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CONSTITUTIONAL LIMITS ON CRIMINAL PRESUMPTIONS AS AN EXPRESSION OF CHANGING CONCEPTS OF FUNDAMENTAL FAIRNESS

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Many puzzle-loving lawyers have been drawn into the intricacies of the law of burdens of proof, presumptions and inferences. Even though this area of the law determines the outcome of comparatively few disputes, these topics are extraordinarily interesting because they are vehicles for discussing two issues basic to the justice system. The first is how decision-making power should be divided between the judge and the jury. The second is who should lose if some disputed fact is not clear.

Allocations of the burdens of proof and presumptions have been challenged under the federal Constitution since the nineteenth century.[1] Although some of the cases were civil, the majority, especially since the mid-1960s, have been criminal. These cases do not address directly the two issues described above, but they deal with related questions. Sometimes the Supreme Court and scholars have used presumption cases to discuss the nature of legislative, as opposed to judicial, authority to determine how a trial should be conducted. In particular, statutory presumptions have been challenged as usurping the trial judge's authority to determine when a party has presented sufficient evidence to get to the jury. The Court and the commentators have also used cases regarding the weight and

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1 Agnew v. United States, 165 U.S. 36 (1896); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Marx v. Hanthorn, 148 U.S. 172 (1893).

allocation of the burdens of proof and presumptions to discuss indirectly limits on substantive law, particularly criminal law.

The purely evidentiary aspects of the law of burdens of proof and presumptions is complicated enough; when the constitutional complexities are added, confusion often follows. Efforts to understand how courts have handled the constitutional issues solely in terms of doctrine or the relationships between the legislature, judges and juries are frustrating and unsatisfactory. The cases and commentary about constitutional limits on presumptions are best understood as expressions of, and factors in, the creation of the changing concept of what due process is all about. The purposes of this article are to sketch the relationship between the limits on presumptions and the meaning of due process over the twentieth century and within this framework to analyze a half dozen cases decided by the Supreme Court since 1975. These cases significantly reform the constitutional limits on the allocation of the burdens of proof, presumptions and inferences in criminal cases.

First this article uses evidence law concepts to provide a background for the constitutional discussion that follows. It defines terms and describes the relationship of presumptions and inferences to the burdens of proof and how courts and legislatures have traditionally used these devices to reshape the substantive law and alter the distribution of power between the judge and jury.

The next section traces the development of the constitutional law of presumptions and of burdens of proof through the early 1970s. The third section concludes that the most recent Supreme Court cases about presumptions, decided in the late 1970s and early 1980s, mean that in criminal cases legislatures may no longer enact statutory presumptions to satisfy or reallocate the burden of production or persuasion. The only effect that a statute which purports to create a presumption may have is to call attention to an inference that might be drawn from evidence. The cases have, however, left largely intact legislative authority to determine what factors are relevant to criminal liability and which party shall bear the burdens of proof on each factor.

Since the late 1960s the cases and commentators have based discussions of burdens of proof and presumptions on how they affect the trial's fact-finding function and the requirement of proof beyond a reasonable doubt in criminal cases. The final section of this article argues that the changes in the law that have resulted from this emphasis will have little effect on the resolution of the vast majority of criminal cases. The importance of these changes lies in their contribution to the prevailing vision of the meaning of due

process. Recent cases are part of a larger pattern of efforts to provide assurance that the criminal justice system is good at convicting only factually guilty people. While protecting innocent people from conviction has always been important, this goal is now particularly emphasized because of the increasingly harsh manner in which persons accused and convicted of crime are treated by the criminal justice system.[2] The discussions of the technical details of burdens of proof, presumptions and inferences are addressed to lawyers themselves and are designed to help convince them that most convicted persons are treated fairly and are in fact guilty.

I. Burdens Of Proof and Evidentiary Devices that Affect Them

Two very basic issues are often discussed under the rubric of who should bear the burdens of production and persuasion and whether the burdens have been satisfied. The first is how decision-making power should be distributed between the judge and the jury, and the second is what the content of the underlying substantive law should be. Understanding the changing constitutional law of presumptions requires understanding how the two burdens of proof work and how two evidentiary devices, presumptions and inferences, may affect them.

The party who bears the burden of production must produce enough evidence to satisfy that burden to get to the jury. If the evidence is insufficient, the judge will direct a verdict against that party.[3] The party who bears the burden of persuasion will lose the case if the factfinder is not convinced of the correctness of that party's assertions.[4]

A presumption is a rule of law requiring that once some fact (a "basic" or "proven" fact) is established, some other fact at issue (the "presumed" fact) must be deemed true, at least provisionally.[5] In contrast, an inference is not a rule of law but rather is just a conclusion that may or may not be drawn that some fact is probably true. Whether such a conclusion is warranted depends on the persuasiveness of the evidence. Presumptions may be logical inferences that have hardened into law, or they may call for conclusions that are only plausible or even illogical, based on the evidence presented. Courts and legislatures create the latter kind of pre-

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[2] *See infra* text accompanying notes 222-31.

[3] C. McCormick, Handbook of the Law of Evidence § 336 at 947 (3d ed. 1984).

[4] 4 J. Wigmore, Evidence § 2487 at 3526 (1905).

[5] McCormick on Evidence, *supra* note 3, § 342 at 965.

sumptions expressly for the sake of manipulating one of the burdens of proof.

The remainder of this part will explain how presumptions and inferences may affect the burdens of proof and consequently, either the distribution of decision-making power between judge and jury or the content of the underlying substantive law.

A. EFFECT ON THE RELATIVE POWER OF JUDGE AND JURY

A presumption can expressly alter the allocation of decision-making power between the judge and jury. Rules that define whether and how the judge may tell the jury about presumptions and inferences also affect this balance of power.

The authority to resolve factual disputes is divided between the judge and jury initially by the substantive law, which determines who bears the burden of production on each issue. The judge decides whether a party has satisfied this burden. Once this burden is satisfied, the power to resolve the factual dispute moves to the jury. As a part of determining whether the burden has been satisfied, the judge draws inferences from the evidence.

In contrast, of its own force a presumption at least satisfies the burden of production of the party in whose favor it runs. The judge has no authority to withhold a case from the jury on the grounds that there is insufficient evidence to support the presumed fact. Ordinarily a presumption additionally shifts the burden of production to the opposing party. If so, the judge is obligated to direct a verdict in favor of the party benefitted by the presumption unless the opposing party produces enough evidence to rebut the presumption.[6] In some jurisdictions a presumption may also shift the burden of persuasion to the opponent of the party in whose favor it runs. Since a shift of the burden of persuasion necessarily involves a shift of the burden of production, such a presumption also alters the relative roles of judge and jury.

Whether and how the judge tells the jury about presumptions and inferences also affects the relative decision-making power of judge and jury. In the early nineteenth century the jury in a criminal case was commonly permitted to determine questions of law as well

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[6] An inference alone does not formally shift the burden of production, but as a practical matter instructions about inferences do alter the relative burdens of the parties. For a discussion of the effects of jury instructions, see *infra* text accompanying notes 7-10. *See also* Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 326-39 (1980)(discussion of the prosecution and defense's relative burdens of persuasion and the effect of judicial comments, presumptions and inferences on them).

as fact.[7] This gave way to the present-day rule that judges determine the law and instruct the jury on it, with the accompanying formal expectation that the jury will follow the judge's instructions.[8]

Juries are always instructed on the allocation and weight of the burden of persuasion, which means that juries are routinely instructed on presumptions that shift the burden of persuasion. Ordinarily the jury is not told about allocation of the burden of production, since the judge would not have sent the case to the jury if it had not been satisfied. Jurors may, however, hear about a presumption that only shifts the burden of production if the basic fact on which the presumption depends is itself in dispute.[9]

In some jurisdictions the judge may also instruct the jury on the inferences it is permitted to draw. Some such instructions, like presumption instructions, are abstract and standardized. Others are ad hoc and tailored to the particular facts, in which case they are a form of comment on the evidence. Neither purports to bind the jury, but both are intended to, and probably do, make it more likely that the jury will draw the suggested conclusion, as instructions about presumptions also do.[10]

Since the late 1800s the way that the judge instructs the jury has changed, moving from commentary in layperson's language tailored to the facts of the case to the current standardized, abstract, dry and boring instructions.[11] This development has tended to min-

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[7] *See* Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507, 524-25 (1975). Until 1835 judges in federal courts told jurors that they were the judges of law and fact in criminal cases, not bound by the court's opinion. Howe, *supra* at 589. *See also* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 107[01] (1986).

[8] *See* Sparf v. United States, 156 U.S. 51 (1895), in which the Supreme Court for the first time clearly concluded that in federal court, the criminal jury is obligated to follow the judge's directions on matters of law.

[9] For discussions of the wording of jury instructions about presumptions and burdens of proof see Morgan, *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939)[hereinafter Morgan, *Use of Presumptions*]; Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933)[hereinafter Morgan, *Instructing the Jury*].

[10] Recent empirical studies suggest that juries may not understand many instructions because of how they are phrased, their abstraction and their use of jargon. *See, e.g.*, Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982). *See also* J. FRANK, LAW AND THE MODERN MIND 181 (1930). Because empirical research on juries while they are actually functioning is prohibited, the correspondence of these studies with reality can always be questioned, but information about how juries actually work is unobtainable. This feature make debates about the effect of jury instructions a particularly attractive device for discussing indirectly other issues.

[11] L. FRIEDMAN & R. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN

imize the amount of control the judge has over the jury.[12] In the federal courts and in some states judges retain the power to make comments tailored to the facts of the case,[13] but this power is rarely used.[14]

B. EFFECT ON THE UNDERLYING SUBSTANTIVE LAW

A presumption that shifts either the burden of production or persuasion on some element of a party's case redefines the parties' cases, at least provisionally or conditionally.[15] For example, assume that illegal importation is an element of the government's case and that illegal importation is rebuttably presumed from proof of the defendant's possession.[16] When the prosecutor proves possession, illegal importation is deleted from the government's case, and legal importation becomes something for the defendant to prove.[17] When, if ever, the obligation to prove the importation's illegality will shift back to the prosecution depends on whether the presump-

ALAMEDA COUNTY, CALIFORNIA 1870-1910 186-93 (1981). Commentators have argued that the elimination of the judge's power to comment on the evidence was a powerful incentive for extending the use of presumptions. *See, e.g.*, Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 703, 719 n.103 (1942).

12 The desire to limit the judge's power is explicit in the no comment on the evidence cases. J. WEINSTEIN & M. BERGER, *supra* note 7, at ¶ 107[01]. McCormick said that instructions on presumptions complied with the no comment on the evidence rule because they were abstract and general and therefore were free of any suggestion that the judge was giving his own opinion. However, he also acknowledged the difficulty of determining when an inference changes from being permissible, and thus a comment, to a presumption, and thus a rule of law. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 665-68 (1954). A second reason for abstract, standardized statements to the jury is that jury instructions are a ripe ground for appellate review, though in times of few criminal appeals this may be only of marginal importance. L. FRIEDMAN & R. PERCIVAL, *supra* note 11, at 188.

13 *See* 1 J. WEINSTEIN & M. BERGER, *supra* note 7, at ¶ 107[01], n.15.

14 *Id.* at ¶ 107[01].

15 Over the years a number of authors have observed that judges use presumptions to change the substantive law. *See, e.g.*, Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 24 (1959); Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, (1930); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 339 (1952); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 909 (1930)[hereinafter Morgan, *Observations Concerning Presumptions*]. *See also* Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 169 (1969).

16 *See* Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969). The Court did not construe the presumption as shifting the burden of persuasion to the defendant in either *Leary* or *Turner*. *See Turner*, 396 U.S. at 405-06, 420-23; *Leary*, 395 U.S. at 37.

17 In *Turner*, the Court acknowledged that from the defendant's point of view the presumption turned the crime into possession, but denied that it redefined the crime. *Turner*, 396 U.S. at 405-09. *See also* United States v. Bailey, 444 U.S. 394 (1979)(rejecting argument that a claim of duress or necessity negates an element of the crime of escaping from prison).

tion merely shifts the burden of production or also the burden of persuasion.[18] If only the production burden is shifted, as soon as the defendant produces some evidence of legality the obligation returns to the prosecutor. If the burden of persuasion is shifted, it will not return to the prosecutor. Sometimes presumptions have more complex results. If the fact on which the presumption rests, in this example possession, is itself an element of the government's case,[19] the presumption has the effect just described. If possession were not an element, however, the government's case would be redefined so that, at least initially, it could choose to prove either illegal importation or possession.[20]

Neither comments on the evidence nor instructed inferences alter the substantive law. Indeed, as part III *infra* discusses, statutory presumptions are today sometimes treated as inferences to avoid the constitutional problems that arise if a presumption shifts the burden of persuasion. Until the late 1960s, however, inferences and comments on the evidence were considered to be only tangentially related to presumptions because they are not rules of law, and both scholars and the courts were concerned with presumptions as law.[21]

Often it is not clear whether a presumption's creator intended it to satisfy the burden of production only, to shift and satisfy it, or further to shift the burden of persuasion. Most of the scholarly literature about presumptions in the twentieth century has been devoted to this question.[22] Interpretation of a presumption is a matter of

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[18] A presumption that shifts the burden of persuasion to a criminal defendant on an element of the prosecution's case today is considered unconstitutional. *See infra* text accompanying notes 104-16. Whether a presumption can shift the burden of production on an element of the crime to the defendant is debatable; at the very least, failure to satisfy such a burden cannot result in a directed verdict against the defendant. *See infra* text accompanying notes 152-54.

[19] *See Turner*, 396 U.S. 398 (1970); *Leary*, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943).

[20] *See, e.g.*, Ulster County Court v. Allen, 442 U.S. 140 (1979). For a discussion of *Ulster Court County* see *infra* text accompanying notes 120-30. The presumption of possession from presence in a car containing a gun effectively meant that the prosecutor could prove in its case-in-chief either possession of a gun or presence in a car that contained a gun. If it chose the latter route, the defendant could escape liability by showing that he did not possess the gun. *See infra* note 117.

[21] For this reason, until the recent changes in how presumptions are understood, it would not have made sense to question whether a presumption improperly invaded the domain of the jury. This issue was raised under the rubric of judicial comments on the evidence. McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions*, 13 WASH. L. REV. 185, 187-88 (1938); Morgan, *Instructing the Jury*, *supra* note 9, at 68. Though jury instructions about presumptions and comments on the evidence are related, instructions were ancillary to the basic law of presumptions and comparatively unimportant. *Id.*

[22] In essence, this is the great Thayer-Morgan debate, with all its ancillary issues, that occupied evidence scholars from the 1930s until well into the 1960s. Representative of

local law not determined by the federal Constitution. The Constitution's due process clauses may, however, invalidate presumptions in certain situations, as the next section will discuss.

II. The Changing Due Process Test For Presumptions

The test for the constitutional validity of presumptions is an expression of, and therefore has varied with, the Supreme Court's changing conception of the meaning of due process, "fundamental fairness."

Understanding the development of the constitutional law of presumptions is difficult because the cases and commentators often take fundamentally different approaches without making their perspectives clear and without acknowledging the different perspectives of their predecessors. This problem manifests itself in discussions of three basic questions.

The first involves the identity of what underlying issue is in dispute. There are two different groups of cases, each assuming that a different issue is key. In one group of cases, always involving statutory presumptions, a party claims that by enacting a presumption which satisfies or shifts a burden of proof the legislature has exceeded its authority to determine when evidence is sufficient to prove some fact.[23] In the other line of cases, which may concern statutory or common law presumptions, the issue is the fairness of

this debate are the following: Morgan, *Observations Concerning Presumptions*, *supra* note 15; Morgan, *Use of Presumptions*, *supra* note 9; Morgan, *Instructing the Jury*, *supra* note 9; Morgan & McGuire, *Loding Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937); McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519 (1938); Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); Reaugh, *supra* note 11; Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245 (1943) [hereinafter, Morgan, *Further Observations on Presumptions*]; Gausewitz, *supra* note 15; Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); McNaughton, *Burden of Production Evidence: A Function of Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955); Stumbo, *Presumptions—A View of Chaos*, 3 WASHBURN L.J. 182 (1964). The debate continues today. *See* Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C.L. REV. 697 (1984).

