed fact from the basic facts. The permissive language would thus reduce the presumption to a permissive inference. Instructions on permissive inferences can satisfy federal due process requirements if the inference meets certain sufficiency standards.<sup>124</sup>

The United States Supreme Court has not ruled directly on the constitutionality of Thayer type presumptions.<sup>125</sup> These require the judge to instruct the jurors to find the presumed fact if they find the basic facts but only if the opponent fails to introduce any evidence contradicting the presumed fact.<sup>126</sup> Though the matter was not presented in these terms in *Roder*, the court's language embraces this kind of presumption. Such a presumption could compel the jurors to find the presumed fact as a matter of law even if the basic facts do not compel a finding of the presumed fact beyond a reasonable doubt. Clearly, such a presumption would not operate "merely as a permissive inference."

**California presumptions: competency to stand trial and insanity.** Under the California Penal Code, a person who is "mentally incompetent" cannot be tried on a criminal charge.<sup>127</sup> A person is mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."<sup>128</sup> The burden of persuasion on the issue of competency is placed on the defendant: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent."<sup>129</sup>

In *Medina v. California*,<sup>130</sup> the United States Supreme Court upheld the constitutionality of this presumption. Since the issues de-

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124. The probative value of the circumstantial evidence giving rise to the inference must be such as to move a reasonable juror to find the inference beyond a reasonable doubt. See MENDOZ, *supra* note 21, § 18.09.

125. *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979), *remanded to* 603 P.2d 244 (Mont. 1979) (finding it unnecessary to pass on Thayer type presumptions). *But see* *Francis v. Franklin*, 471 U.S. 307, 314 (1985). Language in *Francis* could be construed to prohibit instructing juries on Thayer type presumptions where the accused fails to rebut the presumed fact: "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Id.*

126. If the opponent introduces evidence contradicting the presumed fact, then the judge will say nothing to the jury about the presumption. For an extended discussion of Thayer presumptions, see *supra* text accompanying note 33.

127. CAL. PENAL CODE § 1367 (West 2000).

128. *Id.*

129. *Id.* § 1369(f).

130. 505 U.S. 437 (1992), *reh'g denied*, 505 U.S. 1244 (1992).

cided at a competency hearing are separate from those determined at the trial on the issue of guilt, the concerns raised by *Winship* and *Sandstrom* are not implicated. The focus is not on whether the procedures governing competency hearings relieve the prosecution from proving the elements of the offense beyond a reasonable doubt but on whether the procedures satisfy due process. Because the California procedures entitle the defendant to the assistance of counsel and require the use of psychiatric evidence to determine the defendant's mental condition,<sup>131</sup> the *Medina* Court found that the Penal Code provisions were "constitutionally adequate" to guard against trying an incompetent defendant.<sup>132</sup>

The Evidence Code places upon the "party claiming that any person, including himself, is or was insane . . . the burden of proof on that issue."<sup>133</sup> The Penal Code, in turn, places upon the accused the burden of proving his or her insanity by a preponderance of the evidence.<sup>134</sup> Placing the burden of persuasion on the accused does not violate due process so long as the jury first finds that all of the elements of the offense have been proven beyond a reasonable doubt.<sup>135</sup>

The Penal Code provides that during the guilt phase the accused is to be "conclusively presumed" to have been sane at the time the offense was allegedly committed.<sup>136</sup> This presumption does not violate *Winship* since it does not relieve the prosecution from proving the mens rea of the offense beyond a reasonable doubt and does not preclude the accused from offering evidence of mental disorders to disprove the existence of the mens rea.<sup>137</sup>

**Federal criminal presumptions.** As submitted by the United States Supreme Court, the Federal Rules of Evidence had a provision on criminal presumptions that, among other matters, required the judge to instruct the jurors to disregard the presumed fact if it established guilt or an element of the offense, or disproved a defense, unless the jurors found from all the evidence the presumed fact beyond a reasonable doubt.<sup>138</sup> The House Committee on the Judiciary deleted this rule because of its intention to study criminal presumptions in con-

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131. *See id.* at 450.

132. *Id.* at 453.

133. CAL. EVID. CODE § 522 (West 1995).

134. *See* CAL. PENAL CODE § 25(b).

135. *See* *Leland v. Oregon*, 343 U.S. 790, 799 (1952), *reh'g denied*, 344 U.S. 848 (1952).

136. CAL. PENAL CODE § 1026(a).

137. *Id.*

138. FED. R. EVID. 303 deleted and superseded materials.

nection with several bills on revising the federal criminal code.<sup>139</sup> The Senate concurred with the House deletion.<sup>140</sup>

With some changes in the language, the Uniform Rules of Evidence adopted the provision submitted by the United States Supreme Court.<sup>141</sup>

### III. Recommendations

First, the California Evidence Code should retain provisions defining and allocating the production and persuasion burdens, in spite of the fact that the Federal Rules do not contain any provisions concerning these matters. The Code's provisions provide useful guidance to the bench and bar.

Second, the Code's current use of the term "burden of proof" to refer only to the burden of persuasion should be discontinued since it causes uncertainty in terminology. Rather, the Code should employ the term "burden of persuasion" whenever the reference is to this burden.

Third, the Code's provisions regarding presumptions should be retained. The Federal Advisory Committee was wrong in rejecting Thayer type presumptions, and Congress was mistaken in rejecting Morgan type presumptions, opting instead for a variant of Thayer presumptions. The Code recognizes the distinct advantages offered by both Thayer and Morgan presumptions.

Finally, section 607, which governs presumptions in California criminal cases, should either be deleted as unnecessary given the United States Supreme Court's decisions on presumptions or be rewritten to create only a permissive inference as prescribed by the California Supreme Court in *Roder*.

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139. *Id.* report of house committee on the judiciary.

140. *Id.*

141. *See* UNIF. R. EVID. 303.