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DEMYSTIFYING BURDENS OF PROOF AND THE EFFECT OF REBUTTABLE EVIDENTIARY
PRESUMPTIONS
IN CIVIL AND CRIMINAL TRIALS

By Paul F. Rothstein¹

Introduction

Professor Charles T. McCormick, perhaps the most well-known of all Evidence scholars, wrote that evidentiary presumptions are “the slipperiest member of the family of legal terms....”² No subject has

¹ Professor of Law, Georgetown University, specializing in Evidence, Torts, and constitutional and other aspects of the trial process. He is the author of many books and articles on Evidence and related legal subjects. Rothstein has also been advisor to the U.S. Congress (in drafting the Federal Rules of Evidence; and on Codification of Criminal Law), to the Government of Canada (on Evidence and criminal code revision), and to approximately a dozen nations emerging from the former Soviet Union (on various legal and constitutional matters). He has been chair of the American Bar Association and Federal Bar Association committees on the Federal Rules of Evidence, and chair of the Evidence Section of the Association of American Law Schools. He has frequently lectured on Evidence to federal and state judges, to administrative law judges, to federal agencies, and to Washington D.C. law firms. Some of this article is based in part on some material originally appearing in Rothstein, *Evidence: State and Federal Rules* (2d Ed., West Academic Publ. Co.).

² McCormick on Evidence, Sec. 342 (6th Ed. 2002). For a sampling of additional authorities recognizing the difficulty, see Morgan & Maguire, *Looking Backward & Forward at Evidence*, 50 Harv. L. Rev. 909 (1937); Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv.L.Rev. 59, 82 (1933); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan.L.Rev. 5 (1959); Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 Nw. U.L. Rev. 892 (1982); Payne, *Presumptions: What They Are and How They Work*, 1 Glendale L.Rev. 202 (1976); Lansing, *Enough is Enough: A Critique of the Morgan View*, 62 Ore. L.Rev. 485 (1983); Note, 29 Ark.L.Rev. 247 (1975); Hall, *Evidentiary Presumptions*, 72 Tulane L.Rev. 1326 (1998); Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification, 182 F.R.D. 268 (1998); Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1979).

been more perplexing to generations of lawyers, judges and scholars.³ Nevertheless, these presumptions play a major role in areas of law as important and diverse as antitrust;⁴ negligence;⁵ and gender, age, and race discrimination⁶—to name just a few.⁷

³An “evidentiary” presumption is to be distinguished from a “conclusive” presumption, in that evidentiary presumptions are rebuttable, whereas conclusive ones are irrebuttable. A conclusive presumption is not a presumption at all, but a rule of substantive law:

Conclusive presumptions, sometimes called irrebuttable presumptions of law, are really rules of law. Thus it is said that a child under the age of fourteen years is conclusively presumed to be incapable of committing rape. This is only another way of saying that such a child cannot be found guilty of rape.

Eggleston, Evidence, Proof and Probability 92 (1978).

⁴ On antitrust presumptions of anticompetitive effect of certain conduct such as mergers when done under certain existing market conditions such as concentration, see U.S. v. Philadelphia National Bank, 83 S.Ct. 1715 (1963); U.S. v. Baker Hughes, Inc. 908 F. 2d 981 (D.C. Cir. 1990); Salop, The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach, 80 Antitrust Law Jour. 269 (2015); Sullivan, What Structural Presumptions?: Reuniting Evidence and Economics on the Role of Market Concentration in Horizontal Merger Analysis, 42:2 Jour. of Corporation Law 101 (2016); Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions and Evidentiary Standards in Antitrust Legal Standards [Forthcoming on SSRN and Georgetown Law Scholarly Commons, Fall 2017]. I am greatly indebted to my colleague on the Georgetown Law faculty, economist Steven Salop, for an extensive series of scholarly exchanges between him and myself expanding my perspective on presumptions in antitrust merger cases, which led me to additional insights about presumptions in the law generally. Needless to say, however, any errors in the present article are strictly mine.

⁵ E.g., the so-called “*res ipsa loquitur*” doctrine whereby an unusual injury that ordinarily happens only as a result of negligence, caused by an instrumentality in the control of defendant or his agents, gives rise, in the absence of contributory negligence by plaintiff, to a presumption or inference of negligence on the part of defendant or his agents. See *Byrne v. Boadle*, 2 H & C 722, 159 Eng. Rep. 299 (Court of Exchequer 1863) (flour barrel falling out of high window onto plaintiff—primordial case); *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. App. 1953) (truck swerving off road and down an embankment); *James v. Wormuth*, 21 N.Y. 3d 997, 997 S.E. 2d 133 (2013) (during medical surgery a guide wire goes astray; wire left in and not removed).

⁶ See e.g. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (on showing of apparent discrimination, employer must produce evidence that denial of promotion or employment was not motivated by racial animus but lower court improperly placed burden on defendant to persuade court of “convincing, objective reasons” for choosing one applicant over another); on remand, *Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (once some evidence of employer racial discrimination is shown, the employer has the burden of producing evidence of business justification; the burden of persuasion, however, remains on the employee); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)) (denial of re-employment because of race); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441 (1st Cir. 2009) (age discrimination); *Gross v. FBL Financial Services Inc.*, 129 S.Ct. 2343 (U.S. 2009) (semble); *Gastwirth*, Some Recurrent Statistical Issues in the Analysis of Data in Equal Employment Cases,..... CITATION. See also *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261 (3d Cir. 2010) (lender bias suits).

⁷For some additional areas, see *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013) (securities-fraud plaintiffs can invoke a presumption of reliance on the fraud, if plaintiff shows, among other things, that the fraud consisted of certain public, material misrepresentations made by defendant regarding securities traded in an efficient market, and plaintiff thereafter engaged in certain transactions regarding the securities); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (presumption against extraterritorial jurisdiction); *Vance v. Terrazas*, 444 U.S. 252 (1980) (presumption that person who commits expatriating act has done so voluntarily, used

Professor Steven Salop, a legally sophisticated economist, defines presumptions in terms of decision theory, and his “take” is useful in understanding what evidentiary presumptions in the law are, or at least ideally ought to be:

Decision theory provides a formal methodology for rational decision-making when information is imperfect. This methodology can be described as a rational process in which a decision-maker begins with some initial, rationally-based beliefs about the possible effects of a decision. As a formal matter, those initial beliefs can be seen as a set of probabilities of potential alternative outcomes. The decision-maker bases the initial beliefs on prior knowledge and then gathers additional information to refine and improve upon those initial beliefs in order to “update” the presumption to create revised beliefs.

In a judicial context, these initial beliefs represent the decision-maker’s *presumption* while the additional information is *case-specific evidence*. One can loosely characterize the presumption as circumstantial evidence that does not have to be proved in the specific case. The case-specific evidence then leads to the revised beliefs, which then can form a rational basis for making a better decision. A decision is better if it is less likely to be erroneous, in light of the actual (but unknown) outcome of the decision that would be known if there were perfect information. The quality of the decision takes into account the magnitude of . . . harm from making the erroneous decision in addition to the probability of doing so. Decision theory similarly can be used to rationally decide how much information to gather. It does so by balancing the costs and benefits of additional imperfect information in terms of making better decisions.⁸

Evidentiary presumptions in law act as shortcuts to rigorous proof. By means of an evidentiary presumption, a difficult-to-prove critical fact may be established by proving some other more easily provable subsidiary fact from which the critical fact may be presumed. This accounts for the popularity of these presumptions with trial lawyers.

But the puzzling question has always been, “What effect on the normal processes of trial does a legal presumption have, especially when there is other evidence pro and con on the presumed fact?” This article aims to shed light on these problems, and to examine the arsenal of tools available to help solve them or at least to help think about solving them.

in establishing loss of citizenship); *Hodges v. Barnhart*, 276 F.3d 1265 (11th Cir. 2001) (social security benefits case; presumption of a consistent IQ throughout life; thus, an applicant who tested in the mental disability range at the age of forty nine was not required to prove any deficits in adaptive function prior to age twenty two, even though the Act required such proof); *U.S. v. Banafshe*, 616 F.2d 1143 (9th Cir. 1980) (presumption concerning naturalized U.S. citizen establishing a permanent residence in foreign country); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469 (2d Cir. 1976) (assignment of claim by parent corporation to wholly-owned subsidiary which engaged in no business is presumptively improper as undertaken to create jurisdiction); *U.S. v. Ahrens*, 530 F.2d 781 (8th Cir. 1976) (presumption of regularity of Internal Revenue Service procedures means deficiency notice probably properly entered). Cf. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014) (Employee Retirement Income Security Act lawsuit; no presumption of prudence on part of Employee Stock Ownership Plan fiduciary exists in the law). It is easy to see that presumptions can implicate important policies and laws.

⁸ Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions and Evidentiary Standards in Antitrust Legal Standards* [Forthcoming on SSRN and Georgetown Law Scholarly Commons, Fall 2017], pp. 12-13.

But before we do, we must explore another set of widely misunderstood legal concepts that are key to the inquiry. I am talking about “burdens of proof.”⁹ Evidentiary presumptions are exclusively concerned with altering burdens of proof in one way or another.¹⁰ Hence we begin by examining how burdens operate in cases where no presumption is invoked; and then later we will demonstrate how evidentiary presumptions can change the picture.

Burdens: Prerequisite to Understanding Presumptions

In any civil or criminal lawsuit there is a pleading burden, a production-of-evidence burden (also known as the burden of going forward with the evidence or producing more evidence), and a persuasion burden, for each issue in the case.¹¹ A particular burden may be on one party as to some issues, and on the other party as to other issues, in the same case. Even as to one particular given issue, all three burdens may not be on the same party. Further, during the course of a case, the production burden can shift from one to the other party, and perhaps back again, as we shall see.

The Pleading Burden. That which a party must put in his pleading (e. g., in his initial complaint, indictment, charge, accusation, answer, plea) in order for it to be in issue in the case, constitutes his *pleading* burden.¹² Thus, in a murder case, the prosecution must plead that the defendant (D) killed the victim (V), or the case can be dismissed before it ever gets to trial. In other words, the prosecution has the burden of pleading on the issue of whether the defendant killed the victim. I. e., the risk of not pleading on that issue is on the prosecution. Conversely, the pleading burden as to the defense of insanity, is normally on the defendant. If it is not pled by defendant, he cannot defend on that basis. We will not have much more to say about the pleading burden (since it is not so difficult to understand and not so connected with presumptions).