[23] Statutory criminal presumptions have been enacted in waves throughout the century as aids to the prosecutor. Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17 (1930); Chamberlain, *Presumptions as First Aid to the District Attorney*, 14 A.B.A.J. 287 (1928)(especially important where prosecution must prove defendant's state of mind); O'Toole, *Artificial Presumptions in the Criminal Law*, 11 ST. JOHN'S L. REV. 167 (1937)(also concerns statute similar to the one construed in *Ulster County Court*); Note, *Statutory Presumptions as Devices to Facilitate the Proof of Crimes*, 28 COLUM. L. REV. 489 (1928)(includes discussion of statute very similar to the one construed in *Ulster County Court*, which the author approved because it was aimed at a dangerous class of persons so that the benefit justified the slight imposition on the innocent); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702 (1967).

allocating a burden of proof to the defendant.[24] The two groups of cases have not developed as separate, distinct lines; instead, the Supreme Court has moved from one issue to the other, often without making the shift clear.

The second question is what justifies the creation of a presumption, either statutory or common law. Through the years evidence scholars have argued that presumptions may be created for reasons unrelated to the factual likelihood that the presumed fact follows from the proven fact.[25] However, the first due process challenges to presumptions assumed that they purported to be logical inferences. In the early part of the century alternate interpretations of why presumptions are created appeared in the due process cases, but the presumption-as-standardized-inference interpretation has dominated since the 1940s.

The third question is whether the Constitution requires a different treatment of presumptions in criminal cases and, if it does, why. For the first several years of this century courts and commentators usually did not see the problem of imperfect fact-finding as significantly different in civil and criminal cases.[26] By the 1930s they drew

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24 Other unsuccessful constitutional challenges to presumptions have also been made. *See, e.g.*, United States v. Gainey, 380 U.S. 63 (1964)(trial by jury, privilege against self-incrimination); Yee Hem v. United States, 268 U.S. 178 (1925)(privilege against self-incrimination); Adams v. New York, 192 U.S. 585 (1904)(right to jury trial and prohibition of bills of attainder). *See generally* Brosman, *The Statutory Presumption (II)*, 5 TUL. L. REV. 178 (1930)(courts have rejected challenges based on right to jury trial, equal protection clause, presumption of innocence and privilege against self-incrimination).

Attacks on conclusive presumptions have usually succeeded because they deny a party a right to a hearing. Vlandis v. Kline, 412 U.S 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Carrington v. Rash, 380 U.S 89 (1965); Heiner v. Donnan, 285 U.S. 312 (1932). *See also* Sandstrom v. Montana, 442 U.S. 510 (1979); United States v. United States Gympsum Co., 438 U.S. 422 (1978); Morissette v. United States, 342 U.S. 246 (1952). This is so even though many commentators have said that conclusive presumptions are really substantive rules in disguise and should be analyzed as such. C. MCCORMICK, *supra* note 12, at 640 n.2; MCCORMICK ON EVIDENCE, *supra* note 3, at 804; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 539 (1898); 4 J. WIGMORE, *supra* note 4, at 2492; 9 WIGMORE'S EVIDENCE § 2492 at 307 (Chadbourn rev. 1981); Brosman, *supra* note 23, at 18, 40; Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect*, 10 TEX. L. REV. 34 (1931); Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937)[hereinafter Morgan, *Presumptions*]. Disposing of the cases on the basis of this evidentiary question sometimes permits the Court to avoid sticky substantive issues. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (custodial rights of unwed father); Carrington v. Rash, 380 U.S. 89 (limits on right to vote). In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), however, the Court rebuffed a challenge to a conclusive presumption, saying that it was really a disguised substantive rule.

25 For typical listings see MCCORMICK ON EVIDENCE, *supra* note 3, at 968-73; Morgan, *Presumptions*, *supra* note 24, at 257-59.

26 Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 888 (1968). *See also* Hoberg, *The Burden of Proof Where*

a definite distinction, and since then assumptions about the minimum conditions for a fair criminal trial have changed. Until fairly recently, the main consideration in allocating burdens of proof was enhancing the capacity of the trial to find historical truth; a presumption that shifted the burden of persuasion on some issues, even to a criminal defendant, was permitted if more factually accurate verdicts were likely. Until quite recently both the prosecution's obligation to prove guilt beyond a reasonable doubt and the prohibition of directed verdicts against criminal defendants were accepted;[27] they were not, however, understood as being necessarily related.[28] Further, requiring the defendant to prove defenses that are today interpreted as negating elements of the crime[29] was until fairly recently considered consistent with the prosecution's burden of proof.

The two periods of the greatest number of Supreme Court presumption cases and the greatest amount of constitutional change were the late 1920s to early 1930s and the mid-1960s through the late 1970s, both time periods during which the criminal justice system generally was subject to increased constitutional scrutiny. The next two subsections discuss developments before 1965 and from 1965 to 1974. The third section describes and analyzes changes from the mid-1970s to the present.

A. 1900 TO THE MID-1960s

During the first two decades of the twentieth century, when today's conception of what the burdens of proof are and how pre-

Mental Incapacity is Pleaded, 44 AM. L. REV. 538 (1910)(treating criminal law insanity defense and will contest for lack of testamentary capacity as raising similar issues).

[27] As late as 1876, however, a judge could respectably express doubt that the prosecution's burden of persuasions in criminal cases should be higher than that of the plaintiff in civil cases. Note, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876). For a history of the proof beyond a reasonable doubt requirement see Morano, *supra* note 7.

[28] 4 J. WIGMORE, *supra* note 4, at 2541. *See also* 9 J. WIGMORE, EVIDENCE 2511 (1940). Wigmore argued that if a presumption created a duty for the defendant to produce evidence and he did not, the jury could be required to find in accordance with the presumption. 4 J. WIGMORE, *supra* note 4, at 3559-60 (1905).

[29] *Id.* at 3559-60 (1905). *See also* C. MCCORMICK, *supra* note 12, at 662; 9 J. WIGMORE, *supra* note 28, at 2511. Articles in the early twentieth century argued as a matter of logic or policy that the prosecution in criminal cases should have the burden of persuasion for certain defensive matters but did not consider this to be constitutionally required. *See, e.g.*, Note, *Burden of Proof in the Defense of Insanity*, 6 VA. L. REV. 209 (1919). The Model Penal Code was the first complete formulation of the concept that several of the major defenses negate the means rea of the element of the crime to which they pertain. *See* MODEL PENAL CODE § 2.02 commentary at 123, 127 (Tent. Draft No. 4, 1955).

sumptions relate to them was just beginning to be accepted,[30] only a few presumption cases went to the Supreme Court. At a time when the nature of due process limits on legislation in general was a major issue, the first important presumption case involved a statute applicable to personal injury suits against railroads. In 1910 in *Mobile, Jackson and Kansas City Railroad v. Turnipseed*[31] the Supreme Court held that due process permitted the legislature to enact presumptions affecting the process of proof if there was a "rational connection" between the proven and presumed facts, though it did not explain what this meant. The Court also said that a presumption could not deprive a party of a reasonable opportunity to submit to the jury all the facts bearing upon an issue.[32] *Turnipseed* was a civil case, but nothing suggested that criminal cases would be treated differently; in dicta, the Court said that the test applied to both.[33]

The 1920s were marked by growing concern over the rise of organized crime and the perceived ineffectiveness of the criminal justice system to protect society.[34] As applied to criminal statutes containing presumptions, the rational connection test was criticized for limiting too drastically legislative attempts to help prosecutors,[35] even though the test as applied was not very stringent.[36] Some com-

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[30] It was not until the late nineteenth century that Thayer introduced what has become the standard understanding of the two burdens of production and how presumptions may affect them. J. THAYER, *supra*, note 24, at chs. 8-9; Thayer, *Presumptions and the Law of Evidence*, 3 HARV. L. REV. 141 (1889).

[31] 219 U.S. 35 (1910). The Court followed Thayer, making a distinction between the burdens of production and persuasion and treating the instant presumption as shifting the burden of production. In Adams v. New York, 192 U.S. 585 (1904), the Court held that so long as a statutory presumption required the prosecution to prove enough to make it reasonable to require the defendant to explain himself, and so long as the defendant did in fact have a chance to explain himself, the presumption was constitutional. Though *Turnipseed* is generally cited as the first articulation of the rational connection test, its source is clearly visible in *Adams*. *See Adams*, 192 U.S. at 599.

[32] *Turnipseed*, 219 U.S. at 43. This meant at least that the presumption could not be conclusive. Over the next twelve years, the Court treated inconsistently presumptions that, together with rules that prohibited testimony from parties, effectively precluded a defendant from rebutting a presumption. *Compare* Bailey v. Alabama, 219 U.S. 219 (1911) *with* Hawes v. Georgia, 258 U.S. 1 (1922).

[33] *Turnipseed*, 219 U.S. at 43. Early criminal cases using the rational connection test included: Casey v. United States, 276 U.S. 413 (1928); Yee Hem v. United States, 268 U.S. 178 (1925); Hawes v. Georgia, 258 U.S. 1; Adams v. New York, 192 U.S. 585.

[34] For more extensive discussions see C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE ch. 8 (1978); Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 26-33; Griffiths, *Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process*, 79 YALE L.J. 350, 391-93 (1970); Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281 (1979).

[35] Chamberlin, *supra* note 23, at 288; Note, *Statutory Presumptions as Devices to Facilitate the Proof of Crimes*, *supra* note 23, at 494. *See also* Note, *The Constitutionality of Statutory Presumptions*, 8 N.C.L. REV. 50 (1929).

[36] During the 1920s, for example, the Court upheld presumptions that (1) a person

mentators even challenged the claim that the due process clause should be interpreted as requiring legislation to be rational.[37]

Justice Oliver Wendell Holmes proposed an alternative to the rational connection test, now known as the greater includes the lesser test.[38] From his perspective the basic issue that presumptions raise is the extent of legislative authority over the process of proof. Justice Holmes and other proponents of this test argued that if the legislature could constitutionally impose liability on proof of the basic fact alone, it could have made the presumed fact irrelevant. Therefore, if liability on the basic fact were constitutional, the presumption was also necessarily constitutional. For example, in the 1928 case of *Ferry v. Ramsey*[39] a statute provided that if a bank officer accepted a deposit knowing the bank was insolvent, he was personally liable for the deposit. The statute also said that upon proof that the bank was insolvent at the time the deposit was received, the bank officer's knowledge of the insolvency and assent to the deposit were presumed. In *Ferry*, Holmes assumed that the legislature could make bank officers responsible for deposits whenever the bank accepted them, regardless of their knowledge of the bank's insolvency. From this he argued that if the legislature chose to impose liability only on officers who knew of the insolvency, it could also provide that this knowledge was presumed on proof of another fact, here, the bank's insolvency at the time of the deposit.

A majority of the Court accepted this mode of analysis only once, in *Ferry*.[40] In the same year in a criminal case[41] the Court used the rational connection test, and the next year the Court returned to

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on whose property a liquor distilling apparatus is found knows of its presence, *Hawes*, 258 U.S. 1; (2) that opium was illegally imported after 1909 and the defendant knew this from proof of possession, *Yee Hem*, 268 U.S. 178; and (3) a defendant who possessed drugs purchased them from an unstamped package, *Casey*, 276 U.S. 413.

[37] J. Wigmore on Evidence § 1356, 1063 (2d ed. 1923). *See also* Keeton, *supra* note 24, at 45-46.

[38] Holmes advocated this type of analysis across a wide spectrum of issues. *See* Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 699 (1981); Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 14-18, 281-82, 300 (1962).

[39] 277 U.S. 88 (1928).

[40] In several cases, including Bailey v. Alabama, 219 U.S. 239 (1911), and *Casey*, 276 U.S. at 418, Holmes argued for the greater includes the lesser test. In *Bailey*, a majority of the Court held a presumption unconstitutional, in part because the subject matter to which it pertained was within the scope of the thirteenth amendment prohibition of slavery. *Bailey*, 219 U.S. at 239-44. The Court said that the legislature could no more violate a constitutional provision indirectly by use of a presumption than it could by direct enactment. *Id.* at 244. This is something like a greater includes the lesser test: if the legislature cannot do whatever would be involved in enacting the basic thing, it cannot create the presumption. This analysis resurfaces periodically, even though the test more conventionally called the greater includes the lesser has been repudiated.

[41] *Casey*, 276 U.S. 413.

the rational connection test in two civil cases without even mentioning *Ferry*.[42] Despite its logical appeal, the greater includes the lesser test has two major flaws. It denies that fair process is independently important, and it forces questions regarding the constitutionality of the underlying substantive law, which courts often wish to avoid, such as *Ferry*'s focus on legislative authority to impose strict liability.

In the late 1920s commentators generally favored the *Ferry* analysis. They routinely criticized the application of the rational connection test to criminal presumptions as providing inadequate protection to the public. These commentators argued that if a presumption satisfied either the rational connection or the greater includes the lesser test it should be valid.[43] Some even said that directed verdicts against criminal defendants should be permitted.[44]

In a 1934 criminal case the Court adopted a third due process test for presumptions which reflected this emphasis on the struggle between criminals and society, expressly suggesting that due process imposes more stringent limits on presumptions in criminal than in civil cases. In *Morrison v. California*,[45] the Court no longer defined the basic issue as the nature of the limits on legislation that shapes the trial process. Instead, the key question was in what circumstances the state could fairly allocate a burden of proof to the defendant.

The Court was influenced by Wigmore, who believed that a presumption could legitimately be created even if it did not express

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42 Manley v. Georgia, 279 U.S. 1 (1929); Western & Atlantic Railroad Co. v. Henderson, 279 U.S. 639 (1929). *Manley* involved a statute quite similar to the one considered in *Ferry*. *Compare Manley*, 279 U.S. at 3-4 *with Ferry*, 277 U.S. at 93.

In *Henderson*, the Court used the rational connection test to invalidate a statutory presumption very similar to the one that it upheld in *Turnipseed* only nineteen years earlier. *Henderson*, 279 U.S. at 640. *Turnipseed* is discussed *supra* text accompanying notes 31-33. The Court distinguished *Turnipseed* on the basis that the presumption there only shifted the burden of production while the presumption in *Henderson* shifted the burden of persuasion. *Henderson*, 279 U.S. at 644. Whether a presumption shifted both burdens or only the burden of persuasion was a question of state law. *Id. Henderson* did not discuss why this meant that the rationality link had to be stronger or how much stronger it had to be. *Id.*

Whether shifting burdens of production or burdens of persuasion is more important and more onerous was debated. In *Turnipseed* and *Henderson*, the Court treated the burden of persuasion as literally weighing more, so that more evidence was necessary to satisfy it than the burden of production. *See Henderson*, 279 U.S. at 644.

43 Keeton, *supra* note 24, at 42-50; Morgan, *Federal Constitutional Limitations Upon Presumptions Created by State Legislation*, in HARVARD LEGAL ESSAYS 323 (1934); Comment, *Presumptions—Constitutional Validity of Statute Establishing Proof of Reputation as Prima Facie Evidence of Commission of Crime*, 30 MICH. L. REV. 600 (1932); Note, *The Constitutionality of Statutory Presumptions*, *supra* note 35, at 55.