The Burdens of Proof. The other two burdens (the production burden and the persuasion burden) are the so-called “burdens of proof.” Satisfying them or preventing the other party from satisfying them are the goals of introducing evidence.

An understanding of how these two burdens operate in the absence of evidentiary presumptions is essential to an understanding of evidentiary presumptions since evidentiary presumptions’ sole affect is to

⁹ McCormick’s statement above in text that presumptions are the “slipperiest” of legal concepts actually goes on to say “...except for its first cousin, burdens of proof.”

¹⁰ See e.g., holding that presumptions are closely connected with burdens of proof, *Jund v. Town of Hempstead*, 941 F.2d 1271 (2d Cir. 1991) (examining shifting burden of proof in employment discrimination case). See also the description given of some of the cases in footnote 6, *supra*.

¹¹ It is not always clear what has dictated the allocation of the burdens in cases. Considerations of the following kind have all been cited from time-to-time: convenience; relative accessibility of proof to the two parties; who is disturbing the status quo; what is likely to be the truth in the absence of pleading, proof, or persuasion on the factual issue; the unusualness of the claim relied upon by the one party or the other; whether the proposition is negatively or affirmatively stated; whether the matter raises an exception to a statute or general rule; public policies such as deterrence; etc.

¹² See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002) (plaintiff suing under federal law for age and national-origin discrimination need not plead facts sufficient to make out a *prima facie* case, so long as he pleads sufficient facts to notify of what he is talking about and to entitle him to relief if proved).

aid in the satisfaction of (or in preventing satisfaction of) these burdens. Hence we first examine these burdens as they operate in ordinary cases without presumptions.

(a) *Production Burden.*

A party has the production burden when, if he allows the evidence to stay as it is, the factual issue will be concluded against him by the judge (regardless of the jurors) as a “matter of law.” *This is all that “production burden” means.* As we shall see later, the question whether a party has satisfied this burden can be raised at specified times during the trial, by the opposite party, in what is called a “motion,” and if it appears it hasn’t been satisfied, a subsequent opportunity to satisfy it may or may not be accorded by the judge.

The production burden on an issue may shift from one party to the other several times during the course of the trial as more and more evidence is progressively introduced. As evidence is introduced, first one party, then the other, may run the risk (if a proper “motion” were made) of a directed verdict or equivalent preemptory ruling if she allows the state of the evidence to remain as it is without going forward with more evidence. The party on whom this risk rests is said to have the burden of “going forward with the evidence,” i.e., producing additional evidence, or she automatically loses the case or issue if the “motion” is made.

Whether a burden of production has been satisfied is *only for the judge* to decide. Satisfaction of a party’s production burden merely and solely means *the judge will not direct a verdict* or make an equivalent preemptory legal ruling that would foreclose jury consideration of that party’s case or issue. That is, it means only that the judge will not make a preemptory ruling resolving the case or issue against the party as a matter of law. Satisfaction of the production burden removes that risk. In other words, a determination that the burden of production of evidence has been carried means the party’s case (or the particular issue on which the burden has been satisfied) will survive enough to be able to “get to the jury” for resolution, rather than being thrown out beforehand by the judge. *It does not mean the party wins the case or issue.* The jury still has to be persuaded. I.e., the party must also prevail under the persuasion burden with the jury. All satisfaction of the production burden means is that the judge is satisfied there is a minimally sufficient showing to allow the jury to deliberate on and decide the factual issue on which the production burden has been carried, not that the judge thinks the fact is established. The jury can then go either way on the fact. They consider which way they are persuaded. They decide if the persuasion burden is carried or not.

Thus, in contrast to the burden of production, the question whether the burden of persuasion has been satisfied is *only for the jury* to consider. If the jury finds it satisfied, it simply means the party who had the persuasion burden wins the case (or at least wins the particular fact issue involved).

Consequently, the prosecutor in the above murder case has something more to worry about than his pleading burden. One of these things is the production burden. It initially and at various other times will be on him respecting the issue of whether D killed V. (And ultimately he will need to satisfy the persuasion burden: he will need to convince the jury D killed V.)

The question of whether he has satisfied the production burden procedurally can be raised only by means of the opposing party (D) making a “motion” to the judge raising the question at certain specified times during the trial: usually at the close of the prosecution's evidence, and again at the end of all of the

evidence. In a civil case, it is similarly raisable at analogous times.¹³ It can take place even before trial if it becomes clear that a party at trial will not be able to meet his production burden.

When the motion on the “D killed V” issue is made at any of the appropriate times in the criminal case, the state of the evidence must be such that the judge can say some reasonable juror could find beyond a reasonable doubt that the defendant killed the victim,¹⁴ or else the prosecution will suffer an adverse judicial ruling (a “peremptory” ruling) establishing that fact against the prosecution without the aid of the jury. In this particular example, such a peremptory ruling means the prosecution’s entire case fails as a matter of law, because the issue of whether D killed V is crucial to the whole case. The motion can be made even after a verdict of guilt comes in from the jury. The judge can hold that the prosecution never satisfied the production burden on D killing V. The judge is allowed to overrule the jury this way. It is tantamount to saying the jury reached an unreasonable, irrational, or illegal verdict.

Thus, whenever during the course of the trial the evidence does not permit the judge to feel a reasonable juror could find for the prosecution (that D killed V), the risk of a peremptory ruling on that issue is on the prosecution unless and until additional evidence favorable to the prosecution is adduced. (Of course, it does not matter which side adduces it.) If the evidence lines up in this unfavorable way for the prosecutor at any time when he can still introduce more evidence, he had better not rest; he had better go forward and adduce more evidence. He has the burden, in other words, to *produce more evidence*. Of course, one side cannot move for a peremptory ruling so long as the other indicates it has more evidence to introduce on the issue and the time for introducing it has not passed.

¹³ To understand what we have said about when the “motion” can be made, one needs to understand the order of presentation of evidence at a trial. We outline the order in this footnote. The order is roughly similar in criminal and civil trials. We use a civil trial example here; for the criminal analogue, substitute “prosecutor” for “plaintiff.” Following jury selection and the lawyers’ opening jury statements comes stage 1, plaintiff’s case-in-chief (comprised of witnesses, documents, and other evidence); stage 2, defendant’s case-in-chief (not only denying facts asserted in plaintiff’s case, but also supporting any affirmative defenses); stage 3, plaintiff’s rebuttal case (possibly but not necessarily comprised of some of the same witnesses, but confined to rebutting defendant’s case, in the absence of a relaxation by the trial judge); and stage 4, defendant’s rejoinder evidence (confined in theory to the matter newly introduced by plaintiff in the previous stage). In the trial judge’s discretion further stages may be allowed. These would be additional rebuttals and rejoinders to any new matters raised in the immediately preceding stage. Often stages after stage 2 or 3 are not permitted by the trial judge, especially if there has been no new matter to address. A witness presented at any stage will normally be, in uninterrupted sequence, (i) examined directly by the lawyer presenting the witness; (ii) cross-examined by the opposing lawyer; (iii) subjected to re-direct examination by the presenting lawyer, to try to negate the damage from the cross-examination; and (iv) subjected to a re-cross examination by the opposing counsel, attempting to negate the damage of the re-direct—but (iii) and (iv) may be disallowed or limited by the trial judge if their contribution would be minimal. Further re-re-directs and re-re-crosses are possible if necessary. At the end of the trial, there are closing arguments by the lawyers (“summations”) and the judge’s instructions to the jury. There can be minor variations of everything in this footnote, in particular courts or cases.

¹⁴ If this were a civil wrongful death case, all the judge need be able to say is that some reasonable juror could find *by a preponderance of the evidence* that D killed V. In other words, the degree of the persuasion burden influences the production burden. Some cases hold it is drawing too fine a line to require the judge to distinguish in this fashion between criminal and civil cases as respects the ruling spoken of here. Such cases may articulate the standard in both kinds of cases simply as “whether a reasonable juror could find D killed V.” This may imply the distinction, however. Some decisions seem to apply the civil standard in both kinds of cases.

Notice that, whatever the test, the question is not whether the judge *herself* can say D killed V (beyond a reasonable doubt or by a preponderance of the evidence or under any other standard).

Sometimes the problem is talked about in terms of whether or not the prosecutor's (or plaintiff's) evidence (or, more properly, the evidence that cuts in his favor coming from whichever side) is sufficient to get the issue to the jury (or sufficient to sustain a verdict in his favor on the issue).

It is obvious that as to most issues, the plaintiff in a civil case and the prosecution in a criminal case bear the production burden initially, in that if no evidence on the issue is adduced, they will suffer a peremptory ruling. The adduction of sufficient evidence by plaintiff or prosecutor to get to the jury (i.e., the overcoming of their production burden) *does not shift the production burden to the defendant*. Only when plaintiff's evidence is *so overwhelming that it permits no reasonable contrary conclusion* (thus subjecting defendant to the specter of a peremptory ruling if the evidence remains in that state) do we say the production burden has shifted to defendant. As we shall see, this shifting to defendant ordinarily cannot be accomplished by the prosecution on the issue whether D (defendant) killed V (victim) for constitutional/policy reasons, not logic. It can, however, be accomplished by a plaintiff on the same issue in a corresponding civil context (say a civil lawsuit for inflicting wrongful death on V brought by V's family against D).

A production burden once shifted may, of course, be shifted back again by a change in the state of the evidence that once again renders the original party liable to (at risk for) a peremptory ruling.

We have a bunch of unnecessarily fancy names for the peremptory ruling we are talking about, i.e. for the judicial decree or order requested or motion that is made to call to the attention of the judge that one has failed to discharge a pleading or production burden. Depending upon the time when made and the name used in the particular jurisdiction, these may be called judgment on the pleadings, summary judgment, dismissal, non-suit, a directed verdict, judgment notwithstanding the verdict, judgment as a matter of law, etc. But they all assert merely the simple fact that one of these burdens (pleading or production burden) has not been met, on some issue. The failure to meet the burden, or the request (motion) or order (called generically a "peremptory" ruling or order), may pertain to all or any number of issues in the case, or only one issue, foreclosing only *it* from further debate; or, if that issue is determinative, as in our examples, the ruling will determine the entire case. The ruling generally must be solicited of the judge by one party against the other party, through a motion (request).

Suppose the murder example above were a *civil* wrongful death action, which would have a similar allocation of burdens on the issue of whether the defendant killed the victim. (Assume the plaintiff's pleading burden is discharged.) In addition to the peremptory judicial rulings possible in the criminal analogue, the plaintiff (V's family member or representative) can move for one in *her* favor at the close of all the evidence on grounds that on the state of the evidence, all reasonable jurors must agree that the issue whether D killed V must be resolved in her favor. In other words, she argues that the evidence has not only discharged plaintiff's production burden (i.e., allowed her to avoid the specter of an adverse peremptory ruling), but has shifted that burden (the burden to go forward and produce additional evidence, or else suffer an adverse peremptory ruling) to the defendant on that issue. She (plaintiff) is saying that the risk of an adverse peremptory ruling upon no further production of evidence has shifted, or should now be shifted, to the defendant; and that the defendant has closed his case and indicated he has no more to present. If the issue of whether the defendant killed the victim is the only issue in the case, success of the plaintiff's motion will mean success in the case at large. However, there may be other closely contested factual issues in the case, e. g., a defense that V instigated the killing and thus cannot recover, or an argument that plaintiff has no real damages or is not related in the proper way to the deceased. If so, and the plaintiff's motion is successful, the jury will be instructed that they are to find on the remaining issues only, it being established that the defendant killed the victim.

Owing to a special dispensation to criminal defendants, the prosecutor in the analogous criminal case cannot obtain the analogous peremptory ruling (that D killed V). Is this in fact a special dispensation? Or is it because we can never say reasonable people must agree that the evidence that D killed V is credible beyond a reasonable doubt? Either way, the result is the same.

Theoretically, a peremptory ruling might, in both the civil and the criminal example, take the form of a “conditional” instruction to the jury, “If you believe [to the requisite degree] that defendant was seen dismembering the body of V at such and such time under such and such circumstances, then you must find defendant killed V.” In theory, this would be appropriate where the judge could not direct the jury to find that defendant was seen dismembering the body at such and such time under such and such circumstances (because in a criminal case the “special dispensation” would not permit such a direction, or because in the civil or criminal case reasonable people could differ over whether to so find on the particular state of the evidence in that case), but he could (assuming the circumstances line up this way) direct as to what must follow if that fact is so found, because all reasonable people must agree that it follows [beyond a reasonable doubt, in the criminal case]. However, many authorities would dispute the propriety of such a ruling in a criminal case. A similar conditional ruling might be granted in favor of the *defendant* in either the civil or the criminal case. An instruction might also begin, “If you do not believe. . . then you may not find” or “Only if you believe . . . may you find”

Notice that in deciding whether a production burden is discharged, the judge is to consider everything that is properly to be considered in the case at large, not merely evidence proceeding from the side with the production burden. This includes evidence from the other side, experience, and common-sense notions, to the extent permitted to the jury.

“Summary judgment” or “non-suit” is the term used where a peremptory judicial ruling of the kind discussed here is granted in advance of trial because it is made apparent by affidavits that the evidence that will be adduced at trial will entitle the movant to such a peremptory judicial ruling at trial. “Judgment notwithstanding the verdict” is the term usually used where the peremptory judicial ruling is granted after a jury verdict and overturns the verdict. The ruling is in essence a ruling that the verdict was unreasonable—that no reasonable juror could have rendered it. That is indeed the standard for such a ruling. The standard is the same as before a verdict (at which time the ruling would normally be called a “directed verdict” or “judgment as a matter of law”), but often the judge will wait before issuing a peremptory ruling until after a jury verdict, in case the ruling is rendered unnecessary by a jury verdict that is consistent with what he would rule. Even if the verdict is not consistent in this way, judges realize it is still a good idea to delay ruling until after the jury verdict because the judge's ruling may be reversed on appeal in which event it will be good that there was a rendered jury verdict on record to reinstate to avoid the necessity of a new trial.¹⁵

¹⁵ The judgment notwithstanding—the verdict spoken of here—should not be confused with a granting of a new trial on grounds that the verdict is contrary to what the judge feels was the greater weight of the evidence. The latter ruling does not say the jury was unreasonable. It comes closer to saying that the judge, acting as a kind of thirteenth juror, would not have found the way the jury did, although she concedes that a reasonable juror could find as they did. Her disagreement with the jury verdict must be more than mild—the judge must not feel merely that she disagrees in a close case. She must feel the jury went against the “manifest” weight of the evidence, although they were not acting totally unreasonably. (The exact formulation of this concept may vary from jurisdiction to jurisdiction.) This granting of a new trial does not *conclude* the case or issue, but merely results in a new trial. As such, it is not the kind of peremptory ruling about which we are speaking. In a civil case and against the government in a criminal case, neither of these rulings has been deemed to violate the constitutional right to jury trial.

Putting aside any special criminal dispensation, it is established above that the standard for a peremptory judicial ruling on a matter of fact is whether a reasonable person could find in favor of the non-moving party (the party opposing the request for—the motion for—the peremptory ruling) on the issue. If some reasonable person could so find, the motion must be denied—the jury must be allowed the chance to find for the non-moving party. If *no* reasonable person could so find, then all reasonable people must agree that the issue must be resolved in the movant's favor, and the motion should be granted, to prevent an irrational finding by the jury.

It must be added, however, that the law holds that reasonable people nearly always may disagree over whether witnesses can be believed or not, except in extraordinary situations. In some jurisdictions, direct testimony of an uncontradicted and unimpeached witness may constitute such an extraordinary situation, at least where she is not an interested witness and no other facts appear to cast any doubt on her credibility. In this unusual situation it may be that the law will permit the judge to hold that all reasonable people must agree she is to be believed.¹⁶ It will be a very rare situation indeed, however, where a judge will be permitted to say reasonable people must agree a witness is *not* to be believed. The mere fact that an overwhelming number tell one story, and a single witness tells the opposite, is not ordinarily grounds for saying reasonable people must agree that the majority's story is true, the other false.¹⁷

The consequence of all this is that one in the position of our civil plaintiff above will seldom be entitled to a favorable peremptory ruling on an issue like whether D killed V (because reasonable jurors could disagree as to whether to believe plaintiff's witnesses) unless the defendant concedes the credibility of an eyewitness of plaintiff's (which he probably wouldn't) or of a story told by plaintiff's witnesses, which story is such that the inference to be drawn therefrom, that D killed V, while in dispute, seems to the judge to be such that all reasonable people must draw it in favor of the plaintiff regardless of the credibility of anyone else. (If the inference is refuted by another witness, say of defendant, then the case should go to the jury because reasonable people could choose to believe that witness.) A further consequence is that one in the position of our civil defendant can seldom procure a peremptory ruling in

¹⁶ Another such situation may be where a question is exclusively within the ken of experts and all the expert testimony is one way. Consider also that where a matter is said to require (not just to be appropriate for) expert testimony, the trier-of-fact will not be permitted to draw the inference in question unless an expert testifies it can be drawn.

¹⁷ As suggested above, expert testimony may be an exception to the principle that the jury, as rationale deciders, are always free to accept or reject testimony as true. See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (expressing the law in federal courts and a number of states); *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (still essentially the law in a number of states); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending *Daubert* beyond experts in science); Federal Rule of Evidence 702 (purportedly codifying *Daubert* and *Kumho* for federal courts). These authorities set up some somewhat objective criteria that can be applied by a judge to rule that an expert's testimony is not credible as a matter of law, and to therefore keep the testimony from the jury. Further, some of these criteria do indeed regard as an important factor, an expert's *consistency with what other experts in the field believe*. The author of the present article feels this exception is justified because credibility in the expert area means something quite different from credibility of firsthand witnesses to litigated events. Credibility of expert testimony normally involves the technical soundness of the *inference* the expert is drawing, not her testimonial qualities. Credibility of expert propositions is beyond the average competence of a juror. Jurors can be easily "snowed." So assessment of the credibility of expert testimony often cannot rationally go either way based merely on the jury's common sense and experience. See interview of Paul Rothstein in Kaufman, States Slow to Adopt Daubert Evidence Rule, Bloomberg BNA Product Safety & Liability Reporter (April 27, 2016), also available on line and at Bloomberg Law and bna.com.

his favor on an issue like whether D killed V unless the inference that D killed V cannot be drawn even if all testimony favorable to the plaintiff is accepted as true. In other words, the determination is based on the inferences. The test (for granting a peremptory ruling) that is sometimes articulated to take account of these matters is that all issues of credibility must be assumed to be resolved in favor of the non-moving party; and then, if a reasonable person still could not find for him, the motion is granted. In other words, he must be given the benefit of the doubt. Where there are issues of credibility, peremptory rulings are frequently difficult to obtain.

(b) *Persuasion Burden*

In effect the jurors in a case are instructed by the law (through the judge) as to each fact issue in the case, that they are to conclusively assume the fact to be one way—that is, to exist (or not exist)¹⁸—unless convinced to a certain degree (preponderance of the “evidence,” i.e. of probability; or beyond a reasonable doubt, depending on the kind of case, civil or criminal) that it is the other way. In other words, the electric toggle switch (if a fact issue may be viewed as such) starts out in one of its two positions, and rests there with some degree of stickiness unless and until sufficient force—in a civil case proof by a “preponderance of the evidence” (or more properly, “preponderance of the probabilities”) or in a criminal case proof “beyond a reasonable doubt”—is mustered (or otherwise appears) to dislodge it to the other position. The party who loses the issue if it is not dislodged, has the “burden to persuade,” and the degree of force (preponderance; or beyond a reasonable doubt) needed (i.e., the degree of stickiness) is the degree of that burden. In other words, the switch starts out lodged in the position (from among its two possible positions) that is against the position of the party with the persuasion burden. *This is all that persuasion burden means.* It is the burden to “persuade the fact-finder or lose.” It is the risk of loss by the party who has the burden, if she does not persuade the jury. Remember, with *this* burden, it is the *jury* who decides whether it is discharged; whereas the judge decides in the cases of the pleading and production burdens. The jury is instructed as to the persuasion burden only.