44 Morgan, *supra* note 43, at 333.

45 291 U.S. 82 (1934).

a logical relationship between the presumed and proven facts.[46] He saw presumptions as a device for allocating rather than satisfying burdens of proof.[47] Consistent with this, the *Morrison* Court held that a presumption was constitutional either if it satisfied the rational connection test or if there were "a manifest disparity in opportunity for access to evidence and shifting the burden would not subject the accused to hardship or oppression."[48]

The Court rejected *Ferry* and its implication that process did not matter.[49] Instead, it linked the constitutionality of a presumption to the trial's fact-finding function—if an innocent defendant might not be able to rebut the presumption it would fail, but neither was conviction of the guilty to be made too difficult. From today's perspective the manifest disparity of opportunity test seems prosecution-oriented, but in its social and legal context it was reasonably liberal.

Morrison's concern for the innocent defendant reflected changes in the social climate and in how the criminal justice system was perceived. The country was deep in the Depression, and totalitarian regimes were rising in Europe.[50] Only two years before *Morrison*, in *Powell v. Alabama*,[51] the Court for the first time held that trying a

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46 *Id.* at 88-89 (citing 5 J. WIGMORE, EVIDENCE 2486, 2512 (2d ed. 1923)).

47 In several of the early cases, including *Morrison*, whether the presumption shifted the burden of persuasion as well as the burden of production is not entirely clear. What it means to shift a burden of production to a criminal defendant, given that verdicts cannot be directed against the defense, is still a puzzle. *See infra* text accompanying notes 152-54.

48 *Morrison*, 291 U.S. at 88-89. The defendant was prosecuted for conspiracy to put into possession of land an alien ineligible for citizenship. A statute provided that alienage and ineligibility for citizenship were presumed upon proof of possession. *Id.* at 84. The Court held the presumption unconstitutional. It found that the proven facts did not have a "sinister significance" and that the defendant did not have manifestly greater access to proof. *Id.* at 90-96. "The probability [was] . . . thus apparent that the transfer of the burden [might] . . . result in grave injustice in the only class of cases in which it [would] . . . be of any practical importance." *Id.* at 96.

Later recountings of the test, both by the Court and by commentators, treated these as two factors of one test. Some emphasized the rational connection aspect. *See* Tot v. United States, 319 U.S. 463 (1943). For a discussion of *Tot*, see *infra* text accompanying notes 56-60. *See also* Morgan, *Further Observations on Presumptions*, *supra* note 22; Note, Tot v. United States: *Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324, 1327 (1943). Others emphasized the disparity of access to evidence. *See, e.g.*, Hale, *Evidence—Constitutional Law—Necessity of Logical Inference to Support a Presumption*, 17 S. CAL. L. REV. 48 (1943); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, *supra* note 23; *But see* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955)(courts continue to treat comparative convenience as an alternative to rational connection).

49 *Morrison*, 291 U.S. at 94.

50 Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 521-23.

51 287 U.S. 45 (1932).

defendant without counsel could violate due process. Two years after *Morrison*, in *Brown v. Mississippi*,[52] the Court first held that the use of a coerced confession violates the fourteenth amendment due process clause. Law review articles began to express concern about the eagerness of legislators to help prosecutors in criminal cases, arguing in particular that presumptions should not be made to bear the entire weight of fighting organized crime and unscrupulous defense tactics.[53]

Over the next decade the Court, along with much of the rest of government, struggled with the tension between individual rights and the claims of the community.[54] The debate over incorporation of the Bill of Rights into the due process clause of the fourteenth amendment began in earnest.[55] In the midst of World War II, the Court again turned to the constitutional limits on legislative presumptions. *Tot v. United States*[56] reaffirmed that due process requires that there be a rational connection between the proven and presumed facts. It characterized *Morrison*'s manifest disparity of opportunity test as a mere corollary rather than an independent test of validity.[57]

Commentators criticized the Court for holding the presump-

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[52] 297 U.S. 278 (1936).

[53] *E.g.*, O'Toole, *supra* note 23. The article concerned the constitutionality of a New York statutory presumption virtually identical to the one at issue in Ulster County Court v. Allen, 442 U.S. 140 (1979). *See* O'Toole, *supra* note 23, at 169. The author concluded that a presumption that changed the burden of proof, modified the presumption of innocence, and removed the privilege against self-incrimination was not unreasonable and therefore not uncontitutional. *Id.* at 170-71.

[54] *See* G. FETNER, ORDERED LIBERTY: LEGAL REFORM IN THE TWENTIETH CENTURY 69-75 (1983). The major constitutional struggle of the period was over the Court's authority to judge the substantive validity of New Deal legislation. *See* United States v. Darby, 312 U.S. 100 (1941); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Butler, 297 U.S. 1 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Justice William O. Douglas put *Tot* into this framework, characterizing it as a vestige of hard judicial scrutiny of legislation. W. DOUGLAS, THE COURT YEARS 1937-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 52 (1980).

[55] *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). Even though the defendant's claims were often rejected in these early years, the critical step of considering the possibility that specific provisions of the Bill of Rights might limit the states had been taken. *Compare* P. ROSE, PARALLEL LIVES 37, 41 (1983). Other cases of the era also reflect increasing sensitivity to unfairness in the criminal system. *See* Ashcraft v. Tennesee, 332 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); McNabb v. United States, 318 U.S. 332 (1943); Ward v. Texas, 316 U.S. 547 (1942); Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 227 (1940); Johnson v. Zerbst, 304 U.S. 458 (1938); Mooney v. Holohan, 294 U.S. 103 (1935); Quercia v. United States, 289 U.S. 466 (1933).

[56] 319 U.S. 463 (1943).

[57] 319 U.S. at 469.

tion in *Tot*, which they said reallocated the burden of proof, to a standard appropriate only for presumptions that merely prescribed when circumstantial evidence satisfied a burden.[58] The Court was, however, well aware that the issue was limits on legislative authority to allocate burdens of proof; it rejected the *Morrison* test precisely because it could be interpreted to uphold a presumption which cast a burden onto a criminal defendant when the government had not sufficiently proven its case.[59] *Tot* was the first presumption case in which the Court clearly said that sometimes the Constitution requires the prosecution to bear the burden of proof on issues that the defendant is better able to prove, even though the prosecution may have great difficulty proving them.[60]

During the 1950s, interest in the substantive criminal law increased, spurred by the promulgation of the Model Penal Code.[61] The Supreme Court did not deal directly with constitutional limits on substantive law, though its treatment of procedural questions, including presumptions, often seemed colored by this question. For

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58 Hale, *supra* note 48; Note, Tot v. United States: *Constitutional Restrictions on Statutory Presumptions*, *supra* note 48.

59 *Tot*, 319 U.S. at 469. The opinion also firmly rejected the greater includes the lesser test. *Id.* at 472.

60 The Court stated,

> Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the factors and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

Id. at 469.

In later cases, *Tot* has been interpreted as sanctioning only a shift of the burden of production to the defendant. Ulster County Court v. Allen, 442 U.S. 140, 157, n.16 (1979); Sandstrom v. Montana, 442 U.S. 510, 519, n.9 (1979). However, it is not clear whether that was the *Tot* Court's intention.

The academic writings about presumptions at this time continued to be dominated by interpretations of the procedural effect of presumptions. Some authors also wrote about how juries should be instructed on presumptions; they recognized that such instructions were frequently very confusing. The solutions varied significantly, however, ranging from Morgan's argument that one reason presumptions should be held to shift the burden of persuasion is that juries would then not have to hear about them at all, to McCormick's suggestion that instructions be tailored to the facts of each case. *Compare* Morgan, *Presumptions*, *supra* note 24, at 281 *with* McCormick, *supra* note 21, at 190. *See also* Reaugh, *supra* note 11.

One author agreed that jury instructions about presumptions were complex and hard to understand but rejected suggestions to simplify or eliminate them because accuracy was more important than comprehensibility. McBaine, *supra* note 22, at 527.

61 The first draft was promulgated in 1953. MODEL PENAL CODE (Tent. Draft No. 1, 1953).

example, in *Morissette v. United States*,[62] decided in 1952, the Court avoided a challenge to the constitutionality of strict criminal liability by construing a federal statute to require proof of mens rea. In a less well-known part of the opinion, the Court focused on the wording of a jury instruction about a presumption to determine the constitutionality of the presumption. It held the instruction, which concerned inferring intent from a person's acts, unconstitutional because it was expressed as a conclusive presumption, violating the defendant's right to a hearing on the issue to which the presumption pertained.[63]

At this time, the cases and commentaries began suggesting the possibility that the Constitution forbids giving the defendant the burden of persuasion on some issues.[64] In 1957 in *Roviaro v. United States*,[65] the Court expressly construed a statutory presumption that heroin was illegally imported with the defendant's knowledge upon proof of possession as shifting only the burden of production, not the burden of persuasion.[66] The opinion implied that shifting the latter burden raised issues that the Court was not ready to address. Over the next decade, the relationship of such statutory presumptions to the prosecution's burden of proof was repeatedly raised, as the next section will discuss.

B. 1965 TO 1975

The Court did not decide any other major presumption cases until the last half of the 1960s, when the Warren Court's criminal procedure revolution was in full flower. By this time courts and commentators usually characterized presumptions as at most shift-

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62 342 U.S. 246 (1952). The Court's messages about the importance of subjective responsibility to criminal liability were mixed. In the same year that it decided *Morissette* the Court also held in Leland v. Oregon, 343 U.S. 790 (1952), that the Constitution does not prohibit requiring defendants to prove insanity beyond a reasonable doubt. The relationship of the insanity defense to mens rea and to the allocation of the burden of persuasion reoccurred in the mid-1970s. *See* Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393, 408-10 (1983)(discussing New York. v. Patterson, 432 U.S. 197 (1977)).

63 *Morissette* 342 U.S. at 275. Conclusive presumptions have been held to deprive a party of the due process right to a hearing since early in the century. *See supra* note 24.

64 In Speiser v. Randall, 357 U.S. 513 (1958), a free speech case, the Court generally disapproved of shifting the burden of persuasion when important individual rights were at stake. *But see* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527 (1955).

65 353 U.S. 53 (1957).

66 *Roviaro* contains the first of a series of confusing comments to the effect that a presumption shifted the burden of production to the defendant. *Id.* at 63. *See* discussion *infra* text accompanying notes 152-54.

ing the burden of production to defendants.[67] Presumptions were seen as a means of avoiding a directed verdict in favor of the defendant on elements difficult for the prosecution to prove.[68] From 1965 to 1970, the Court decided two pairs of important cases. The holdings in each pair are difficult to reconcile with each other and reveal uncertainty about how the due process requirement of fundamental fairness affects presumptions. In all the cases the Court said that "rational connection" was the due process test, but its application of the test changed markedly during these five years.

In the first pair of cases, decided in 1965, the Court's conception of the fundamental issue returned, at least in part, to the limits on statutory presumptions that preempt judicial authority to determine whether a party has satisfied its burden of production. *United States v. Gainey*[69] upheld a statute which provided that a person present at a still was presumed to be "carrying on" a distillery business. Justice Black dissented, arguing that the legislation intruded on the domain of the trial court to determine, case by case, whether the prosecution's evidence satisfied the burden of production.[70] His interpretation was, of course, consistent with the usual understanding of the effect of presumptions.[71] The majority asserted that, despite

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[67] One author argued that presumptions could shift the burden of production to the defendant. Comment, *supra* note 23, at 154-58. Another recognized that if the burden of production were shifted to the defendant in the traditional sense, it would amount to directing a verdict against the defendant. Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. 277, 283 (1969).

However, one of the best law review articles of the period still asserted that a presumption could shift the burden of persuasion to the defendant; it favored using the strengh of the inference posited by the presumption and the likelihood that an innocent person would be unable to rebut the presumption to determine when the defendant could constitutionally be required to prove something. Ashford & Risinger, *supra* note 15. *See also* Comment, *supra* note 23, at 154.

[68] Several articles argued that presumptions could satisfy the prosecution's burden of production, permitting it to get to the jury where its evidence was otherwise insufficient. Holland & Chamberlin, *Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?*, 7 VAL. U.L. REV. 147 (1973); Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 7, 9 (1966); Soules, *supra* note 67, at 284-87; Comment, *supra* note 23, at 142; Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, *supra* note 23, at 703-04.

Some authors saw that this might conflict with the requirement of proof beyond a reasonable doubt and proposed that the rational connection test be interpreted to require that the presumed fact follow from the proven fact beyond a reasonable doubt. Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 924; Holland & Chamberlin, *supra*, at 161-64; Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 110 (1969). *Cf.* C. MCCORMICK ON EVIDENCE, 344 (2d ed. 1972)(rational connection may be a test of relevancy or of probative sufficiency).

[69] 380 U.S. 63 (1965).

[70] *Id.* at 76-77 (Black J., dissenting).

[71] *See supra* Part I.A.

the presumption, the trial judge could direct a verdict against the prosecution if the evidence presented at trial was insufficient. It also found the connection between the defendant's presence at a still and "carrying on" a distillery sufficiently strong to be rational.[72]

Later the same year the Court in *United States v. Romano*[73] held unconstitutional a similar presumption—that a person present at the site of a still "possessed" the still. The Court reconciled *Romano* with *Gainey* by saying that "carrying on" was a broader offense than possession, and that it was, therefore, rational to infer the former but not the latter from presence.[74] The trial judge in *Gainey* was careful to tell the jury that it was not bound to reach the conclusion that the presumption called for,[75] while the judge in *Romano* simply read the statute containing the presumption to the jury.[76] The Court said that an instruction which authorized a finding based on the presumption alone, as the *Romano* instruction did, required that the proven fact be sufficient alone to support a finding of the presumed fact.[77] Since an earlier Supreme Court decision had held that presence alone was insufficient to support a finding of possession,[78] the defendant's conviction had to be reversed, even though

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72 *Gainey*, 380 U.S. at 67-68.

73 382 U.S. 136 (1965).

74 The distinction is difficult to make, since the offenses carried the same penalty and were both defined in the same statute. 26 U.S.C. § 5601 (1958). *But see* Saltzburg, *supra* note 62, at 413-14 (distinction makes sense because possession carries more stigma than does carrying on).

75 *See Gainey* 380 U.S. at 69-70.

76 *Romano*, 382 U.S. at 137-38. The statute provided in relevant part that the defendant's presence at the site of the illegal still shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury. *See* 26 U.S.C. § 5601 (b).

77 *Romano*, 382 U.S. at 138-39. If there is more than one path that the jury can follow to determine the defendant's guilt or innocence, each path must be free of constitutional error. This rule is known as the two routes rule, which was first articulated in Stromberg v. California, 283 U.S. 359 (1931)(jury instruction authorized conviction if the jury found that the defendant's acts were done with any of three purposes; if any of the three were invalid the conviction could not stand). For an example of the test applied to presumptions, see *infra* note 93.

The possibility that a jury instruction might be interpreted as shifting the burden of persuasion was not seriously at issue in *Gainey* or *Romano*. *See Gainey*, 380 U.S. at 70; *Romano*, 382 U.S. *passim*. Justice Douglas, dissenting in part in *Gainey*, said that if the statute were interpreted as compelling the jury to draw the inference it would violate the right to trial by jury. *Gainey*, 380 U.S. at 72 (Douglas, J. dissenting). Justice Black dissented, in part because he thought the instruction interfered with the right to jury trial. *Id.* at 76-77 (Black, J., dissenting). Today the *Gainey* instruction might well be upheld as permissive. It is quoted at 380 U.S. at 69-70. The *Romano* instruction, on the other hand, would probably be interpreted as shifting the burden of persuasion. It is discussed at 382 U.S. 137. *See* discussion *infra* text accompanying notes 104-16.