Let us return to our example of a murder prosecution for illustration. Assume that liability to an adverse peremptory judicial ruling based on failure to plead that D killed V or to adduce sufficient evidence of that fact, is overcome by the prosecution. I.e., the prosecution has discharged its pleading and production burden, and the case “gets to the jury” on the issue. The prosecution will still suffer an adverse verdict if the jury is not persuaded beyond a reasonable doubt that the defendant killed the victim. The jury is so instructed by the judge. Thus, as respects this issue, the risk of non-persuasion, or the so-called “persuasion burden,” is on the prosecution, as were the pleading and production burdens.¹⁹

Let us revisit in more detail the *degree* to which the prosecution must convince the minds of the jurors in a criminal case—i.e., how “heavy” his persuasion burden is. As we said, the jurors must be convinced “beyond a reasonable doubt” that D killed V, and they are so instructed. Belief that it is slightly

¹⁸ For example, in most jurisdictions, in a criminal case, defendant’s sanity is usually assumed to exist until proven otherwise by the defendant. In the traditional negligence civil case, defendant’s negligence is normally assumed to *not* exist until proven otherwise by plaintiff.

¹⁹ As in the case of the other burdens, the language of “burden,” as opposed to “risk [of non-persuasion],” is much more frequently found though it is the less preferred by some scholars because it suggests that only evidence proceeding from the side with the burden is considered in deciding whether the burden is discharged, which is not so. However, in this article we stick with the traditional parlance of “burdens,” which is very much more common and communicative. We have made it clear that evidence from all sides can be considered in deciding if one side has carried its various burdens.

more probable that the defendant killed the victim than that he didn't, would be insufficient to convict. The probability must appear to the jurors to be much higher—perhaps upwards of 90%, if we must affix a figure. Thus a criminal defendant might be acquitted though the jury thinks on balance of probabilities he most probably did it. While a 51% probability would be insufficient in a criminal case, it might be sufficient for a plaintiff's verdict in an analogous civil wrongful death action. For as to most civil issues, as we said, the persuasion burden is to “prove by a preponderance of the evidence”—a standard which we may take to mean “establish by a preponderance of the probabilities.” It would seem that the merest preponderance will do.²⁰ Some cases seem to insist that the standard means something other or more than this;²¹ but it is certainly less than in a criminal case. The difference between the weight of the persuasion burden on the prosecution in a criminal case, and the weight of the persuasion burden on the plaintiff in a precisely analogous civil case, is part of the reason why O.J. Simpson was acquitted in the criminal case

²⁰ Judges eschew a numerical quantification of these standards when instructing juries. But it is often recognized that it may be useful for judges, legal theorists, and scholars to think in terms of some rough numerical quantification, although there is considerable disagreement on the exact number, at least for criminal cases. There is considerable agreement that the “preponderance” standard in civil cases entails a probability of just over 50%. See Judge Weinstein’s thoughtful opinion in *U.S. v. Fatico*, 458 F. Supp. 388 (E.D. N.Y. 1978); and Rita James Simon, *The Jury and the Defense of Insanity* (Little, Brown, 1967) suggesting that jurors may like and understand a 95% figure for criminal cases.

²¹See, e.g., *Smith v. Rapid Transit, Inc.*, 58 N.E.2d. 754 (Mass. 1945). The suit was brought against defendant bus company. Plaintiff was hit by a bus which she could not identify. It might have been a bus of defendant company. Plaintiff’s evidence that it was, essentially was this: The department of public utilities had issued permission to the defendant for three routes in town, one of which included where plaintiff was hit. There was another bus line in operation in town at that time but not with regular routes on that street. According to the defendant’s bus timetable, buses were scheduled on the relevant route at about the time plaintiff was hit. In affirming the grant of a directed verdict for the defendant, the court held that:

The ownership of the bus was a matter of conjecture. While defendant had the sole franchise for operating a bus line on that street this did not preclude private or chartered buses from using this street; the bus in question could very well have been one operated by someone other than the defendant. It is not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black; nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough. A proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.

Contrast *Evans & Co. v. Astley* [1911] A.C. 674, 678 (British House of Lords, per Earl Loreburn, L.C.):

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act on. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities.

against him for killing Nicole Brown Simpson and Ron Goldman, but was found liable in the civil case brought by family members of the deceased for the same killing.²²

Notice that contrary to the language of the criminal standard, the language of the civil standard addresses itself to the state of the evidence rather than to the degree of “convincedness” or “conviction” that must be felt or produced in the minds of the jurors. This, it is submitted, is not the intendment of the civil standard, and the selection of language is unfortunate and misleading to both judges and jurors. The language is further unfortunate and misleading insofar as it suggests, quite erroneously, (a) that only evidence, not common sense and experience, may be considered;²³ (b) that the quantity and not the quality of the evidence counts;²⁴ (c) that only evidence adduced by his own side may be considered in favor of a party (“he must show by a preponderance of evidence”); (d) that there can be only *belief* or *disbelief* in the truth of a proposition, with nothing in between, such as belief that a proposition is probable (“you may find for plaintiff if you *believe*, upon a preponderance of evidence, that . . .”); and (e) that *probability* of truth is an insufficient basis for awarding a verdict to the party having the persuasion burden.

A standard somewhere between the civil and the criminal persuasion standard is frequently applied to proof of certain special issues in certain civil cases. These are often issues of an equitable nature, such as “mistake” in a suit for reformation of a deed or contract. This standard is most often phrased as “clear and convincing evidence.”²⁵

It has been suggested that the three standards (civil, civil-equitable, and criminal) be described, respectively, as requiring belief that the proposition is “probably so” (i.e., more probably true than false); “very probably so” (i.e., considerably more probable than not); and “almost certainly so” (i.e., very highly probable).

Are three standards enough? In daily life persons require different degrees of convincedness depending upon what “rides” on their decision—i.e., upon the stakes. Civil cases are not all alike as respects stakes. Nor are criminal cases. Indeed, the stakes in some civil cases are greater than in some criminal cases. How is the jury likely to get around this? Will there be some correlation between the degree of convincedness felt by the jury on the issue of liability, and the degree of punishment or amount

²² There were some other reasons, too: The evidence was somewhat different (for example the shoes that left the incriminating footprints, that O.J. claimed were “ugly ass shoes I never would have bought” were found on O.J. in a photo surfacing between the trials); the plaintiff’s counsel presented the evidence better than the prosecution (particularly the DNA); the jury was different; allegations of botched police work were viewed by a different jury in a different perspective; etc. The excessively dramatic, and deceptive, presentation by the defense, of a crime-scene glove that “didn’t fit” O.J. in the criminal case, may also have played a role. The present writer taught a course on the O.J. case during the trial.

²³ But there are and must be limits to the use of matters brought by the jurors with them in their minds to the courtroom. The law has never been able to satisfactorily delineate this area. Perhaps the line ought to be drawn at the point where it is no longer fair to assume the parties are sufficiently apprised of what *might be* influencing the jurors.

²⁴ Suppose one plaintiff must prove someone to be right-handed and another in another case must prove someone left-handed. It is obvious that the same quantum of evidence (e. g., an instance of eating with the hand sought to be proved) will go further in persuading a jury (and, incidentally, in discharging the production burden and avoiding a peremptory ruling by the judge) depending upon whether it is introduced to prove right-handedness or left-handedness. This is but an illustration that quantity of evidence is not all that should be considered.

²⁵ See *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979) (holding that this equitable-case standard is the constitutionally required persuasion burden for civil commitment).

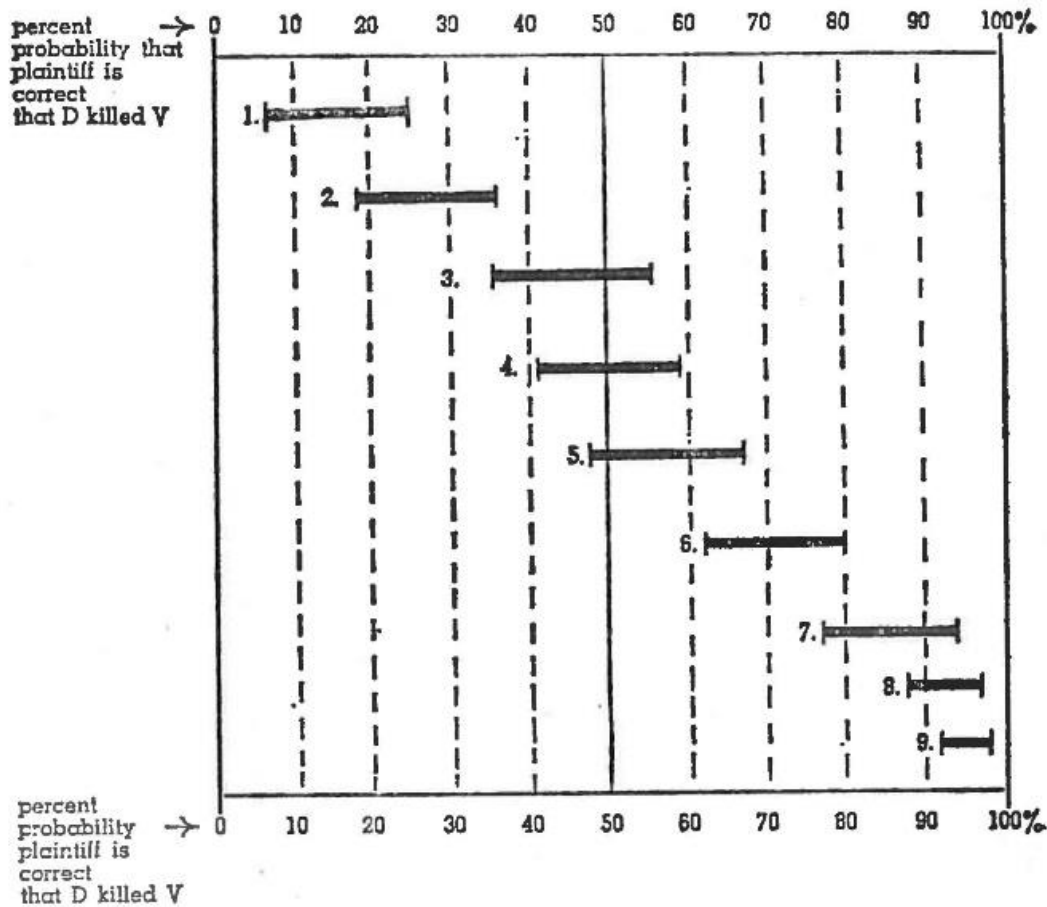
of damages they mete out? Are we forgetting, in this analysis, that a decision either way by the jury helps the one side as much as it hurts the other?

As a semantic artifact of what we have been saying above, it is worth noting that in a practical way there is a light persuasion burden on the party who is conventionally thought not to have the burden. For example, in the case of the typical criminal issue, we might say that the defendant, though *favored* by the persuasion burden, has a burden to raise or preserve a reasonable doubt. As a practical matter it is usually not wise for a criminal defendant to introduce no evidence and rely wholly on the notion that the prosecution's evidence will fail to persuade.

It should also be noted that in a civil case, the only time it makes a practical difference who has the persuasion burden is when the state of the evidence leaves the trier-of-fact's (juror's) mind in perfect 50-50 equipoise. In such a case, if the burden instruction is obeyed, the issue must be resolved against the party with the burden, because she has failed to show even the merest preponderance (51%), as she must do under the standard. On the other hand, in a criminal case, whom the persuasion burden is upon should make a great deal of difference in most instances. A scrupulous juror may be quite convinced the defendant "did it," and yet feel compelled to acquit because not convinced to the requisite degree (beyond a reasonable doubt).

(c) *Visualization, Summary, and Some Other Applications.*

The above material concerning burdens (in particular the production burden) may be graphically represented as in figure 1 below:



The first heavy black horizontal bar represents what hypothetical Judge Jones estimates to be the range over which reasonable people could differ in assessing the probability that plaintiff is correct that D killed V, given the state of the evidence at the time he is asked to make a peremptory ruling in a civil wrongful death action (where all the burdens initially are on the plaintiff). No reasonable person, he feels, could possibly believe (while remaining reasonable) the probability to be less than 5%. Similarly, Judge Jones feels, no reasonable person could possibly believe (while remaining reasonable) that the probability is more than 25%. In other words, he feels any assessment placing the figure anywhere between 5% and 25% is reasonable; all others are unreasonable. What the judge himself feels to be the probability is irrelevant. The judge, if properly presented with a request for the proper motion at this particular time on this state of the evidence, would have to grant a peremptory ruling on the issue, in defendant's favor.

The bars numbered 2 through 9 represent exactly the same thing, but on different states of evidence.

As to all bars that intersect the center (50%) line—that is, all bars that *at any point* cross or are crossed by the center line—the judge must allow the case to go to the jury. These are bars 3, 4, and 5. As to all bars that lie wholly to the left of the center line (i.e., the top two bars, numbered 1 and 2), a

peremptory ruling should issue against plaintiff, in defendant's favor. As to bars 6, 7, 8, and 9, which lie wholly beyond the 50% line, a peremptory ruling should issue in plaintiff's favor.

If this were a criminal prosecution for murder, a peremptory ruling against the prosecution would be in order for all bars except those that intersect, or lie wholly beyond, the 90% line. Thus, the prosecution would survive a motion for a peremptory ruling only with respect to bars 7, 8, and 9. Since bar 9 lies wholly beyond the 90% mark (90% or more being assumed to be what is meant by “beyond a reasonable doubt”), on that particular state of the evidence no reasonable person could find less than 90% probability that D killed V—in other words, all reasonable people must agree D killed V beyond a reasonable doubt. A peremptory ruling would seem to be in order in favor of the prosecution on that issue; but owing to a special dispensation to criminal defendants, none is allowed.²⁶

Turning now to some other points not directly connected with our chart, in the example in this chapter concerning a murder prosecution, we have seen that, on the issue of whether D killed V, the prosecution will have had all three burdens (pleading, production, and persuasion). On the other hand, if the defendant wishes to be excused on grounds of insanity, he must plead it. The law perhaps feels that it is safe to assume sanity in the absence of a plea to the contrary by the person who is closest to the matter. If insanity is *pleaded* but no *evidence* of it appears that could justify a reasonable juror in acquitting on that ground, either the jury will not be informed by the judge of the possibility of acquittal on grounds of insanity, or the jury will be affirmatively instructed that they cannot acquit on such grounds; and, of course, legal argument will not be permitted that would suggest that they can so acquit. (Suppose they do anyway? Will we know why they have acquitted?) Again, perhaps the law feels it is safe to assume sanity in the absence of *evidence* to the contrary. Thus, at least initially, both the pleading and production burdens are on the defendant.

If by the end of the trial there appears some evidence of insanity which could justify a reasonable doubt concerning his sanity, the jury is usually instructed that before they may convict, they must be convinced of sanity beyond a reasonable doubt—i.e., the *persuasion burden is on the prosecution* as respects this issue to the same extent as it is on the issue of whether D killed V. (Of course, a common-sense presumption that people are normally sane, perhaps reinforced by mention of such a presumption by the judge, may play a role in bringing the jury to this state of convincedness.) The defendant wins the issue if he (or the prosecution, or the common sense or experience of the jury based on some evidence in the case) succeeds in creating and maintaining a reasonable doubt. (If on the evidence there must be a reasonable doubt, he is, of course, entitled to a directed acquittal.)

Some jurisdictions place the persuasion burden (as well as the other burdens) on defendant on the sanity-insanity issue. The burden may be to prove “by a preponderance of the evidence” or even “beyond a reasonable doubt.”

Can we say that whatever the allocation of the burdens and whatever their weight, it is still true as a philosophical matter, that sanity is an element of the crime? Is this merely a question of the use of language?

²⁶ The chart is based on McNaughton, *Burden of Production of Evidence: A Function of the Burden of Persuasion*, 68 Harv.LRev. 1382 (1955).

Evidentiary Presumptions in Civil Cases²⁷

An evidentiary presumption is simply a legal mechanism that helps a party meet or prevent another party meeting, or on occasion shifts, a burden or burdens of proof. It is rebuttable rather than conclusive. An evidentiary presumption affects a production burden, a persuasion burden, or both. These are the only effects it can have. Since satisfaction of production burdens is the province of the judge, and satisfaction of persuasion burdens is the province of the jury, one should always ask when examining the effect of a presumption, What is its intended affect on the judge? What is its intended affect on the jury?²⁸ Again, these are the only effects it can have. When we refer to “presumptions” hereafter, we mean these evidentiary legal presumptions.

Presumptions are found in case law, statutes, and regulations. Some examples of presumptions appear in the margin.²⁹ There have been some efforts to codify the *effect* of presumptions on judge and jury, some of which codifications we will be treating later in this article. But these codifications, with a few exceptions, do not try to list or codify particular presumptions. They merely provide the effect to be given any presumption found in other law. We similarly limit the scope of this article. The effect of evidentiary legal presumptions on judge and jury (i.e., on production and persuasion burdens) is the focus of this article, and particular presumptions and their source are discussed only to the extent they contribute to understanding the effect presumptions can have.

These evidentiary presumptions are rebuttable (as we said) and classifiable as either “permissive” or “mandatory”—*not* “conclusive.” Conclusive presumptions are not evidentiary presumptions at all, but are irrebuttable dictates that actually change the substantive law.³⁰ As such, they are largely beyond the scope of this paper.

Whether a presumption is mandatory or permissive usually can be determined, if at all, only from the cases, statutes, or regulations creating or applying the particular presumption. The consequences of classifying it as the one or the other are as follows.

Evidentiary presumptions—the permissive and the mandatory variety—are a direction of law to a judge (to be heeded in considering whether a production burden is overcome) and/or to the jury (to be heeded in considering whether the persuasion burden is overcome), that if fact A is believed by the jury to be established (to the degree required by the persuasion burden) or is otherwise established, then fact B

²⁷ Criminal cases are discussed *infra*. The definitions, effects, and theories of evidentiary presumptions are conceptually the same, but there are certain constitutional limits on the effects they may have on a criminal defendant.

²⁸ Perhaps it would be better to speak of “finder of law” instead of judge, and “finder of fact” instead of jury, because sometimes cases are tried without a jury, so that the judge acts both as “finder of law” and “finder of fact,” i.e., as both judge and jury. But even in those cases, it is best to realize these are two separate functions, and the effect of the presumption on the judge as finder of law, and on her as finder of fact, should be kept separate. Consequently the analysis in a non-jury case is no different than when analyzing a jury case, although sometimes it is more difficult to identify clearly which function the judge is exercising in a trial without a jury. To keep the analysis clear, we will speak of “judge” and “jury” in our discussion of presumptions.

²⁹ See footnotes 4-7 *supra* and 30-31 and 34-36 *infra*.

³⁰ See pp.....for an illustration and a comparison.

must be (in the case of a mandatory presumption)³¹ or *may be* (in the case of a permissive presumption)³² taken by the jury as also established,³³ *where there is no evidence directed against fact B itself*.³⁴ The presumption may or may not accord with what a reasonable person would have to or could believe. In other words, presumptions may be predominantly expressions of rational probabilistic factual connections (perhaps based on common sense, experience, logic, studies, statistics, etc.);³⁵ or of extrinsic social policy concerning which way it is desirable to “tilt” the case to achieve certain social objectives,³⁶ or some

³¹ See, holding that the presumption of negligence arising from running into the rear of a car, is a mandatory presumption, *McNulty v. Cusack*, 104 So. 2d 185 (Fla. 1958).

³² See, holding that the presumption of negligence arising from running into the rear of a car, is a permissive presumption, *Harvey v. Borg* 257 N.W. 190 (Iowa 1934). This holding is precisely opposite to the holding in the case in our immediately preceding footnote. See also *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. App. 1953) (truck swerving off road and down an embankment; *res ipsa loquitur* presumption; while the presumption is normally *permissive* only, sometimes on the facts of the case the presumption of negligence is so strong that it would be *mandatory* but that is not this case).

There is little uniformity of opinion even as to the same presumption, even in the same jurisdiction even on the same facts. This is true of nearly all evidentiary presumptions. Terminology is not consistent, either. The terms “permissive” and “mandatory” are not used everywhere, but the same concepts are there.

³³ If fact A means, as we said, that fact B may or must be taken by the jury as true in the absence of evidence of non-B, it is easy to see this not only affects the determination of whether the persuasion burden on B has been carried (province of jury), which it seems to directly address, but also affects the production burden on B (province of judge), because if the jury can find B from A, then A is sufficient evidence of B—i.e., sufficient evidence has been adduced by adducing A, to avoid a directed verdict of non-B (since a jury could/must find B). That means the production burden to prove B has been satisfied.

³⁴Where there *is* evidence of non-B, the effect of a presumption will be a little different. We examine that situation in a later section of this paper. Generally in that situation the distinction between permissive and mandatory presumptions disappears.