78 Bozza v. United States, 330 U.S. 160 (1947).

the totality of the evidence was sufficient to support it.[79]

By 1969, when the next presumption case was decided, the Supreme Court was coming under attack for disregarding the truth-finding function of criminal trials.[80] Though ordinarily invoked in criticism of decisions limiting police conduct, the emphasis on fact-finding also prompted a re-examination of the process of proof at trial. In 1970 in *In re Winship*,[81] the Supreme Court held that due process requires the prosecution to prove guilt beyond a reasonable doubt. At this time presumptions were still treated as a means of satisfying, rather than allocating, the burden of persuasion.[82] Therefore, presumptions potentially threatened proof requirements by authorizing conviction on evidence that left more than a reasonable doubt of guilt. This concern was expressed in terms of whether the rational connection test meant that the presumed fact had to follow from the basic fact beyond a reasonable doubt or whether it only had to be more likely true than not true. *United States v. Leary*[83] and *Turner v. United States*,[84] decided in 1969 and 1970, were expected to answer this question, but the Court ducked. In both cases, the Court purported to assess the strength of the logical relationship between the proven and presumed facts. It upheld some of the presumptions, saying the presumed fact was true beyond a reasonable doubt, and rejected others because the presumed fact was not even more likely true than not true.[85]

The Court in *Leary* and *Turner* framed the fundamental issue as the extent of legislative authority to declare one fact sufficient to

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[79] The majority apparently assumed that the trial judge could not direct a verdict against the prosecution in the face of the statute. *Cf.* discussion of *Gainey supra* text accompanying notes 70-72.

[80] The commentators who emphasized the fact-finding function were reacting to the Warren Court's perceived indifference to this function in its pursuit of other values such as controlling governmental behavior that encroached on an individual's liberty, promoting equality and racial justice, improving access to the courts, and enlarging judicial supervision of criminal proceedings. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). *See generally* Allen, *supra* note 50; Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH L. REV. 1320 (1977); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

[81] 397 U.S. 358 (1970).

[82] Neither of the presumption cases decided around the time of *In re Winship* expressed concern that a jury instruction on a presumption might shift the burden of persuasion. *See* Turner v. United States, 396 U.S. 398 (1970); United States v. Leary, 395 U.S. 6 (1969). Indeed, the Court did not particularly focus on the instructions. *See Turner*, 396 U.S. at 406-07; *Leary*, 395 U.S. at 30-31. In *Turner*, the Court did not even consider the instructions important enough to quote. 396 U.S. at 406-07.

[83] 395 U.S. 6 (1969).

[84] 396 U.S. 398 (1970).

[85] *See infra* text accompanying notes 88-90.

prove another. It purported to defer to the legislature's judgment,[86] particularly since the questions that the presumptions ostensibly concerned were specialized, even arcane, and beyond the general knowledge of the ordinary juror (or the Supreme Court).[87] In fact, though, the Court deferred very little to Congress and undertook an independent assessment of the facts in each case. In *Leary*, a statute provided that one could presume from possession of marijuana that it was illegally imported and that the defendant knew this.[88] *Turner* involved similar presumptions for heroin and cocaine.[89] *Turner* also concerned the validity of presuming from possession that the defendant purchased heroin or cocaine not in or from a stamped package.[90] To determine whether these presumptions were rational, the Court analyzed evidence not presented to the jury about the incidence of marijuana, cocaine and heroin production in the United States and how users of these drugs behave. It upheld the presumptions about heroin and rejected those regarding cocaine and marijuana.

The Court purported to use something like the *Leary-Turner* approach only one more time, in 1973. *Barnes v. United States*[91] involved the ancient common law presumption that the possessor of recently stolen property is the thief. The Court was dubious that one could conclude beyond a reasonable doubt that possessors are necessarily thieves, but it did not even attempt an empirical analysis. Instead, it relied on the presumption's ancient pedigree to uphold it.[92] The *Leary-Turner* empirical analysis was unstable for two rea-

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86 *Leary*, 395 U.S. at 36, 38.

87 As these cases are structured, it seems that if the legislative record had shown factual support for the statutory presumption, the Court might have felt compelled to defer to Congress. But, of course, it did not; the record showed instead that Congress enacted the presumptions because the elements to which they pertained were very hard or impossible to prove, which was usually the reason for statutory presumptions throughout this century. *See* Leary v. United States, 395 U.S. at 38. *See also* United States v. Gainey, 380 U.S. 63, 65 (1965); Holland & Chamberlin, *supra* note 68 at 151; Sandler, *supra* note 68 at 8; Comment, *supra* note 23; Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, *supra* note 23; *see* articles cited *supra* note 23.

The elements presumed in *Leary* and *Turner* were the jurisdictional ones about illegal importation and failure to pay stamp taxes, which no one took literally anyway. They were, it seems, the product of an earlier era's view of how limited congressional authority over intrastate activities was and the development of fake federal nexuses to avoid any constitutional problem. *See* Sandler, *supra* note 68, at 8.

88 The Court rejected the presumption of knowledge as not being more likely true than not true. *Leary*, 395 U.S. at 44-53.

89 The Court rejected the presumption about cocaine and upheld the one about heroin. *Turner*, 396 U.S. at 408-19.

90 *Id.* at 402-03.

91 412 U.S. 837 (1973).

92 *Id.* at 845. The Court also emphasized even more strongly than it did in *Turner*

sons. Its method was ill-adapted to courts, especially appellate courts, which have difficulty amassing and assessing facts necessary to determine whether the relationship posited by a presumption is generally true.[93] Second, it limited so severely the legislature's authority to declare one fact sufficient to prove another that presumptions lost much of their utility. The Court escaped from this box by recharacterizing the basic nature of due process limits on presumptions, as the next section discusses.

III. The New Tests of the 1970s and their Implications

The new emphasis on the trial's fact-finding function and the constitutionalization of the proof beyond a reasonable doubt requirement stimulated study of questions much more basic than how due process limits presumptions. The most important question was *what* the prosecution was obligated to prove beyond a reasonable doubt. The standard reply, that it must prove the elements of the crime, quickly gave rise to the question of how to distinguish an element from a defense for constitutional purposes. Two major articles of the late 1960s addressed these questions. A basic question in both articles was the circumstances under which a burden of proof could fairly be allocated to a criminal defendant.

The first article concerned the substantive criteria for imposing

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that the prosecution's circumstantial evidence was sufficient to support the conviction without the presumption. *Id.*

93 The best example is *Turner*'s discussion of the likelihood that a person in possession of heroin purchased it from other than the original stamped package. The majority argued that (1) the heroin could not have come from a stamped package because only registered importers and manufacturers may purchase stamps, and registered persons do not deal in heroin because all heroin is illegally imported and (2) that the defendant must have purchased the heroin because heroin is so high-priced that it would be very unreasonable to assume that any sizable number of possessors have not paid for it. *Turner*, 396 U.S. 421-22.

In both cases the prosecution had, on some counts, a theory that did not require use of a presumption. In *Leary*, the defendant knowingly brought marijuana into the United States from Mexico that he had taken into Mexico in the first place. *Id.* at 30-32. On this basis he could have been convicted of knowingly possessing illegally imported marijuana. In *Turner*, the defendant was found with 275 unstamped glassine bags of heroin, which would warrant a finding of distribution, an alternative to convicting him of purchasing heroin from an unstamped container. *Turner*, 396 U.S. at 419-21. Thus, in both *Leary* and *Turner*, as in *Romano*, the jury was presented with alternative theories on which to conclude that the defendant was guilty. *United States v. Romano*, 383 U.S. 136, 138-39 (1965). In *Leary*, as in *Romano*, the Court held that both routes had to be free of significant error and so reversed the defendant's conviction. *Cf. Leary*, 395 U.S. at 31-32; *Romano*, 382 U.S. at 138-39. *Romano* is discussed *supra* note 77. *Turner*'s approach to this issue was more ambiguous—it asserted that if the presumption caused an error it would be harmless, given the independent evidence of guilt, but it also was careful to assert that the presumption was true beyond a reasonable doubt. *Turner*, 396 U.S. at 421.

criminal liability on an individual. Its author concluded that liability ought not to be imposed in the face of facts showing that the defendant was not culpable.[94] As a corollary he argued that the prosecution should have the burden of persuasion on any fact pertinent to an assessment of culpability.[95] The second article addressed evidentiary devices that affect burdens of proof and their relationship to the requirement of proof beyond a reasonable doubt. It said that presumptions are like affirmative defenses; both place some burden of proof on the defendant.[96] Its authors argued that due process invalidates any device that shifts a burden of proof to the defendant if this shift could enhance the possibility of convicting innocent persons.[97] Therefore, they argued, an affirmative defense or a presumption may not require a defendant to prove anything that an innocent person might be unable to prove.[98] Though they never explicitly defined "innocent," they used it to mean not characterized by all the attributes that the legislature had decided were relevant to punishment.[99]

These articles applied the requirement of proof beyond a reasonable doubt to the allocation of the burdens of proof, especially the burden of persuasion. A 1975 case presented this allocation issue to the Supreme Court, and the Court moved toward the analysis suggested in the two articles, with its substantive and functional approach to the burdens of proof. Two years later, when the implications of this move became apparent, the Court retreated, adopting in a second case a constitutional test for allocation of the burden of persuasion tied to the formal structure of criminal statutes. In subsequent cases the Court also created a new approach to presumptions based on the relationship between the structure of criminal statutes and the weight and allocation of the prosecution's burden of persuasion. A new definition of what is essential to fairness underlies these changes: the prosecution must prove guilt beyond a

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[94] Fletcher, *supra* note 26, at 883-92.

[95] *Id.* at 906-30.

[96] Ashford & Risinger, *supra* note 15.

[97] *Id.* at 180, 190.

[98] *Id.* at 181, 190-91. This position is reminiscent of that of Justice Brandeis in Morrison v. California, 291 U.S. 82 (1934), discussed *supra* text accompanying notes 45-49. Responding to Ashford and Risinger, Christie and Pye argued that forbidding the legislature to compromise a debate over whether to liberalize some substantive provision by enacting it while allocating the burden of persuasion to the defendant in practice might well result in a decision to retain the older, harsher law, to the defendant's disadvantage. In short, they argued, Ashford and Risinger's position elevated form over substance. *See* Christie & Pye, *supra* note 68.

[99] Ashford & Risinger, *supra* note 15, *passim*.

reasonable doubt and guilt must be determined by an independent jury, acting on the basis of evidence presented at trial.

A. The Demise of Using Presumptions to Modify the Substantive Law and Satisfy the Burden of Production

Three of the cases, *Mullaney v. Wilbur*,[100] *New York v. Patterson*,[101] and *Sandstrom v. Montana*,[102] concern when the burden of persuasion on an element can be allocated to the defendant. *Ulster County Court v. Allen*[103] applied principles allied to those used in the first three cases to fashion a conceptual structure and new tests for presumptions. Though none of the cases purported to be about constitutional limits on substantive law, together they appear to push the legislature toward a re-examination of the minimum conditions for criminal liability. However, because of limits inherent in the cases and because of the kinds of elements to which statutory presumptions usually apply, major substantive changes probably will not be forthcoming.

1. *Limits on Allocating the Burden of Persuasion to the Defendant*

In 1975 the Court in *Mullaney v. Wilbur*[104] held that the prosecution must prove beyond a reasonable doubt all elements of a crime and that a rebuttable presumption that shifts the burden of persuasion on an element to the defendant is unconstitutional. *Mullaney* emphasized the need to justify depriving people of liberty and imposing the stigma of criminality on them.[105] The Court spoke strongly of the role that the burden of persuasion plays in maintaining public confidence in the criminal justice system.[106] The opinion was interpreted by some to mean that the prosecution must bear the burden of persuasion on any fact relevant to an assessment of culpability.[107]

The problem with this reading of *Mullaney*, of course, is that it would require the substantial revision of assignments of the burden

100 421 U.S. 684 (1975).
101 432 U.S. 197 (1977).
102 442 U.S. 510 (1979).
103 442 U.S. 140 (1979).
104 421 U.S. 684 (1975). The Court cited the article by Fletcher discussed *supra* text accompanying notes 94-95. *Mullaney*, 412 U.S. at 694, 695, nn.16, 20.
105 *Id.* at 698-700.
106 421 U.S. at 700.
107 *See, e.g.*, Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325, 1338-44 (1979) and articles cited therein at n.40.

of persuasion for affirmative defenses in many jurisdictions.[108] Further, it suggested that due process requires the substantive law to take cognizance of defenses that many jurisdictions did not recognize.[109] Not surprisingly, two years later in *New York v. Patterson*[110] the Court backed away from these implications. It held that while the prosecution bears the burden of persuasion on all elements of a crime, the formal structure of the statute will determine these elements. Like *Mullaney*, *Patterson* said that some constitutional limits on allocating the burden of persuasion to defendants are linked to limits on the underlying substantive law, but *Patterson*'s limits are far more modest than *Mullaney*'s. *Patterson* subjected the legislature's power to decide what is an element and what is an affirmative defense only to vague and limited constraints.[111]

Together *Patterson* and *Mullaney* have also come to mean that once the legislature has allocated the risk of error between prosecution and defense by defining elements of the crime and affirmative defenses, it cannot require the defendant to prove still more through the use of a rebuttable presumption. *Patterson* affirmed

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108 Allen, Mullaney v. Wilbur, *The Supreme Court and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 Tex. L. Rev. 269 (1977). *See* Jeffries & Stephan, *supra* note 107, at 1339-44.

109 *See, e.g.*, Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U.L. Rev. 775 (1975).

110 432 U.S. 197 (1977). *Patterson*, like *Mullaney*, involved the mitigation of homicide from murder to manslaughter because of the killer's emotional agitation. *See Patterson*, 432 U.S. at 197-98; *Mullaney*, 421 U.S. at 686-87. New York's statutes were based on the Model Penal Code; malice aforethought was not an element of murder under its statutes, and extreme emotional disturbance, the rough equivalent of heat of passion, was an affirmative defense to be proved by the defendant. *Patterson*, 432 U.S at 197-98, nn.1-3.

111 *Id.* at 210. It is important, though, that those vague constitutional limits are recognized; by doing this the Court continued the practice it had followed in, inter alia, Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962); and Lambert v. California, 355 U.S. 225 (1957), of avoiding explicit constitutionalization of the substantive criminal law while holding out the promise that some limits do exist. For a more extended treatment, see Angel, *Substantive Due Process and the Criminal Law*, 9 Loy. U. Chi. L.J. 61 (1977).

The Court gave practical and principled reasons for rejecting *Mullaney*'s implications. *Patterson*, 432 U.S at 207-09. It argued that requiring the prosecution to prove all facts relevant to culpability would impede reform, since the legislature could not enact a substantive rule more lenient than the existing one while giving the defendant the burden of persuasion. *Id. Cf.* Christie & Pye, *supra* note 68. As a matter of principle the Court justified giving the states broad latitude to decide whether a fact will be an element or an affirmative defense by saying that, with a few exceptions, the states do not have to recognize any particular facts as relevant to criminal liability at all. *Patterson*, 432 U.S. at 210. *Cf.* the discussion of Holmes' argument in favor of the greater-includes-the-lesser test *supra* text accompanying notes 38-39. The same kind of analysis underlies the Court's recent sanctioning of a conclusive presumption. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

Mullaney's holding that rebuttable presumptions which shift the burden of persuasion to the defendant on the elements of a crime are inconsistent with the prosecution's burden of proof beyond a reasonable doubt.[112] In 1979 in *Sandstrom v. Montana*[113] the Court relied in part on this aspect of *Mullaney* to hold unconstitutional a jury instruction which said that a person is presumed to intend the natural and probable consequences of his or her acts.[114] Since the jury could have interpreted the presumption instruction as conclusive[115] or as shifting the burden of persuasion on intent to the defendant,[116] it violated due process.

Mullaney, *Patterson* and *Sandstrom* make sense only at a formal level. With few exceptions, a fact can constitutionally be made irrelevant to criminal liability or it can be an affirmative defense which the defendant must prove. But a fact cannot be an element of the crime that will be presumed once some other fact is proven if the

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112 432 U.S. at 213-16.