The mandatory effect is the effect of a presumption in the situation of no evidence of non-B even in those jurisdictions that hold simply that presumptions (or at least some presumptions) are a command by the law that the burden of persuasion shall rest on the party presumed against (which view obviously also affects production burden). See, e.g., 1974 Uniform Rules of Evidence, Rule 301, adopted by some states.

A presumption’s effect (i.e., *must* as opposed to *may*) when there is no evidence of non-B is what makes a presumption classifiable as mandatory (as opposed to permissive). When there is evidence of non-B, mandatory and permissive presumptions ordinarily are treated alike and have the same effect, so the difference between them usually disappears then. See discussion *infra*.

³⁵ For example the presumption that letters properly addressed, stamped, placed in a postal service mailbox, and not returned, have been received by the addressee. This seems to be based on a statistical correlation between proper mailing and receipt deriving from common sense and common experience. In other presumptions the rational factual connection might be based on studies, scientific research, statistics, specialized experience, literature in a field, etc., rather than common sense or common experience. See, e.g., the antitrust presumption that certain market structure generally means a merger would be anticompetitive, in *U.S. v. Baker Hughes, Inc.* 908 F. 2d 981 (D.C. Cir. 1990). That presumption may also be based on notions of judicial and litigant efficiency or economy. Presumptions based on what we have called rational factual probabilistic connection are sometimes called presumptions based on “probative value” or “rational connection.”

³⁶ For example the presumption that a child born to a woman during marriage is her husband’s, which is usually assumed to be enacted or adopted to help assure financial support for the child and overcome the social stigma and legal disentanglements associated with being deemed a bastard. But this presumption is (or at least was at its creation) also supported by common sense notions of statistical frequency and probability and thus some rational logical factual connection. It may also be backed by considerations of convenience of proof and adjudicative efficiency.

combination of both. Notions of judicial and litigant efficiency or economy, or of facilitating the determination of a controversy,³⁷ as well as the parties' relative ease of obtaining proof, may also play a role. For example, a presumption of fact B against the party who has the best ability to prove or disprove fact B may stimulate that party to produce the proof, and that may be fairer and more minimizing of chances of error than requiring the other party to prove it. It may also be economically cheaper.³⁸ The presumption that goods delivered to a bailee in good condition and received back in bad condition probably means bailee was negligent, is usually considered to be the result of this reasoning, as well as rational connection.³⁹

If the proof of fact A is such that a peremptory ruling establishing it is in order, then if the presumption is mandatory, a peremptory ruling would have to issue establishing fact B (absent evidence of non-B). It is as though reasonable people could not differ as to whether fact B exists. If the presumption is permissive, a peremptory ruling establishing fact A would mean the jury must be allowed to find fact B, but also must be allowed to find against fact B. It is as though reasonable minds can differ on whether fact B exists, and we cannot say they must agree the one way or the other. No peremptory ruling either way on fact B would be in order. As a matter of terminology, fact A is often referred to as the "basic" fact and fact B as the "presumed" fact.

Some authorities do not call permissive presumptions "presumptions" at all, but have some other term for them.⁴⁰ This raises questions as to whether presumptions which under traditional law have been treated as permissive are within a provision like Federal Rule of Evidence 301 purporting to prescribe the effect of "presumptions" which are found in existing law, without listing or creating particular presumptions.

As we indicated, the determination of what presumptions are mandatory and what ones are permissive, should be made by looking at the law of the particular state or jurisdiction, and even then there will be considerable inconsistency in classification from case to case even of the same presumption. There are no clear criteria to be applied to determine classification. It does not necessarily have to do with

Many presumptions have such multiple rationales, which could produce problems under approaches that attempt to classify presumptions as either policy based or probabilistic for purposes of ascribing different effects to each category. See.....*infra*.

³⁷ For example, the presumption that, in tracing land titles through the documentary trail of purchases and sales, identity of names gives rise to a presumption of identity of person. This not only facilitates judicial determinations of chain of title (for example where the same name appears first as a grantee of title, then later as a grantor) but also promotes convenience and freedom of alienation (transfer) of titles because people can rely on the fact that what appears a sound transfer is likely in fact to be held so.

³⁸ This is analogous to the notion of "least cost avoider" familiar to tort law economists and prominent in the writings of Calabresi and of Landes & Posner. See, for a succinct example of it, Calabresi & Hirschoff, Towards a Test of Strict Liability in Torts, 81 Yale L.J. 1055 (1972).

³⁹ For a pure example of a presumption based solely on a policy like this, with no basis in rational connection at all, indeed contrary to rational connection, see *Ybarra v. Spangard*, discussed *infra* at [footnote 76], creating a presumption that each independent individual doctor in a group of attending physicians is responsible for a medical mishap of unknown nature and origin occurring at an undetermined time during plaintiff's hospital stay.

⁴⁰ Such as an "inference," "presumption of fact," or "not a true presumption." Such nomenclature is, for instance, found in New York practice.

whether a presumption is based on likely probability or extrinsic social policy, or any other policy. Rather, it has to do with how strong the courts (or statute or regulation) feel the connection between A and B factually is, or how strongly they wish to boost the connection for policy, efficiency, or fairness reasons, and therefore how much they wish to “tilt” the playing field. Whether a given presumption is mandatory or permissive, therefore, could vary from case to case.

There have been attempts to list and classify some common presumptions by whether they are social-policy-based or probability based and whether they are mandatory or permissive.⁴¹ But these have not achieved any widespread agreement in the Anglo-American legal system.

(a) *The Effects of Presumptions in the Absence of Evidence of Non-B*

Decisions differ about whether the jury is to be told of the existence of a permissive presumption of B from A, where A has been proven and there is no evidence of non-B. We have seen that a permissive presumption in this situation does *not* impose a production burden (“produce evidence of non-B or lose the issue as a matter of law”) on the opponent of the presumption. Rather, the jury gets to decide the issue of B or non-B. Is the legal presumption to play any role with the jury or is the presumption’s role limited to the judge and the effect on the production burden? If so, what role? Is the jury even told there is a legal presumption?

Some courts will not mention any “legal” presumption to the jury in this situation, leaving them to resolve the issue on their own without any special guidance about the legal connection of A and B. These judges may or may not explicitly mention to the jury that there is a permissible common-sense or experiential inference even if there is one which the jury may use. Some jurisdictions have outlawed judicial comment on the weight of the evidence, which this would seem to be, but some of those jurisdictions make exceptions for certain classic inferences.

On the other hand, some courts will instruct the jurors “if you find A you may but need not infer [or presume] B;” some instruct “you should but do not have to infer [or presume] B;” some instruct that the presumption is “[strong?] evidence” of B. Some say “the law presumes” but that runs the danger of giving the impression that making the connection between A and B is legally mandatory, unless it is explained that it is not. There are other formulations, too. There is very little agreement.

It is easy to see that what the judge tells the jury can influence them to a greater or lesser extent toward finding what the presumption presumes.

But I submit that for a purely extrinsic policy-based presumption, it may or may not make sense to submit the question to the jury at all where there is no evidence from which B can be rationally factually found (but only the policy presumption of B). *It depends upon whether the failure to produce non-B itself is some indicator of B.*⁴² If not, submission to the jury would be allowing the jury to find B with no rational basis in fact. The presumption of B is not a rational factual inference, but is based purely on policy in this kind of presumption. A jury’s job is only to decide on a rational basis what facts are true. Allowing a jury to decide whether the policy should be enforced or not, is not a proper jury function, especially since none of the evidence at trial would be addressed to that kind of decision. In other words,

⁴¹ See, e.g., our discussion of the California Evidence Code, *infra* at [footnote 82], and McCormick, Law of Evidence Sec. 309 (1954).

⁴²It might be some indicator if the fact B presumed against a defendant is something within his peculiar knowledge. For an example see *Ybarra v. Spangard*, *infra* at footnote 76.

a purely extrinsic-social-policy-based presumption should in this situation not be made a permissive presumption, but instead should be a mandatory one. If there is no evidence from which B may be factually inferred, there should be a peremptory ruling of law or direction to the jury that the opponent of the presumption loses—that B is automatically established (assuming A is found by the jury or established pursuant to a peremptory legal ruling, or conceded). The “establishment” of B this way does not pretend to be an actual finding of probably true fact, but rather a policy judgment. This is less of a pretense.

(b) The Effect of Presumptions in the Presence of Evidence of Non-B

Thus far in the present section focusing closely on presumptions, we have been primarily concerned with what happens when there is no evidence in the case specifically directed at B itself. If there *is* such evidence and it tends to rebut B, what should be the role of the presumption, with judge and jury? As we suggested earlier, authorities agree that presumptions of the kind we are speaking about—whether they are “mandatory” or “permissive”—are not “conclusive.” That is, they are rebuttable. They can be overcome not only by evidence of non-A, but of non-B as well. Thus, when there is evidence of non-B, no matter how conclusively established A is (even to the extent that there must be a peremptory ruling that A exists), if the evidence of non-B is such that a reasonable person could find non-B, B may not be established by a peremptory ruling, nor may the presumption command that B follows if A is found. This is so whether we have a mandatory or a permissive presumption. The two merge at this point. Indeed, the evidence of non-B may be such that a reasonable person *must* find non-B, so that a peremptory ruling of non-B would be in order.

But then, in these situations (where there is evidence of non-B), isn't the case treated just as though there were no *legal* presumption at all? What is added or changed by telling the judge or jury there is a legal presumption? Perhaps it would to some inarticulable extent make it more difficult to prove non-B than would otherwise be the case. But if the presumption of B is not to be overcome (by the production of evidence of non-B) at the point where common sense would say it is, when is it to be overcome?

Take a presumption that a child born to a married woman is the child of her male husband. This is called a presumption of legitimacy.⁴³ It has its basis in a rough sense of probability (at least in the common-law era in which it was originally created). Its creation was also influenced by social policies to help secure sources of parental financial support for the child, and to avoid the “bastard” stigma which infected multiple areas of popular culture and law such as the right to inherit. It also helped in resolving the difficult fact issue of paternity.

While in a number of jurisdictions the presumption of legitimacy is nearer a conclusive presumption than an evidentiary one, let us briefly examine how it would be treated differently if it were the one kind or the other.