113 442 U.S. 510 (1979). Sandstrom was charged with deliberate homicide. He admitted doing the killing, but denied that he did so purposely or knowingly because of a personality disorder aggravated by alcohol consumption. *Id.* at 512. Thus, the only factual issue was whether he intended the victim's death. *Id.*

114 This presumption has an ancient pedigree. For many years there was a lively dispute about whether this was really a presumption that could be rebutted or whether it was a substantive rule, expressing objective rather than subjective criminal liability. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 117-19 (1960); 0. HOLMES, THE COMMON LAW ch. 2 (1881); J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 110-22 (1883); J. THAYER, *supra* note 24, at 335; G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 35 (2d ed. 1961); Keeton, *supra* note 24; Turner, *The Mental Element in Crime at Common Law*, 6 CAMBRIDGE L.J. 31, 40-41 (1936).

115 The Court's aversion to conclusive presumptions was not new. *See supra* note 24. Nor was its condemnation of jury instructions that require the jury to conclude that a criminal defendant intended the consequences of his or her acts. In Morissette v. United States, 342 U.S. 246 (1952), which is remembered mostly for its strong statement against strict liability, the Court condemned such an instruction. Conclusive presumptions, the Court said, violate the right to have the jury determine whether the government proved all of the elements of the crime. *Id.* at 274-76.

In United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Court again returned to the theme that conclusive presumptions are unconstitutional, violating the right to a hearing and intruding on the jury's fact-finding function. It said that an instruction in the form of an inference would have been permissible. *Id.* at 446.

In a departure from precedent, the Court recently held in a civil case that a statutory conclusive presumption is merely an awkwardly expressed substantive rule and is, therefore, constitutional. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976).

116 In Francis v. Franklin, 471 U.S. 307 (1985), Justices Rehnquist, Burger and O'Connor argued in dissent that the language in *Sandstrom* forbidding rebuttable presumptions is merely dicta. Their opinion does not deal with *Mullaney*. *Franklin*, 471 U.S. at 333 (Rehnquist, J., dissenting).

The most recent edition of MCCORMICK ON EVIDENCE interprets *Sandstrom* and Ulster County Court v. Allen, 442 U.S. 140 (1979), discussed *infra* notes 120-36, as permitting presumptions that shift the burden of persuasion to the defendant. MCCORMICK ON EVIDENCE, *supra* note 3, at 997.

presumption shifts the burden of persuasion to the defendant.[117] The key to applying these cases is determining what the elements of a crime are, and that is determined very formally, from the structure of the statute.[118]

Sandstrom's prohibition of jury instructions couched as rebuttable presumptions precludes one traditional use of presumptions: al-

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[117] Another problem with these cases is the inconsistent way in which they treat the question of whether form or substance is crucial. To say that the legislature can make something an affirmative defense but not a rebuttably-presumed element seems to indicate that form has independent value. On the other hand, the rationale of *Patterson* is that so long as the legislature's goal is constitutional, how it goes about attaining its end does not matter.

Some argue that in essence the rebuttable, burden-of-persuasion shifting presumption is the same thing as an affirmative defense. Allen, *supra* note 6, at 321, 324-25, 330; Jeffries & Stephan, *supra* note 107, at 1336; Sheldon, *Presumptions Against Criminal Defendants, Affirmative Defenses, and a Substantive Due Process Interpretation of* County Court of Ulster v. Allen, 34 ME. L. REV. 277, 278 (1982); Wilson, *Shifting Burdens in Criminal Law: A Burden of Due Process*, 8 HASTINGS CONST. L.Q. 731, 756 (1981). In terms of where the burden of persuasion lies at the close of the evidence, such a rebuttable presumption and an affirmative defense are the same. However, a presumption that shifts the burden of persuasion on an element comes into play only if the prosecution produces sufficient evidence of the basic fact. If it does not, the presumed fact remains an element on which the prosecution bears the burden of persuasion. Thus, such a presumption turns the presumed fact into the functional equivalent of an affirmative defense only if the base fact is proven. A second variable to consider is that the base fact may or may not itself be an element. If it is, then the presumed fact becomes an affirmative defense. If it is not an element, however, the presumption redefines the crime in the alternative so that the base fact is an element and the presumed fact an affirmative defense or so that the element is the presumed fact. The presumption at issue in *Ulster County* is a good example. The presumption of possession from presence in a car containing a gun redefined the crime so that it was either 1) possession of a gun, or 2) presence in a car containing a gun with the affirmative defense of not being the possessor. *See supra* note 20.

[118] Some who have tried to make sense of the cases have argued that constitutional limits on affirmative defenses and presumptions are tied to limits on the underlying substantive law. Allen, *The Restoration of In re* Winship*: A Comment on Burdens & Persuasion After* Patterson v. New York, 76 MICH. L. REV. 30, 43-46 (1977); Jeffries & Stephan, *supra* note 107, at 1344-59. Allen has further argued that the requirement of proof beyond a reasonable doubt applies only to constitutionally necessary factors and means that any device that lessens this burden violates due process. He has said that the Constitution does not limit in any way devices that effectively require the defendant to prove anything else. Allen, *supra* note 6, at 339-41. As others have pointed out, though, the contours of constitutional limits on substantive law are indistinct and limited. Nesson, *Rationality, Presumptions and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574, 1576-81 (1981); Saltzburg, *supra* note 62, at 401-07; Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1325-29 (1977). If the principles of *Mullaney* and *Sandstrom* apply only to constitutionally necessary elements, they are not especially important. Further, this theory assumes that the legislature's underlying substantive decision is the only issue of constitutional importance; how it chooses to implement substance does not matter. While there is a certain logic to this position, the Supreme Court has repeatedly rejected it. Holmes' greater-includes-the-lesser test rested on the same assumption. *See supra* at text accompanying notes 38-42. This test was clearly rejected in Tot v. United States, 319 U.S. 463, 472 (1943).

tering the substantive law.[119] *Sandstrom*, therefore, tends to encourage the legislature to express in more straightforward ways what the state must prove to justify punishing a person. *Mullaney* and *Patterson* have a similar tendency.

2. *Using Presumptions to Satisfy the Burden of Production*

In 1979, the same year in which *Sandstrom* was decided, the Court in *Ulster County Court v. Allen*[120] reconsidered when the legislature may enact a presumption that declares proof of one fact sufficient to prove another. Though the Court continued to say that the Constitution requires a rational connection between the proven and presumed facts, the meaning of the test was changed substantially. Attention shifted from an assessment of the statute creating the presumption to the jury instruction concerning how to use it.

The defendants in *Ulster County Court* were charged with unlawful possession of guns. A statute provided that a person present in an automobile containing a firearm was presumed to possess the firearm.[121] This presumption illustrates well the problems with the *Leary-Turner* test developed ten years earlier.[122] Intuitively it seems unlikely that one can say beyond a reasonable doubt that people in cars where guns are found generally possess them. Even if an empirical answer could be found, a court would have difficulty marshalling and assessing the facts.[123]

To avoid this problem the Court for the first time divided presumptions into two categories, permissive and mandatory,[124] with a different rational connection test for each. The wording of the jury instruction about a presumption determines whether it is permissive or mandatory.[125]

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119 *See supra* text accompanying notes 15-20.

120 442 U.S. 140 (1979).

121 New York Penal Law § 265.15 (3) (McKinney 1967), *quoted in Ulster County Court*, 442 U.S. 142 n.1.

122 *See supra* text accompanying notes 83-93.

123 The Court of Appeals for the Second Circuit nevertheless tried, concluding that the presumption failed the *Leary* test. Allen v. Ulster County Court, 568 F.2d 998 (2d Cir. 1977).

124 The 1954 edition of McCORMICK ON EVIDENCE first used this terminology. C. McCORMICK, *supra* note 12, at 640. The 1972 edition abandoned this usage, saying that permissive presumptions are inferences and should be so labeled to avoid confusion. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE, *supra* note 68, at 804.

125 *Ulster County Court*, 442 U.S. at 157 n.16. This emphasis is, in a sense, misleading. Ordinarily differences in the wording of jury instructions raise either the permissibility of shifting a burden of persuasion or how much control the judge legitimately exercises over the jury's deliberations. *See* discussion *supra* text accompanying notes 7-14.

In Sandstrom v. Montana, 442 U.S. 510 (1979), these are exactly the issues that the jury instruction was used to raise. If the jury understood that the presumption shifted

"Permissive presumptions" are not really presumptions at all. Instead, they are simply inferences drawn from evidence. They do not shift the prosecution's burden of production,[126] and the jury is not required to abide by them. An instruction about a "permissive presumption" is really an instructed inference. Therefore, the Court said the "presumed," (i.e., inferred) fact does not have to follow from the proven fact in the abstract,[127] nor does the proven fact have to be sufficient alone to establish the inferred fact beyond a reasonable doubt.[128] If in light of the evidence as a whole the inference is more likely true than not true in the particular case, the inference is "rational" and the conviction should be upheld.[129]

The opinion did not discuss what would happen if the trial judge found the evidence taken as a whole to be insufficient. The implication of the Court's analysis is that, since a "permissive presumption" is not a rule of law but merely an inference that may be drawn, it has no force independent of the evidence presented. Therefore, an inference would not save the prosecution's case just because it was expressed as a statutory presumption. In short, *Ulster County Court* collapsed the question of the validity of a "permissive presumption" into a general sufficiency of the evidence test.[130]

In dicta the Court discussed "mandatory presumptions," which the jury must accept and may not reject on an independent evaluation of the state's evidence.[131] Such a presumption must satisfy the *Leary-Turner* test,[132] that is, the presumed fact must in the abstract follow from the proven fact beyond a reasonable doubt.[133] In the-

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the burden of persuasion, it violated limits on such shifts. *Id.* at 524. If the presumption was conclusive, the judge invaded the jury's province. *Id.* at 521-23. *See supra* text accompanying notes 113-16.

The Court in *Ulster County Court*, though, did not even address the instruction's effect on the burden of persuasion or the distribution of power between judge and jury. The only issue it considered was whether the evidence was sufficient to support the conviction. *Id.* at 163-67. Of course, sufficiency of the evidence does raise a judge-jury control issue, but it is a different one—whether the judge should deprive the jury of decision-making authority altogether by taking a question from it. *See supra* text section I.A.

[126] *Ulster County Court*, 442 U.S. at 157. Evidence scholars do not consider such devices to be true presumptions, calling them instead inferences. *See supra* text accompanying note 5.

[127] *Ulster County Court*, 442 U.S. at 157.

[128] *Id.* at 157.

[129] *Id.* at 163-65.

[130] Some, including the dissenters, have characterized the majority in *Ulster County Court* as reducing the analysis of the presumption to a harmless error test. *Id.* at 176 (Powell, J., dissenting).

[131] *Id.* at 157-58.

[132] *Id.* at 162.

[133] *Id.* at 166-67.

ory this test permits legislative control over sufficiency of the evidence issues, but because it is so very demanding, the legislature's domain has probably been eliminated as a practical matter.[134] Moreover, a jury instruction expressed as a "mandatory presumption" probably cannot survive the *Mullaney-Patterson-Sandstrom* test,[135] as the next section demonstrates.

Ulster County Court's prohibitions of "permissive presumptions" unsupported by evidence and of "mandatory presumptions" that are not true beyond a reasonable doubt do not purport to be about the underlying substantive law. Like *Sandstrom*,[136] however, *Ulster County Court* tends to push the legislature toward reexamining what the minimum conditions for criminal liability should be.

3. *The Minimal Effects of These Cases on Substantive Law*

Sandstrom's prohibition of rebuttable presumptions that shift the burden of persuasion to the defendant and *Ulster County Court*'s prohibition of legislative presumptions that permit the prosecution to get to the jury with otherwise insufficient evidence have the potential to require major restructuring of the substantive criminal law. Examination of the presumptions that have actually reached the Supreme Court in recent years shows that this is unlikely.[137]

The first type of presumption excuses the prosecution from proving elements of a crime that establish federal jurisdiction and which would indeed be difficult to prove. Examples include the presumption in *Tot v. United States*[138] that a person previously convicted of a violent crime received a gun in interstate commerce after July 30, 1938, and the presumptions in *Leary v. United States*[139] and *Turner v. United States*[140] that drugs in the defendant's possession were ille-

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[134] This is particularly important, since legislatures have historically enacted statutory presumptions to relieve prosecutors from having to prove difficult elements of crimes. *See supra* notes 23 & 35.

[135] *See* discussion *infra* text accompanying notes 151-54.

[136] *See supra* text accompanying note 119.

[137] The most problematic presumptions are those which say that a person's proximity to some item implies that the person possessed the item. *See, e.g.*, Ulster County Court v. Allen, 442 U.S. 140 (1979)(person found in car with a gun presumed to possess it). The problem lies not in the presumption but in defining and containing the doctrine of constructive possession. *See* Whitebread & Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751 (1972). The *Ulster County Court* requirement that a finding of possession be supported by the evidence produced may mean that some defendants who would have been convicted will be acquitted for insufficient evidence. If this result is not acceptable, the legislature will have to decide whether to enact a statute that criminalizes proximity to the item.

[138] 319 U.S. 463 (1943).

[139] 395 U.S. 6 (1969).

[140] 396 U.S. 398 (1970).

gally imported.[141] Today's understanding of the scope of congressional authority makes reliance on these contrived jurisdictional findings unnecessary.[142] Modern federal statutes do not have such elements,[143] and their removal from the older style statutes should be merely a housekeeping task.

The second group of presumptions are standardized inferences of culpable mental states from proof that the defendant was associated with an item or performed some act. Examples are the inference in *Sandstrom* that a person intends the natural and probable consequences of her acts[144] and in *Barnes v. United States*[145] that one in possession of recently stolen mail knows it was stolen.[146] In such cases the prosecution ordinarily will not need to rely on a formal presumption to meet its burden of production, since even without the presumption the mental state can reasonably be inferred from the evidence.

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141 Others are Casey v. United States, 276 U.S. 413 (1928)(purchase of drugs from other than stamped package presumed from absence of required stamps on drugs in defendant's possession); Yee Hem v. United States, 268 U.S. 178 (1925)(illegal importation of heroin after 1909 presumed from possession).

142 For a discussion of the 1970 federal legislation, particularly its commerce clause implications, see R. BOGOMOLNY, M. SONNENREICH & A. ROCCOGRANDI, A HANDBOOK ON THE 1970 FEDERAL DRUG ACT 63-65 (1970). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 150-59 (1978). As late as 1966 a commentator still argued that the commerce clause required a specific effect on interstate or foreign commerce to justify a federal criminal statute prohibiting the possession of drugs. Sandler, *supra* note 68, at 8.

143 *See* 21 U.S.C. §§ 801-969, especially §§ 841 & 844. These provisions have repeatedly been upheld in the face of commerce clause objections. *See, e.g.*, United States v. Lopez, 461 F.2d 499 (5th Cir. 1972); United States v. Lane, 461 F.2d 343 (5th Cir.), *cert. denied*, 409 U.S. 952 (1972); United States v. Kiffer, 477 F.2d 349 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973); United States v. Davis, 561 F.2d 1014 (D.C. Cir.), *cert. denied*, 434 U.S. 929 (1977); United States v. Weinrich, 586 F.2d 481 (5th Cir.), *cert. denied*, 441 U.S. 927 (1979).

144 442 U.S. 510, 512 (1979).

145 412 U.S. 837, 838 (1937).

146 Other examples include Adams v. New York, 192 U.S. 585 (1904)(knowledge that items are numbers slips presumed from their possession) and Hawes v. Georgia, 258 U.S. 1 (1922)(knowledge of a still's presence presumed if found on the defendant's land).