Imagine a lawsuit involving the legitimacy presumption, brought on behalf of the child, claiming paternity and child support against the male husband of the child's mother. The husband, the defendant, denies paternity. Normally all the burdens reside initially with the plaintiff, including to show legitimacy.

If the presumption of legitimacy were a conclusive presumption there would be no issue provable at all about whether the husband was really the father. It would be presumed he was the father, even in the face of incontrovertible DNA evidence that he was definitely with 100% certainty not the biological father. The DNA evidence, therefore, would be inadmissible as irrelevant. In other words, if the

⁴³ Black's Law Dictionary 1205 (7th Ed. 1999).

presumption were conclusive, the only issue in a paternity lawsuit for support of the child, brought against the husband, would be whether the child was born to the wife during the marriage. Hence, in effect, the substantive law is amended (by the conclusive presumption) from providing that a biological father must support his biological child, to providing that in addition a husband must support a child of his wife born during their marriage (regardless of biology and whether he is really the father, which is totally irrelevant under the amendment). So the only elements of our support cause-of-action (and only things needed to be proven) would be merely the period of the marriage, the time the baby was born, and who was the mother. In the absence of the amendment an element subject to proof would be whether he is the biological father (establishment of which, if there were an evidentiary rebuttable presumption of legitimacy, might be aided by the presumption).

Now imagine a jurisdiction where the jurisdiction's legitimacy presumption is a rebuttable evidentiary presumption. Although recognizing a policy favoring support of and solicitude for the child, and ease of adjudication, this jurisdiction obviously only wants to go so far in serving those policies. They also want to give *some* sway to contrary policies—for example that one person should not have to pay involuntarily for another person's biological child. Consequently they may not want to make someone pay who clearly proves he is not the biological father—but some onus of proving it should be on him. The evidentiary presumption expresses this—their compromise between the policies. The onus, placed on him by the presumption, could be heavy or light, depending upon the relative importance to the jurisdiction of each conflicting policy.

Thus, this jurisdiction's presumption may put a quite high onus on him, to show by *clear and convincing* evidence or even *beyond a reasonable doubt*, rather than by a preponderance of evidence (preponderance of probability). Contrariwise, the jurisdiction's presumption may put a lesser onus on him than any of this. They may just tell the jury the presumption may be weighed with the other evidence as evidence itself. Other views are possible. For example, maybe the "presumption" disappears once the defendant has been forced by it to supply some specified quantum or quality of evidence deemed sufficient to or desirable to destroy the presumption altogether.

In other words, there are degrees of difficulty that can be imposed on the opponent of the presumption (the putative but denying father)—i.e. degrees of "strength" of the presumption. The degree a jurisdiction chooses may reflect how strongly the jurisdiction prizes the policies of support, solicitude for the child, and ease of adjudication, over the policy of not making a person support someone else's biological child.

But most of the choices entail some very knotty problems of how the law can administer the choice and articulate it sensibly to the judge and jury without pre-empting their legitimate roles. And how can it be expressed as a matter of logical coherent theory?

For example, imagine a case involving our rebuttable evidentiary legitimacy presumption, brought on behalf of the child, claiming paternity and child support, against the husband of the child's mother. The husband claims he is not the biological father and thus not responsible for the child's support, which is the law if he is indeed not the biological father. Assume the burden of persuasion in a civil case (which this is) normally is on the plaintiff (here the party seeking support) to prove plaintiff's case by 50+% probability (i.e., the "preponderance of evidence" standard). Assume further any DNA testing is not available or possible.⁴⁴ What effect is our legal rebuttable evidentiary presumption of legitimacy to have

⁴⁴ Certainly this was the case when the common-law created this presumption. It may still be the case in certain small communities. Alternatively, there may be a religious objection that is respected, to a DNA test. Or the parties

on a jury who hears testimony in the trial that the husband during the entire relevant period had a vasectomy—which medical procedure is not 100% effective in eliminating ejaculation of sperm according to the expert testimony—to prevent having a child? Does that “rebut” the presumption? And what would that mean? That the presumption disappears? That the jurors are instructed to decide as they would if they had never heard of a presumption? Are they not told of a presumption at all in that case? Or are they instructed to give the putative inference he is the father some additional weight to what they would give it in the absence of a legal presumption? How much weight? How could that be articulated in an instruction and what thought process would it engender in the jurors? Suppose they think—based on the whole evidence including the vasectomy but without the *legal* presumption—that the probability of his biological fatherhood despite the vasectomy is just a *tiny bit below* the probability needed to convince them he is the father. Should the presumption boost them into finding he is the father? How *much* below can it be before the presumption cannot boost it enough for them to find he is the father—assuming it is even sensible to talk of the presumption boosting the inference? How can this degree be communicated to the jury? In other words, how forceful is the presumption and how can we sensibly tell that to the jury? (Even if the presumption were given the effect of reversing the burden of persuasion and/or changing its degree, there would still be the weight problem.)

The question of what weight (in a legal proceeding) a person should give a *legal* presumption over and above the weight the person would give to the same inference in the absence of a legal presumption, could be called the problem of “artificial” weight. What artificial weight should be given by the legal presumption to the natural weight (if any) of the analogous underlying inference? How should that artificial weight (plus any natural weight of the inference) be totaled and then compared with the natural weight of the opposing evidence/inferences? How can this quantum be articulated in comprehensible laws and directions to the instrumental players: judge, jury, lawyers, and parties?

These issues are of course not limited to the presumption of legitimacy, but inhere in all rebuttable evidentiary presumptions. We have used the legitimacy presumption as an illustration.

To give another example, suppose there is a presumption from wearing a watch on the right hand that the wearer is left-handed. The judge or jury feels the additional fact that the wearer in a case before them used a baseball bat right-handedly would just barely overcome such assumption if it were merely a matter of common sense. How much more is required to overcome it if it is a legal presumption? The answer here may seem a little easier with this type of presumption because it is exclusively based on notions of rational connection. The questions I have raised are more difficult to answer where some component of the additional weight the presumption is to lend to a connection of A and B is not because of any real probabilistic connection, but because of *policy*. The weight *that* component should add seems even less measurable and articulable than in presumptions based on rational connection, though those are difficult, too. The whole process strikes one as “apples and oranges”—an adventure in incommensurables.

simply may wish to know what result the presumption will produce, before they go to the expense and inconvenience of obtaining DNA testing.

The presumptions that certain diseases come from exposure to Agent Orange,⁴⁵ that a person absent and not heard from for seven years is dead,⁴⁶ and the legitimacy presumption above, have all been said to be social policy based, although they also reflect at least an estimate of some logical statistical factual connection.

But there are presumptions that seem based *purely* on policy. E.g., the presumption that one of two or more victims survived a common disaster,⁴⁷ the presumption that a testator is aware of antilapse law (i.e., aware of to whom his estate goes if he has no will),⁴⁸ and the special application of the presumption of negligence from certain unusual occurrences, in *Ybarra v. Spangard*, discussed *infra*.⁴⁹ That kind of presumption is the most difficult of all.

Some efforts to codify the effect of presumptions have tried to give policy-based presumptions a different effect than rational probabilistic ones. But this has not met with widespread success, perhaps because most presumptions are based on a mix of both rationales.⁵⁰ The effort instead has been to have one effect or at least one formula of effect, for all or most presumptions, of whatever type.

So again we ask the question: *if there is evidence directed at fact B itself, that tends to rebut fact B*, what, if anything should be the special role of a legal presumption with judge and/or jury? How does the rebuttal evidence change the picture? We are assuming the evidence is not so insubstantial that it is tantamount to no evidence.

In order to examine some of the potential approaches to the questions, let us consider a simple presumption: the common presumption that delivery of a letter (fact B, or the “presumed fact”) is

⁴⁵ See Peters & Woolley, “George Bush: Statement on Signing the Agent Orange Act of 1991, February 6, 1991” (the American Presidency Project, University of California - Santa Barbara). The presumption is based on a social policy of compensation but also on a statistical factual rational connection. Similar presumptions are found in many structured settlements, easing the proof of causation. A similar scheme has been adopted for alleged vaccine injury compensation. Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (black lung disease presumed to arise from mining employment). Here, because black-lung is practically a signature disease, the rational connection basis of the presumption is predominant.

⁴⁶ See under the entry “Presumptions” the sub-entry on “Presumption of Death” in Black’s Law Dictionary 1205 (7th Ed. 1999). The presumption’s policy is to promote mobility, marriage, inheritance, and the alienation and resolution of certain property interests.

⁴⁷ See under the entry “Presumptions” the sub-entry on “Presumption of Survivorship” in Black’s Law Dictionary 1205 (7th Ed. 1999). The presumption’s policy is to promote orderly succession of property for a situation unanticipated in most wills, inheritance laws, and *inter vivos* transfers.

⁴⁸ E.g. *Estate of Delmege*, 759 N.W.2d 812 (Table, Iowa Ct. App. 2008).

⁴⁹ At footnote 76.

⁵⁰ For example, how would the following commonly found evidentiary presumptions be classified: the *res ipsa loquitur* presumption which presumes negligence where the injuring instrumentality was in the exclusive control of the defendant and injury does not ordinarily occur when due care is exercised; a presumption of authority granted to a driver by the owner of an automobile under certain circumstances; a presumption of negligence from statutory violations?

presumed from proper mailing (fact A, or the “basic fact”).⁵¹ Let us assume that (at least in the absence of a presumption) the normal burden of persuasion in the case in which the presumption is being used is that the plaintiff must prove delivery by a preponderance. For example assume it is a lawsuit by plaintiff to enforce a contract against defendant where defendant claims he never received plaintiff’s written acceptance of the terms, such receipt being necessary at law to form a binding contract. Let us further assume that to prove delivery he relies solely on the presumption and on establishing proper mailing (which we are assuming he can establish). If it is a mandatory presumption, then once proper mailing is established (to the satisfaction of the jury; or as a matter of law by overwhelming evidence, concessions in the pleadings, stipulations, or judicial notice), then delivery must be taken as established by the judge and jury, if there is no evidence of non-delivery. If it were merely a permissive presumption, we would merely have a jury issue as to whether or not there was delivery, and there would be a question as to what, if anything, to tell the jury over and above what is told them in an ordinary case where there is a jury question of fact (“you are to decide whether there was delivery”) Are they to be told to give any special weight to the fact of proper mailing in this determination? If so, what weight? How much more, if any, than the weight common sense tells them to give in the absence of a presumption? In short, all the questions about effect we raised above may be asked here, about this presumption. Answers have varied.