See also State v. Rainey, 298 Or. 459, 693 P.2d 635 (1985)(knowledge of character of a controlled substance presumed from proof of its unlawful delivery); People v. Roder, 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983)(knowledge that property was stolen presumed from proof that defendant was a dealer in secondhand merchandise who bought or received stolen property and who failed to make reasonable inquiry whether the person from whom the property was bought had the legal right to sell it under circumstances which should have caused him to make such an inguiry); State v. De La Ossa, 128 Ariz. 37, 623 P.2d 826 (1981)(purchase of stolen property at a price substantially below its fair market value permits a conclusion that the purchaser was aware of the risk that it had been stolen).

B. JUDICIAL CONTROL OF THE JURY'S DECISION-MAKING PROCESS

The Supreme Court in *Ulster County Court v. Allen*[147] and *Sandstrom v. Montana*,[148] as well as most current commentators, conclude that the due process test for presumptions and inferences must insure that the jury's role as an independent decision-maker is protected. In *Ulster County Court* and *Sandstrom*, as well as two later cases, the Court mandated a highly formal analysis of judge-jury communications that provides only symbolic protection for the jury. A reform proposed by some commentators, to turn presumption and inference instructions into comments on the evidence, might enhance the rationality of the jury but not necessarily its independence. Further, some state courts have been reluctant to accept the conversion of instructed inferences to comments on the evidence because of the legal and practical problems comments can create.

1. The Fate of Jury Independence in the Supreme Court

Sandstrom held that if a particular subjective state of mind is an element of a crime, whether a defendant had this state of mind is a question of fact for the jury, not a legal conclusion that follows from proof of the defendant's actions. More generally *Sandstrom*, together with *Mullaney* and *Patterson*, means that the jury must be free to determine whether the prosecution has proven every element of the crime. In this sense the Court supported a shift of decision-making power from judge to jury. But this aspect of the case amounted only to a reaffirmation of a well-accepted principle.[149] In contrast, *Sandstrom*'s test for the validity of jury instructions does little or nothing to free the jury's fact-finding responsibility from effective control by the judge and in fact insulates the judge's communications from any real scrutiny as to how they affect the jury.[150]

Sandstrom requires that jury instructions about presumptions be read closely so they can be fit into the proper category. If the judge says, "The law presumes . . ." *Sandstrom* may well have been violated. But the judge may convey the same message to the jury by beginning, "You may infer . . . ." Presumption instructions are forbidden; only instructed inferences are allowed.

At what point an instruction crosses the line into forbidden territory is not clear, but *Sandstrom* does say that instructions must be

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147 442 U.S. 140 (1979).
148 442 U.S. 510 (1979).
149 *See* United States v. United States Gypsum, 438 U.S. 422 (1978); Morissette v. United States, 342 U.S. 246 (1952).
150 *See supra* text accompanying notes 117-18.

interpreted from the point of view of the jury. If the jury could reasonably have understood that the presumption was conclusive or that it shifted the burden of persuasion to the defendant, it is erroneous.[151]

These principles shed some light on one of the ambiguities that remains in the wake of *Sandstrom* and *Ulster County Court*: the meaning of a "presumption that shifts the burden of production." Many cases, including these two, mention such a device without explaining what it is.[152] The holdings of these two cases, however, preclude shifting the burden to the defendant in the conventional sense.[153] *Sandstrom* requires that the jury understand that it alone

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[151] Francis v. Franklin, 471 U.S. at 316; Sandstrom v. Montana, 442 U.S. at 516-19.

[152] In Ulster County Court v. Allen, 442 U.S. 140, 157 (1979), the Court defined a mandatory presumption as one that tells the jury that it must find the presumed fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. The jury cannot reject a mandatory presumption on an independent evaluation of the state's evidence. *Id.* at 159. The Court said that most mandatory presumptions in its prior cases shifted only the burden of production to the defendant. *Id.* at 157 n.16. Evaluation of these statements must take into account that *Ulster County Court* was decided before Sandstrom v. Montana, 442 U.S. 510 (1979), discussed *supra* text accompanying notes 113-18.

In *Sandstrom*, the state argued that the presumption only shifted the burden of production to the defendant. *Sandstrom*, 442 U.S. at 516 n.15. The Court rejected this interpretation and questioned in a footnote what it might mean to shift the burden of production to the defendant in a criminal case. *Id.*

The Court also raised, but did not decide, the validity of a burden of production-shifting presumption in Francis v. Franklin, 471 U.S. 307, 314 n.3 (1985).

[153] *Sandstrom*, 442 U.S. at 516 n.5 (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); Carpenters v. United States, 330 U.S. 395, 408 (1947); Mins v. United States, 375 F.2d 135, 148 (5th Cir. 1967). If a party suffers a directed verdict for failure to satisfy a burden of production, allocation of the production burden to that party also amounts to allocation of the burden of persuasion. Assuming that the presumption applies to an element of the crime, if the presumption shifted the burden of production so that the burden of persuasion was also shifted, the presumption would violate *Sandstrom*. *See Sandstrom*, 442 U.S. at 524. This, however, is just another way of talking about the problem presented by the question of what it means to direct a verdict against a defendant.

As a practical matter, of course, verdicts are directed against criminal defendants all the time. The most obvious example is with affirmative defenses; if the defendant does not produce enough evidence, the jury simply will not be instructed on the defense. *See* United States v. Bailey, 444 U.S. 394 (1979).

Burdens of production are also shifted to defendants on defenses that negate elements, such as mistake of fact and intoxication. If the defendant does not produce enough evidence to support the claimed defense, a verdict is effectively directed in favor of the prosecution when the judge refuses to instruct the jury on the defense. This is more troublesome, doctrinally, since it is hard to square with *Sandstrom*. Nevertheless, this practice will continue. The prosecution simply is not going to be required to negate claims that the defendant does not make, and the jury is not going to be instructed on issues that the facts have not raised. This problem flows from current insistence on dealing with questions of jury instruction within the very formal framework of elements and affirmative defenses. *See* Engle v. Isaac, 456 U.S. 107, 120 n.20 (1982).

has the authority to determine whether all of the elements have been proven beyond a reasonable doubt, precluding the judge from taking an element from the jury and directing its finding. *Ulster County Court* prevents the legislature from enacting a presumption that requires the judge to send a case to the jury if the evidence is otherwise insufficient to support a guilty verdict.

The remaining interpretation of "shifting the burden of production to the defendant" is that the judge strongly urges the jury to reach a conclusion consistent with the presumption unless the defendant produces sufficient rebuttal evidence.[154] Such an instruction could easily be interpreted as shifting the burden of persuasion to the defendant and thus is risky to use. Given how easy it is to urge the same conclusion on the jury in the form of an instructed inference, presumption instructions are unlikely to survive except as slips of the trial judge's tongue.

The formalism of this analysis does not satisfactorily address the question of how strongly the judge may urge a conclusion on the jury. Assuming that the coercive effect of instructions varies depending on the language used, it is still very hard to believe that jurors hear, much less are profoundly affected by, the kinds of differences that *Sandstrom* makes crucial.[155]

The treatment of instructed inferences in *Ulster County Court* suffers from a similar flaw. The Court said that an instructed inference does not have to be generally valid because the jury is not required to abide by it.[156] This holding fails to acknowledge the problem

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[154] *See* Turner v. United States, 396 U.S. 398, 401-02 (1970); Leary v. United States, 395 U.S. 6, 31 n.52 (1969); United States v. Romano, 382 U.S. 136, 137 (1965). Statutes containing presumptions are often phrased so that they appear to shift at least the burden of production to the defendant, as that is conventionally understood. *See id.*

Alternatively, people who talk about the burden of production being shifted to the defendant may envision only an instruction that permits the jury to make a finding. If so, this is the same thing as an instructed inference, which the Court calls a permissive presumption. Such an instruction does not shift a burden of production to the defendant in the conventional sense. What this characterization seems to mean is that the very act of commending a conclusion to the jury does, as a practical matter, almost force the defendant to produce rebuttal evidence.

[155] The emphasis on differences in jury instructions and case-by-case, fact-oriented analysis has left the lower courts without adequate guidance. For examples of the problem see Oakes, *The Status of* Sandstrom *in the Second Circuit*, 49 BROOKLYN L. REV. 641 (1983); Note, *Life After* Sandstrom*: The Use of Criminal Presumptions in the Second Circuit*, 49 BROOKLYN L. REV. 1089 (1983); Note, *After Sandstrom: The Constitutionality of Presumptions That Shift the Burden of Production*, 1981 WIS. L. REV. 519. Categorizing instructions as permissive or mandatory is not easy. It is, for example, far from clear whether the jury in *Ulster County Court* would have understood whether it was required to draw the inference suggested by the presumption instruction. *See Ulster County Court*, 442 U.S. at 160-62, nn.19-22.

[156] *Id.* at 157.

created by an instruction that posits an inference which is, in the general run of cases, questionable. Earlier cases[157] and *Sandstrom*[158] say that if a jury may have arrived at a general verdict by more than one route, each of those routes must be free of error. An inference phrased abstractly and in general terms authorizes the jury to convict based only on the relationship described by the instructions, as the Court has previously recognized.[159] If the relationship is not generally true, the instruction pushes the jury to reach a conclusion based only on the strength of the judge's word.[160]

In the three cases concerning the remedy for a *Sandstrom* violation the Court had an opportunity to develop meaningful limits on the trial judge's communications to the jury. Though these cases produced eleven opinions, none of them deals well with the problem, and the effect of the holdings is to eliminate *Sandstrom* as an important limit on what judges tell juries while building a monument to jury decision-making.

In *Francis v. Franklin*,[161] decided in 1985, the Court decided

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157 Leary v. United States, 395 U.S. 6, 31-32 (1969); Brotherhood of Carpenters v. United States, 330 U.S. 395, 408-09 (1947); Bollenbach v. United States, 326 U.S. 607, 611-14 (1946); Stromberg v. California, 283 U.S. 359 (1931).

158 *Ulster County Court*, 442 U.S. at 519-26.

159 *See* Morissette v. United States, 342 U.S. 246, 275 (1952), in which the Court said,

> A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.

See also Bailey v. Alabama, 219 U.S. 219, 235 (1911). This is true whether the presumption is permissive or mandatory.

The dissent in *Ulster County Court* made the same point. *Uster County Court*, 442 U.S. at 175-77 (Powell, J., dissenting). *Cf.* Nesson, *supra* note 118, at 1586.

160 On the other hand, *Ulster County Court* has been interpreted as holding that presumption instructions should be turned into judicial comments while taking liberties with the facts of the particular case. Nesson, *supra* note 118, at 1584. This, however, assumes that the instructions actually given are not approved as a model.

Mandatory presumptions, which *Ulster County Court* defined as those that the jury must abide by and which may be the only basis for finding an element, also present obvious problems for jury independence. *Ulster County Court*, 442 U.S. at 166-67. If the jury is told that it must find consistently with the presumption absolutely unless the defendant rebuts it, *Sandstrom* would be violated. Further, it would be impermissible to instruct the jury that it could reach the conclusion called for by a presumption without presenting evidence which supports the conclusion. Allen, *supra* note 6; Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1215, (1979). If so, in theory the prosecution could present evidence in support of the presumption's postulate and the defense could present rebuttal evidence. As a practical matter, of course, this requirement would eliminate the use of presumptions in the kind of situation for which they have most often been enacted: to help the prosecutor in situations where proving a specific fact would be difficult or impossible. *See* sources cited *supra* note 23.

161 471 U.S. 307 (1985).

how to apply the rule that an erroneous instruction must be read in the context of the charge as a whole to determine if it amounts to a constitutional violation.[162] The majority held that a conclusive or rebuttable presumption instruction is constitutionally erroneous if a "reasonable juror" *could have* understood the instruction as shifting the burden of persuasion to the defendant and nothing else in the charge explained the error.[163] Justice Rehnquist, writing in dissent, would have found constitutional error only if it were *likely* that a "reasonable juror" understood the instruction as shifting the burden of persuasion.[164]

As the majority said, an appellate court cannot be certain whether a given jury pieced together an accurate understanding of the law from all of the instructions.[165] In such cases it favored a test that emphasizes the integrity of the jury's decision-making process. The dissenters characterized the majority's approach as creating the risk of finding constitutional error "after finely parsing through the elements of state crimes that are really far removed from the problems presented by the burden of proof charge in *Winship*."[166]

In two cases dealing with the harmless error[167] test for a *Sandstrom* violation the Court split along similar lines. In the first case, *Connecticut v. Johnson*,[168] decided in 1983, the Court split four to four with Justice Stevens concurring in the judgment without addressing the merits. In 1986 in *Rose v. Clark*[169] Justice Stevens took the position of the dissenters in *Johnson* to establish that *Sandstrom* errors can be harmless.[170]

In *Johnson* the plurality argued that a *Sandstrom* error should be considered harmless only if the instruction was given in connection with an offense for which the defendant was acquitted or if the defendant conceded the issue of intent.[171] The plurality reasoned that

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162 *Id.* at 315 . This is the rule articulated in Cupp v. Naughton, 414 U.S. 141 (1973).

163 *Id.* at 316. The majority further held that even under the harmless error standard proposed by the dissent in Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983)(Powell, J., dissenting), the instruction was not harmless. *Franklin*, 471 U.S. at 326. For a discussion of *Johnson*, see *infra* text accompanying notes 168-80.

164 *Franklin*, 471 U.S. at 342 (Rehnquist, J., dissenting).

165 *Id.* at 322.

166 *Id.* at 342 (Rehnquist, J., dissenting).

167 Constitutional error is not the same as harmful error. Whether the instructions taken as a whole are erroneous is an issue separate and distinct from the harmless error analysis. Together these tests provide two ways that an appellate court may avoid reversing a conviction because of an erroneous jury instruction.

168 460 U.S. 73 (1983).

169 106 S. Ct. 3101 (1986).

170 Justice White shifted from the plurality in *Johnson* to the majority in *Clark*, so that the *Clark* decision now expresses the majority view of the Court.

171 *Johnson*, 460 U.S. at 87.

a conclusive presumption instruction is the functional equivalent of a directed verdict.[172] The dissenters, who ultimately prevailed in *Clark*, said that this analogy is inapt.[173] The dissenters argued that a *Sandstrom* error should be considered harmless if, on the record as a whole, an appellate court could say beyond a reasonable doubt that it did not contribute to the guilty verdict.[174]

All of the Justices agreed in *Johnson* and *Clark* that an instruction should not be phrased conclusively. They purported to disagree about how a jury will use such an instruction if it is given.[175] The plurality in *Johnson* argued that a conclusive presumption instruction

> would have led [the jury] to ignore the evidence in finding that the State had proved respondent guilty beyond a reasonable doubt. . . . The jury thus would have failed to consider whether there was any evidence tending to cast doubt on this element of the crime . . . . Because a conclusive presumption eases the jury's task, "there is no reason to believe the jury would have deliberately undertaken the more difficult task" of evaluating the evidence of intent.[176]

The *Johnson* dissenters responded:

> Contrary to the plurality's assumption, a *Sandstrom* type presumption does not operate independently of the evidence. The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption. . . . If, however, these basic facts are themselves dispositive of intent, the presumption becomes unnecessary to the jury's task of finding intent. Because the presumption does not remove the issue of intent from the jury's consideration, it does not preclude a reviewing court from determining whether the error was "harmless beyond a reasonable doubt."[177]

Because of rules protecting the secrecy of jury deliberations, how juries integrate instructions with the evidence cannot be proven. It is, therefore, impossible to determine which group of Justices is right. The Justices were really arguing about whether the deliberation process that a particular jury uses is of constitutional importance. The plurality, which considered fatal the possibility that the instruction short.circuited the jury's deliberations, was arguing that jury deliberations free from erroneous influence by the judge are essential to a fair trial. The dissenters, who imagined the

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[172] *Id.* at 84.

[173] *Id.* at 95-97.

[174] *Id.* at 97, 102.

[175] On one level, the dispute may simply be about whether juries will obey such an instruction. Given the secrecy of jury deliberations, this is an unanswerable empirical question.

[176] *Johnson*, 460 U.S. at 84-85.

[177] *Id.* at 96-97.

jury turning to the presumption only if the evidence of guilt was weak (and who found the evidence in *Johnson* very strong,[178]) would have found the instruction to be at worst harmless error.[179] But, since they could not be sure that the jury acted as they hypothesized, the dissenters' position amounts to an argument that all that is essential is that the decision formally be made by the jury.[180]

With regard to the specific issues raised in these cases, the position of the dissenters in *Franklin* and the majority in *Clark* seems intuitively more plausible: minor changes in the wording of instructions probably do not have much effect on the outcome of the trial. On the broader question of jury independence, most of the Justices expressed concern,[181] but none of their approaches provides significant protection. The *Clark* majority is satisfied so long as the trial is structured to make the jury the official decision-maker, without regard for the actual progress of the trial.[182] The *Clark* dissenters attach importance to the dynamics of the judge-jury relationship,[183] but their emphasis on the formal structure of instructions continues the pattern of and shares the problems of *New York v. Patterson*[184]

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178 *Id.* at 99-101.

179 See Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1177-91, for a discussion of their research indicating that judges cannot discern whether juries believe that evidence is prejudicial. They conclude that, given the inability of judges to say either how a particular or an average jury would respond to erroneously admitted evidence, the conviction should be affirmed only if the evidence is so persuasive that any reasonable jury would have been persuaded beyond a reasonable doubt. *Id.* at 1176-92. This harmless error test gives great weight to the right to trial by jury without recognizing an entitlement to the possibility of an irrational acquittal.

180 An even rougher version of this theory is expressed by Justice Burger, concurring in Ulster County Court v. Allen:

> In the necessarily detailed step by step analysis of the legal issues, the central and controlling facts of a case often can become lost. The "underbrush" of finely tuned legal analysis of complex issues tends to bury the facts.
>
> On this record, the jury could readily have reached the same result without benefit of the challenged statutory presumption . . . .

Ulster Court County, 442 U.S. at 167(Burger, J., concurring).

181 In *Clark*, Justice Stevens, concurring in the judgment, did not even identify jury independence as a value at stake. 106 S. Ct. at 3112 (Stevens, J., concurring).

182 They said,

> In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. (citations omitted) In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Id. at 3108 (citations omitted).

183 The dissent began by asserting that the majority "disregarded totally" the defendant's right to have a jury determine guilt or innocence. 106 S. Ct. at 3113 (Blackmun, J., dissenting).

184 432 U.S. 197 (1977).

and *Sandstrom v. Montana*.[185]

To determine whether a judge has intruded too far into the jury's domain, the likely effect of the judge's words in the context of the evidence must be examined. This same issue is raised by judicial comments on the evidence, as most recent commentators have recognized.[186]

2. *The Consequences of Turning Instructed Inferences into Comments on the Evidence*

An analysis of how the judge should communicate with the jury is a vehicle for discussing the fundamental issue of the relative decision-making power of the judge and the jury.[187] Therefore, courts sometimes examine such communications with great care and evaluate them against strict standards. At the same time, courts are reluctant to reverse convictions because of an erroneous jury instruction, especially where the evidence of guilt is strong. When the trial judge guides the jury's deliberations by suggesting that it should draw certain conclusions from circumstantial evidence, the dilemma posed by these propositions is particularly obvious.

On the one hand, any type of jury instruction infringes on the jury's independence,[188] limiting its role as the finder of fact and, of particular importance in criminal cases, as the decider of the ultimate issue—guilt or innocence. On the other hand, the jury loses its legitimacy if its decision-making is too idiosyncratic. Debates earlier in this century about the desirability of permitting judges to comment on the evidence framed the issue as a conflict between the democratic ideal of jurors as citizen judges and the specter of unintelligent, naive jurors misled by wily lawyers.[189]

The practicalities of the situation are also very important. The

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185 442 U.S. 510 (1979). *See* discussion *supra* text accompanying notes 117-18, 149-55.

186 *See, e.g.*, sources cited *infra* notes 194 & 195.

187 *See* discussion *supra* text accompanying notes 7-14.

188 Extreme emphasis on jury independence led to the notion accepted in the nineteenth century that the jury was the judge of law as well as fact. *See* sources cited *supra* notes 7-8.

189 Johnson, *Province of the Judge in Jury Trials*, 12 J. AM. JUD. SOC'Y. 76 (1928); Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915). *Cf.* Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 458-59 (1899).

McCormick advocated instructing juries on presumptions because "[p]ersons unaccustomed to weighing evidence and particularly persons of limited intelligence are notoriously suspicious of circumstantial evidence." C. MCCORMICK, *supra* note 12, at 668. The deprecation of juries continues today. *See, e.g.*, 1 J. WEINSTEIN & M. BERGER, *supra* note 7, at 107-56, 107-58.

Other reasons for desiring judicial control are suspicion of lawyers' tricks and a

defense has available to it several mechanisms that protect against convictions based on insufficient evidence. Similar mechanisms are not available to insure against unfounded acquittals. The judge can direct a verdict in favor of the defense but not the prosecution. The defense may challenge on appeal any erroneous rulings that favor the prosecution; the prosecution traditionally has been unable to make such appeals, and today the prosecution still cannot challenge a jury's acquittal on the basis that the decision was against the weight of the evidence.[190] Judicial admonitions that incline the jury toward conviction—such as comments on the evidence, instructed inferences, and, in an earlier day, presumption instructions—have been one of the relatively few devices available to protect against a jury's leniency.[191]

Standardized instructions and ad hoc comments each have their advantages. Standardization reduces the risk of error and minimizes appellate review because it permits prior approval of language that can be transported from case to case.[192] On the other hand, empirical research suggests that a comment tailored to the facts of the case is more likely to be understood and therefore followed.[193] Furthermore, contemporary commentators criticize standardized jury instructions about inferences for their effect on the balance of decision-making power between judge and jury. These commentators claim that such an instruction promotes jury irrationality by encouraging jurors to reach a conclusion without giving them an independent basis for judging the conclusion's validity.[194] These

desire to further bolster the law as a special area of learning that only the initiated can understand and manipulate successfully. *Id.* at 107-49, 107-57.

The debate over the allocation of power between judge and jury also appears in the question of whether standards of liability should be expressed as rules that judges apply or as fact questions left to the jury. It is also reflected in appellate courts' inconsistent treatment of inaccurate instructions. Sometimes the judge's every word is treated as critical; at other times great imprecision is tolerated.

190 On the constitutionality of prosecution appeals, see C. WHITEBREAD, CRIMINAL PROCEDURE 500-01 (1980); Comment, *Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach*, 69 CAL. L. REV. 863 (1981).

191 On occasion people openly admitted that this was their concern. *See, e.g.*, Johnson, *supra* note 189, at 81 (quoting a South Carolina judge who characterized a constitutional prohibition of comments on the evidence as a deliberate design on the part of two or three able criminal lawyers in the Constitutional Convention to prevent verdicts of guilty in criminal cases).

192 *See* sources cited *supra* note 12 and accompanying text. Several states abolished judicial comments because of the demonstrated excesses of a particular judge, a response criticized by the commentators, but one that is not entirely irrational. *See* Johnson, *supra* note 189, at 81; Sunderland, *supra* note 189, at 309.

193 Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981); Severance & Loftus, *supra* note 10.

194 Allen, *supra* note 6, at 336-37, 353; Lushing, *Faces Without Features: The Surface Va-*

commentators commonly propose to use individualized comments on the evidence instead of standardized instructions.[195]

Despite repeated calls from the academic community for a greater use of judicial comments on the evidence,[196] however, most states still forbid or severely restrict their use.[197] Standardized presumption and inference instructions have been much more widely used. *Sandstrom* forbids instructions expressed as presumptions, but it does not ban standardized inference instructions.[198] However, *Ulster County Court* precludes inference instructions except when they express a conclusion that the evidence actually presented supports.[199] As a practical matter then, instructed inferences are func-

lidity of Criminal Inferences, 72 J. CRIM. L. & CRIMINOLOGY 82, 108-17 (1982); Nesson, *supra* note 160, at 1205-08, 1215-22; Saltzburg, *supra* note 62, at 418-19; Schmolesky, County Court of Ulster County v. Allen *and* Sandstrom v. Montana*: The Supreme Court Lends an Ear but Turns Its Face*, 33 RUTGERS L. REV. 261, 295 (1981); Sheldon, *supra* note 117, at 288-89.

In a later article, Professor Ronald Allen linked the rationality of the decision-making process to the accuracy of result by acknowledging the indeterminacy of past facts and substituting for accuracy a rational process, one that a wise person would use in an effort to make the most likely reconstruction of the past. Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 J. CRIM. LAW & CRIMINOLOGY 1147, 1152-53 (1983).

195 Professor Allen has asserted that the principal evil of instructions on presumptions is that they, like affirmative defenses, de facto shift the relative burden of persuasion to the defendant. Allen, *supra* note 6, at 332-38. However, he has expressed approval of accurate comments on the evidence even though they also encourage the jury to find against the defendant and so effectively lessen the prosecution's burden of persuasion. *Id.* at 348-53. He reconciled these propositions by arguing that the burdens of proof are reciprocal—when the prosecution has the burden of proof beyond a reasonable doubt, the defendant has the burden of raising a reasonable doubt. Therefore, if a device merely requires the defendant to raise a reasonable doubt, it is not inconsistent with the prosecution's constitutional burden of proof. Thus, an accurate comment is permissible because it only requires the defendant to raise a reasonable doubt, while the inaccurate comment is forbidden because it increases the defendant's burden beyond showing that there is a reasonable doubt of guilt. *Id.* at 349.

Professor Charles Nesson has argued that presumptions threaten the perceived validity of a jury verdict, which is essential to the legitimacy of the criminal justice system by making it possible to second-guess the jury's findings. Specifically, a generalized presumption jury instruction isolates and identifies one reasoning avenue the jury might have followed, which reduces the case to a simplified assessment of the chances of guilt. This is inconsistent with the concept of proof beyond a reasonable doubt. To avoid this, he says that such instructions should be replaced by accurate, individualized comments on the evidence. Nesson, *supra* note 160, at 1222-25; Nesson, *supra* note 118.

See also United States v. Bailey, 444 U.S. 394 (1979), in which the Court said that the right to jury trial would be compromised if the jury were permitted by an instruction to acquit the defendant on an affirmative defense for which there was insufficient evidence.

196 *See, e.g.*, Wright, *The Invasion of Jury: Temperature of the War*, 27 TEMPLE L.Q. 137, 140-41 (1953).

197 J. Weinstein & M. Berger, *supra* note 7, at 107[01] n. 15.

198 *See supra* text accompanying notes 113-16.

199 *See supra* text accompanying notes 126-129.

tionally equivalent to comments on the evidence. Therefore, states that forbid comments must either reconsider their position or lose this means of controlling the jury. As might be expected, courts in several recent cases have been reluctant to accept the equation of presumption instructions with instructed inferences with comments on the evidence. Other courts, though, have adopted this line of reasoning and its implications.

At one extreme is Delaware, which permits comments on the evidence.[200] In *Hall v. State*,[201] the Delaware Supreme Court said that presumptions must be permissible but that they "explain the legal significance which the law attaches to a particular factual finding," a statement which is quite inconsistent with the first proposition. The position taken by the California Supreme Court in *People v. Roder*[202] is more coherent. The court there said that inference instructions are the equivalent of comments. Since California permits comments on the evidence,[203] the court saw no reason to forbid instructed inferences. It said:

> [P]reservation of the statutory provisions [creating a presumption] in a restrained form will still enable the court to inform the jury of an inference which the Legislature—drawing on its general experience—has concluded can often reasonably be drawn from proof of the basic facts (citations omitted); elimination of the device would deprive the jury of any legislative guidance in circumstances in which direct evidence of actual guilty knowledge will rarely be available.[204]

The Supreme Court of Oregon, a state in which comments on the evidence are forbidden,[205] has carefully and correctly analyzed the effect of converting presumptions into inferences. In *State v. Rainey*[206] the jury was instructed about a statutory presumption as if it were a permissible inference. The Oregon Supreme Court held that the instruction was the legal equivalent of a forbidden comment on the evidence, requiring reversal of the defendant's conviction. Henceforth, the court said, judges should not tell the jury about statutory presumptions, even in permissive terms. It said:

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200 J. Weinstein & M. Berger, *supra* note 7, at ¶ 107[01] n.15.

201 473 A.2d 352, 356 (Del. Super. Ct. 1984). *See also* State v. Carlisle, 458 So. 2d 1347 (La. Ct. App. 1984).

202 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983).

203 J. Weinstein & M. Berger, *supra* note 7, at ¶ 107[01], n.15.

204 33 Cal. 3d at 508, 658 P.2d at 1313, 189 Cal. Rptr. at 512.

205 Oregon R. Civ. P. 59 E.

206 298 Or. 459, 693 P.2d 635 (1984). The court said its decision was not based on federal due process. However, it cited Sandstrom v. Montana, 442 U.S. 510 (1979) and Ulster County Court v. Allen, 442 U.S. 140 (1979), as well as the Oregon Rules of Evidence and the leading scholar on Oregon evidence law, who says that the rules correspond with the federal constitutional cases. 298 Or. at 465-66, 693 P.2d at 639-40.

> It is the task of the advocate, not the judge, to comment on inferences. The advocate must do so without reference to any statute, but merely from the evidence in the case. Inferences when used against the defendant should be left to argument without any instructions . . . . Therefore, all a statutory inference does in a criminal case when used against the accused on an element of the crime is to focus the trial court's attention on a potentially available inference that, subject to satisfying the foregoing tests, may entitle the case to go to the jury and to provide the prosecutor with a theoretical basis for an argument for the jury.[207]

Citing *Ulster County Court*, the court in dicta also said that a statutory presumption will not save the prosecution from a directed verdict if the evidence actually presented at trial is otherwise insufficient, unless the inferred fact follows from the proven fact beyond a reasonable doubt.[208]

Standardized inference instructions seem more attractive than comments on the evidence, whose propriety cannot be determined without assessing the specific setting in which they are given.[209] Under *Ulster County Court v. Allen*,[210] though, the jury may be told about a statutory presumption in the form of an instructed inference only if the evidence actually presented at the trial supports the inference. Therefore, states which cling to standardized instructions do not escape a review of these instructions dependent on the facts of each case, though these states preserve the advantage of routinized language.[211]

The changes of the 1970s and 1980s in the law of burdens of proof and presumptions in criminal cases have substantially limited legislative authority to declare that proof of one fact satisfies the prosecution's burden of production and have eliminated the use of presumptions to shift the burden of persuasion. However, the legislature's ultimate authority to allocate the burden of persuasion between the prosecution and the defense is still intact. In terms of the values that the Court has said are essential to fairness—proof beyond a reasonable doubt and jury fact-finding—the cases do enhance the authority of the jury, as opposed to the legislature, to find the facts. These cases have not, however, significantly limited the

207 *Id.* at 467-68, 693 P.2d at 640. *Cf.* Sims v. State, 482 N.E.2d 1182 (Ind. Ct. App. 1985); Aguilar v. State, 682 S.W.2d 751 (Tex. Ct. App. 1985); Roberts v. State, 672 S.W.2d 570, 577-80 (Tex. Crim. App. 1984).

208 298 Or. at 467, 693 P.2d at 640.

209 *See* J. WEINSTEIN & M. BERGER, *supra* note 7, at ¶ 107[17], 107[18].

210 442 U.S. 140 (1979). *See supra* text accompanying notes 126-29.

211 See *supra* text accompanying notes 194-95 for a discussion of the claim made by recent commentators that abstract, standardized inference instructions promote irrational decision-making and so should be banned.

practical ability of the judge to influence the conclusions the jury draws from circumstantial evidence.

IV. The Symbolic Importance of Proof Beyond a Reasonable Doubt and Jury Independence

The recent cases regarding presumptions, inferences and the burdens of proof provide weak protection for the values that the Supreme Court says are at stake. Furthermore, though complex and interesting, the constitutional law of presumptions and inferences has always had comparatively little direct effect on how the criminal justice system operates. Most cases that go to trial hinge on issues other than presumptions, for example, the propriety of some police investigatory tactic and the consequent admissibility of evidence. Moreover, the great majority of cases do not even go to trial but are resolved by a guilty plea following bargaining between the lawyers.[212] Other factors, such as the scope of recidivist statutes,[213] the possibility of excluding illegally obtained evidence[214] and the law of plea bargaining itself,[215] are generally more important to criminal

[212] An estimated ninety percent of all criminal convictions in the United States are by guilty pleas. Cramer, Rossman & McDonald, *The Judicial Role in Plea-Bargaining*, in PLEA BARGAINING 139, 139 (1980), *cited in* Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935 n.36 (1983). Professor Friedman has traced the prevalence of plea bargaining to the late nineteenth and early twentieth centuries. Its rise coincides with the ascendance of professional police and prosecutors and the attendant shift from an adjudicative to a more administrative system. L. FRIEDMAN & R. PERCIVAL, *supra* note 11, at 173-94; Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979). *See also* Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273 (1979).

[213] *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978). The Supreme Court has upheld application of recidivist statutes in all but the most outrageous cases. *See* Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Davis, 454 U.S. 370 (1982); Rummel v. Estelle, 445 U.S. 263 (1980).

[214] *See, e.g.*, Parker v. North Carolina, 397 U.S. 790 (1971); McMann v. Richardson, 397 U.S. 759 (1970)(guilty pleas induced in part by erroneous belief that coerced confessions would be admissible upheld against defendant because defendant advised by counsel); Brady v. United States, 397 U.S. 742 (1970)(guilty plea valid because defendant assisted by counsel, even though statute subjected defendant who went to trial to possiblity of death penalty, and statute held unconstitutional between plea and appeal). Recent erosion of limits on police investigative tactics may have increased the prosecutor's bargaining leverage.

[215] The Supreme Court has mandated formal guarantees of a fair plea process. *See* Henderson v. Morgan, 426 U.S. 637 (1976); Boykin v. Alabama, 395 U.S. 238 (1969)(record must establish knowing waiver of constitutional rights relinquished by pleading guilty); FED. R. CRIM. P. 11. *See also* White v. Maryland, 373 U.S. 59 (1963); Von Moltke v. Gillies, 332 U.S. 708 (1948)(right to counsel); McMann v. Richardson, 397 U.S. 759 (1970)(counsel must be competent). *But see* Hill v. Lockhart, 439 U.S. 212 (1985)(to satisfy prejudice requirement of ineffective assistance of counsel claim, defendant must show that there was a reasonable probability that he would not have pleaded guilty had counsel not made errors). The Court has, however, refused to har-

cases than the application of statutory presumptions. The major significance of cases and commentary about constitutional limits on presumptions, inferences and the process of proof is their contribution to the philosophical environment of the criminal justice system. As demonstrated, over the years the constitutional law of presumptions has reflected and helped shape the changing concept of what fundamental fairness means.

For the last fifteen years, as in the 1920s and 1930s, great rhetorical emphasis has been placed on fact-finding accuracy. Though most often invoked today to justify a restriction of pretrial protections for criminal defendants,[216] this rhetoric has produced decisions favorable to defendants. Among them are the cases about presumptions and burdens of proof discussed here—*Mullaney*, *Patterson*, *Ulster County Court* and *Sandstrom*. Others include *In Re Winship*,[217] which held that proof beyond a reasonable doubt is constitutionally required, *Taylor v. Kentucky*,[218] which concluded that under certain circumstances due process requires that the jury be instructed on the presumption of innocence, and *Jackson v. Virginia*,[219] which strengthened the constitutional test for sufficiency of the evidence. In a sense, some of these requirements, such as those associated with proof beyond a reasonable doubt, distort fact-finding accuracy by mandating acquittal when the defendant may be factually guilty. In *In re Winship* the Supreme Court justified this result in terms of the symbolic meaning of the burden of persuasion. It said:

The requirement of proof beyond a reasonable doubt has this vital

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ness structural features that tend to deprive the defendant of any real choice other than to accept the bargain offered. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978)(plea of guilty valid though induced by prosecutor's statement that if defendant did not accept plea offered, prosecutor would seek to indict defendant under recidivist statute that carried mandatory penalty of life imprisonment); Corbitt v. New Jersey, 439 U.S. 212, (1978)(guilty plea valid even though statute encouraged pleas of guilty by providing that sentence of life in prison mandatory if defendant convicted by jury but lesser term of 30 years possible if defendant pled guilty to same offense); Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970)(discussed *supra* note 214).

216 *See, e.g.*, Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335 (1983); Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151 (1979); Whitebread, *The Burger Court's Counterrevolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L. REV. 471 (1985). *But see* Seidman, *supra* note 80.

217 397 U.S. 358 (1970).

218 436 U.S. 478 (1978). *But see* Kentucky v. Whorton, 441 U.S. 786 (1979).

219 443 U.S. 307 (1979). *Jackson* is also notable for its extension of this test to federal habeas corpus review of state convictions at a time when the scope of review in other areas was being restricted. *See* Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741 (1982).

> role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt .... Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.[220]

The emphasis of *Ulster County Court* and *Sandstrom* on the jury's role as an independent fact-finder invokes a similar powerful symbol. Giving ultimate power to assess guilt to a group of independent citizens offers further assurance that only factually guilty defendants will be convicted.[221]

Today's focus on factual guilt and innocence, however, differs in an important way from the focus of the 1930s. The concern in the 1930s marked the dawn of the constitutional taming of the criminal justice system. In contrast, for the last decade and a half treatment of persons accused of crime has been growing harsher. Today assurance that defendants are in fact guilty is important because it makes this harshness more palatable.

Increasingly punitive attitudes toward criminals appear throughout the criminal justice system. The movement from indeterminate to determinate sentencing is premised philosophically on the rejection of rehabilitation as a justification for punishment and the acceptance instead of retribution, deterrence or incapacitation to justify punishment.[222] While some who advocated this change perceived that the implementation of the rehabilitative ideal was de-

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220 397 U.S. 358, 363-64 (1970). *See also* Santosky v. Kramer, 455 U.S. 745, (1982)(clear and convincing evidence required to terminate parental rights); Addington v. Texas, 441 U.S. 418 (1979)(clear and convincing evidence required for civil commitment proceedings).

221 *See* Duncan v. Louisiana, 391 U.S. 145, 151-58 (1968); McKeiver v. Pennsylvania, 403 U.S. 528, 554-55 (1971)(Brennan, J., concurring and dissenting). *See also* Schultz, *The Jury Redefined: A Review of Burger Court Decisions*, 43 LAW & CONTEMP. PROB. No. 4, 8 (1980)(concluding that retrenchment on several issues has weakened the jury's functional utility).

222 *See, e.g.*, Blackmore & Welsh, *Selective Incapacitation: Sentencing According to Risk*, 29 CRIME & DELIN. 504 (1983); Cavender & Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425 (1983); Gal-

humanizing,[223] much of the current rhetoric in support of the change is punitive.[224] Reformers call for changes in the juvenile justice system to make it more like the adult system; they believe it mollycoddles delinquents who are as or more dangerous than their adult counterparts.[225] Professional organizations propose to restrict the scope of the insanity defense,[226] and some states have even eliminated it.[227] The acceptability and use of the death penalty has increased.[228] Erosion of constitutional limitations on police investi-

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vin, *Prison Policy Reform Ten Years Later,* 29 CRIME & DELIN. 495 (1983). *But see* Von Hirsch, Book Review, 131 U. PA. L. REV. 819 (1983).

223 *See, e.g.* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE—A REPORT ON CRIME AND PUNISHMENT IN AMERICA, 34-47 (1971).

224 Numerous politicans have made such statements for popular consumption. In the professional literature hysterical statements are rare. Scholars tend to speak in terms of protecting society effectively and just desserts. *See, e.g.*, P. GREENWOOD, SELECTIVE INCAPACITATION (1982); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); J. WILSON, THINKING ABOUT CRIME, PART III (2d ed. 1983).

225 *See, e.g.*, Schuster, *Violent Juveniles and Proposed Changes in Juvenile Justice: A Case of Overkill?,* 33 JUV. & FAM. CT. J. No. 4 37 (Nov. 1982)(citing *e.g.*, *No More Kid Gloves for Young Hoodlums,* U.S. NEWS & WORLD REPORT Mar. 5, 1979 at 24; *Treating Kids Like Adults,* NEWSWEEK, April 16, 1979 at 54; Wolfgang, *Abolish the Juvenile Court System,* No. 10 Calif. Lawyer 12 (Nov. 1982); U.S. Dept. Justice, Office of Juv. Justice & Delin. Prev., The Young Criminal Years of the Violent Few (1985)). *See also* C. SILBERMAN, *supra* note 34, at ch. 9.

226 American Psychiatric Ass'n, *Statement on the Insanity Defense, Dec. 1982,* 140 AM. J. PSYCHIATRY 6 (1983); MODEL INSANITY DEFENSE AND POST-TRIAL DISPOSITION ACT 201 (Nat'l Conf. of Comm. on Uniform State Laws 1984); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-6.1 (1984)(approved 1985).

227 Idaho Code Ann. § 18.207 (Supp. 1985); MONT. CODE ANN. tit. 46, § 14-102 (1985).

228 During the mid-1960s about half the population favored the death penalty. Since the late 1960s a majority of more than two to one has supported it. H. BEDAU, THE DEATH PENALTY IN AMERICA 65 (3d ed. 1982)(ch. 3 surveys literature on public opinion). The Supreme Court has moved since 1972 from uncertainty about the constitutionality of any death penalty scheme, Furman v. Georgia, 408 U.S. 239 (1972); to validation of at least some death penalty schemes, Gregg v. Georgia, 428 U.S. 153 (1976); to approval of an accelerated appeals process in capital cases, Barefoot v. Estelle, 463 U.S. 880 (1983). Since 1977, the year of the first execution after *Furman,* both the numbers of people on death row and of people executed has risen substantially.

Year	Persons Under Sentence of Death	Persons Executed
1977	443	1
1978	445	0
1979	567	2
1980	714	0
1981	838	1
1982	1,050	2
1983	1,202	5
1984	1,405	21

Sources: U.S. DEPT. COMMERCE, CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1981 192-93; STATISTICAL ABSTRACT OF THE UNITED STATES 1986 188-89.

gative practices has been justified because the objects of the searches and interrogations turn out to have violated the law.[229] In a 1984 opinion rejecting a prisoner's claim to compensation for a guard's intentional destruction of his property during a shakedown search, the Supreme Court even rejected the notion that one of the basic aspects of respect for human dignity extends to persons imprisoned for crime.[230] It said, "[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the fourth amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[231]

Some of these changes have little direct effect on the criminal justice system's operation. Relatively few people assert the insanity defense[232] or are subject to the death penalty.[233] Empirical studies suggest that fourth amendment limits on searches and seizures and *Miranda* warnings may not really prevent the conviction of many people.[234] The studies do, however, show that such rules induce police to avoid illegal searches and stimulate police training programs.[235] All of these rules help to shape expectations about the relationship between individuals and agents of the state, which affects how the mass of criminal defendants are treated. So too the change in the tone of constitutional criminal procedure decisions reflects and helps to validate thinking about criminals as not entitled to the respect that government affords other citizens.[236] To make

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229 *See* sources cited *supra* note 216.

230 Hudson v. Palmer, 468 U.S. 517 (1984).

231 *Id.* at 525-26.

232 The insanity defense is successfully invoked in less than one percent of all felony cases. American Psychiatric Ass'n., ISSUES IN FORENSIC PSYCHIATRY 10 (1984)(citing Pasewark, *Insanity Plea: A Review of the Research Literature*, 9 J. PSYCHIATRY & LAW 357 (1981)); Subcomm. on Criminal Justice, House Comm. on the Judiciary (1982)(Testimony of H.J. Steadman). 97th Cong., 1st Session.

233 For example, in 1978, 19,555 people in the United States were murdered. In the same year no one was executed, 183 received the death sentence, and at year-end 445 were under sentence of death. In 1979 two persons were executed and 159 were added to the death-row population, which totaled 567 at year-end. H. BEDAU, *supra* note 228, at 51, 56, 63 (charts collecting data from FBI Uniform Crime Reports, Monthly Vital Statistics Report, National Prisoner Statistics, Bureau of Justice Statistics Bulletin on Capital Punishment, and NAACP Legal Defense and Educational Fund).

In 1983, 18,593 murders and nonnegligent manslaughters were reported to the police. FBI, CRIME IN THE UNITED STATES, U.S. DEP'T JUSTICE 146, 147 (1983). In the same year five persons were executed and 1,202 were under sentence of death. BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT, U.S. DEP'T JUSTICE 1, 3 (1983).

234 *See* Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 9-10 nn.27 & 31 (1985)(collecting empirical studies).

235 *Id.* at 30-33 (collecting studies).

236 Near the height of the Warren Court era, Professor Griffiths wrote that the new

this attitude acceptable, though, people must be assured that persons convicted of crimes are in fact guilty.

The constitutionalization of the proof beyond a reasonable doubt requirement is part of the effort to provide this assurance. The general population, however, has no reason to know about the intricacies of burdens of proof, presumptions and jury instructions. Thus, decisions about these topics do not directly affect public perception of the criminal justice system.

Ostensibly many of the changes discussed in this paper are designed to prevent judges from making statements to the jury that are coercive or incoherent. Whether a jury would perceive an abstract instruction as incoherent, or an instruction that begins "You may infer" as substantially less coercive than one beginning, "The law presumes," is, however, doubtful. Even if the jury considers an instruction incomprehensible or obligatory, its members may not be bothered. If they are bothered, they constitute a small portion of the population and are not likely to spread the word to the general populace. Nor is the public likely to become aware of the issue through some other means.[237]

The people who know and care about the niceties of the burdens of proof, presumptions, inferences and jury instructions are lawyers. Socialized to believe in process as much as results, lawyers need more than an appellate court's finding that the evidence is sufficient to feel that a criminal defendant has been treated fairly. Consideration of these topics serves a useful purpose when it facilitates exploration of issues central to the criminal justice system, such as how to divide power between judges and juries and what the content of the criminal law should be. But to the extent that this discussion turns away from fundamental issues toward ritual affirmation of

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constitutional limits on criminal procedure were largely irrelevant to how the system actually operated and served merely to explain, excuse and justify it. Griffiths, *supra* note 34, at 415-16. The cases did more than this though; they also created new expectations about the relationship between criminals and society which are themselves under attack now.

237 Another argument tying limits on presumptions to legitimacy is that statutory presumptions obscure what the legislature is doing. Ashford & Risinger, *supra* note 15, at 178; Underwood, *supra* note 118, at 1320-23. However, the public probably does not know the exact content of criminal statutes, though there may be general assumptions that, for example, a person who possesses stolen property but does not know that it is stolen is not guilty of a crime. But the question raised by this view of presumption statutes is whether people would perceive a difference, and further, an unfair difference, between a statute prohibiting knowing possession of stolen property with a presumption of knowledge if the goods were stolen recently and a statute with the same elements but without the presumption.

factual guilt, it is harmful, for it diverts energy from and provides an excuse for neglecting the host of other issues that really matter.