Suppose, however, the more troublesome situation: that some not-insubstantial evidence of non-delivery (non-B) *had* been introduced—for example, testimony of the addressee’s mailroom clerk that he does not remember receiving the letter, and the circumstances are such that one could feel that he would remember if he had received it. In this situation courts have seldom distinguished between mandatory and permissive presumptions (although a distinction could be made), and have given the presumption one of the following effects (here labeled Views (1) through (6)) or some variant thereof:⁵²

View (1): The Legal Presumption and the Rational Inference “Burst Like Bubbles.”⁵³ The mere introduction of evidence of non-B causes the legal presumption and any common-sense or rational

⁵¹We are referring to what millennials call “snail mail,” that is, mail carried by the U.S. Post Office system, as opposed to e-mail (although the presumption has also been applied to e-mail, with appropriate modification of what is needed to establish fact A; but there is less agreement on this). By “proper mailing” (fact A) in the U.S. Postal situation, we mean proper addressing, placing in an envelope, stamping, placing in a post box, and, in some versions, that the letter was not returned. For an example of this presumption, see *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956 (9th Cir. 2001) (this so-called “mailbox” presumption applies to the question whether a Supplemental Retirement Plan received an election of benefits form sent to the plan by an employee and is not contrary to the requirement of actual receipt under ERISA and the Plan).

⁵² It is important to remember that the following views apply *only when there is evidence of non-B*. Also remember that *then*, ordinarily, no distinction is drawn between mandatory and permissive presumptions. The views examined in this article are not exhaustive. Occasionally another view or a modification of one of our views may be found. Although a jurisdiction may talk as if it subscribes to one view, often which view is adopted in a particular case may depend upon what the policy underlying the presumption (or the field of law) is, how strong it is conceived to be, and how much a court wishes to tilt the playing field in its favor, boost one position over another, and serve the policy.

⁵³ See, e.g., *O’Brien v. Equitable Life Assur. Soc’y*, 212 F. 2d 383 (8th Cir. 1954) (presumption against non-accidental death such as suicide or—as alleged in this case—death resulting from commission of crime; insurance policy pays double indemnity only for accidental death). *U.S. v. Baker Hughes, Inc.* 908 F. 2d 981 (D.C. Cir. 1990) (antitrust presumption of anticompetitive effect of mergers if taking place against a background of certain market conditions) *might* also support this view. See [footnotes 96-101](#), *infra*. Remember, as to all these cases, there is little consistency of views among cases even concerning any given presumption.

probabilistic logical factual notion or inference (if any) underlying the presumption to disappear from the case and play no further role in the case. The case is to be determined exactly as if they never existed. Under this view, in our hypothetical case above, there would be a directed verdict or directed finding of non-delivery against the plaintiff. To the extent this view removes common sense or rational probabilistic logical factual notions from the case, it is unwise and frequently unworkable. It can easily be seen that under this View (1), the presumption affects only the production burden (the judge's province) and not the persuasion burden (the jury's province).

View (2): Only the Legal Presumption “Bursts Like a Bubble.”⁵⁴ The mere introduction of evidence of non-B causes the legal presumption, but not the common-sense notion underlying it (if any), to disappear. The case is to be determined exactly as if there were no presumption. But the common-sense notion (the logical and rational probabilistic factual inference that proper mailing may bear some weight in establishing receipt) continues. It may be taken into account by the judge in deciding a motion for a directed finding or verdict. The jury is allowed to⁵⁵ take it into account in deciding the issue of delivery, and may even be instructed on the possibility of so taking it into account, if the jurisdiction is in the habit of advising the jury on such common-sense notions concerning the weight of evidence in non-presumption cases.⁵⁶ Thus, the issue of delivery *vel non* in our hypothetical case (where plaintiff has at least something of some substance to establish proper mailing) would go to the jury (no matter how strongly proper mailing was established—even if established as a matter of law), perhaps with the indicated advisory instruction. The jury is still told the plaintiff has the burden of proving delivery by a preponderance, i.e. the burden of persuasion. (On our facts, then, the finding would be more in doubt than under View (1).) It can easily be seen that under this view, the *legal presumption* (as opposed to the analogous common sense or rational probabilistic logical factual notion if any) affects only the production burden (the judge's province) and not the persuasion burden (the jury's province).⁵⁷

⁵⁴ For this view, see, e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (alleged age discrimination by employer; holds that in age discrimination and other discrimination cases of various kinds defendant's evidence of innocent explanation of an apparently discriminatory situation, causes the legal presumption of discrimination but not the inference to disappear); *In re Barrett*, 2 B.R. 296 (Bankr. E.D. Pa. 1980) (holding in a case involving a fraudulent credit application and recovery of the loan in a subsequent bankruptcy proceeding, that once the creditor makes out its *prima facie* case, the burden of going forward with evidence to show lack of intention to deceive shifts to the other side, and the credibility of that other side's evidence, when proffered, is irrelevant; the simple production of evidence to the contrary causes the presumption to disappear); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 35 Fed. R. Evid. Serv. 505 (Fed. Cir. 1992) (rejected on other grounds by *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 2015 WL 5474261 (Fed. Cir. 2015) (patent infringement suit; presumption of laches after the patentee delays filing suit for six years, which presumption no longer exists if the patentee produces some evidence of reasonable delay or that party suffered no prejudice).

View (2) is often called the “Thayer” view. See Thayer, *Preliminary Treatise on Evidence* (1898). He was probably not the originator of the view, but was, in the early years of the 20th century, its most visible and prestigious proponent, along with the great pioneering Evidence scholar John Henry Wigmore, who was then Dean of the Northwestern University School of Law. See 9 Wigmore, *Evidence*, Sec. 2490 *et seq.* (original ed.).

⁵⁵ In rare circumstances the common-sense of it may be so strong as to compel the jury to follow it as a matter of law but not because of the legal presumption but because of the strength of the evidence and facts.

⁵⁶ See our immediately preceding footnote for the possibility on rare facts, of an even stronger instruction.

⁵⁷ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (to rebut showing of apparent discrimination by claimant, employer must produce evidence that denial of promotion or employment did not have

In this (and the last) view, the evidence necessary to burst the bubble usually means “some evidence of some substance,” often defined as “evidence upon which a reasonable person could find by a preponderance of probability” against the presumed fact—sometimes phrased as “evidence sufficient to support a finding of” non-B, which probably comes to the same thing. This will ordinarily be the standard we are employing in our discussion of civil presumptions in this article.

A few cases may specify a lesser kind or quantum such as “any evidence,” or “a scintilla”; or a greater quantum, such as “substantial evidence.” A few cases state it is “evidence such as would justify a reasonable person in deciding the presumed fact is *as likely as not*” (rather than more likely than not

racial motivation; Court of Appeals improperly placed burden on defendant to persuade court of convincing and objective reasons for choosing one applicant over another) (for result on remand see *Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981)); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (once some evidence of discrimination is shown by claimant, the employer has burden of producing evidence of business justification; the burden of persuasion, however, remains on the employee); *Com. of Pa., Dept. of Transp. v. U. S.*, 226 Ct. Cl. 444, 643 F.2d 758 (1981) (showing of state's payment of highway settlement costs creates presumption in favor of federal reimbursement which may be rebutted by showing that costs were unreasonable; burden of persuasion always stays with plaintiff state); *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (rejected on other grounds by *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 2015 WL 5474261 (Fed. Cir. 2015)) (in a patent infringement suit, there is a presumption of laches after the patentee delays filing suit for six years, which may no longer exist if the patentee produces some evidence of reasonable delay or that the defendant suffered no prejudice); *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180 (3d Cir. 2011) as amended (Sept. 29, 2011) (Truth in Lending Act suit; plaintiff borrower signed that she had received the required disclosures; statute creates a presumption from a signature that the disclosure notices have been received; plaintiff testified she never got them and trial judge told jury more than this testimony was needed to rebut the presumption and make the case like there were no legal presumption; this instruction held to be erroneous because statute impliedly incorporates the bursting bubble effect; therefore all that was needed to burst the bubble and remove the presumption from the case was the testimony of the plaintiff; the jury however is still free to consider—even apparently without any specific instruction—any common-sense inference they think arises from the fact of her signature—even that she received the notice; when the presumption drops out of the case as here, the court says the trial judge should avoid any reference to a presumption in the instructions); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) (once the defendant did all it was required to do if the plaintiff had properly established his *prima facie* case, the presumption of race discrimination vanishes, and the court should decide the discrimination issue on the basis of the evidence before it); *Nunley v. City of Los Angeles*, 52 F.3d 792 (9th Cir. 1995) (bursting bubble theory applies to presumption of receipt after mailing where receipt of notice of a judgment was the issue); *McCann v. Newman Irrevocable Trust*, 458 F.3d 281 (3d Cir. 2006) (regarding federal jurisdiction, which is based on domicile, the “bursting bubble” theory applied to the presumption favoring an established domicile, which placed “the burden of production on the party alleging a change in domicile” and left burden of persuasion alone); *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225 (5th Cir. 2010) (statutory presumption of validity arises when a trademark has been registered by the United States Patent and Trademark Office; once sufficient rebuttal evidence is introduced to avert judgment as a matter of law, the presumption disappears and has no independent effect; but the evidence *giving rise* to the presumption remains in the case for whatever effect it may have); *Sorrentino v. U.S.*, 199 F. Supp. 2d 1068 (D. Colo. 2002), judgment rev'd on other grounds, 383 F.3d 1187 (10th Cir. 2004) (“bursting bubble” theory applies to taxpayer mailings to the Internal Revenue Service). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976) (Coal Mine Health and Safety Act presumptions that certain conditions or injuries are due to a miner's employment for purposes of a miner's claims against his employer are constitutional especially since the effect of the presumption is merely the limited “bursting bubble” effect of shifting the burden to go forward).

which would be a preponderance of probability; the difference is the difference between 50 percent and >50 percent). “Likely as not” could also be phrased as “equipoise.”⁵⁸

This question of quantum needed to burst the bubble is a question of degree and obviously implicates the policy behind the presumption. The choice a court makes may have to do with what the policy is and the degree to which the court wishes to boost it, or with the strength of the inference that a particular A equals B, or with the strength and kind of showing of A that is made by the party relying on the presumption.

A number of commentators attack View (2) and attack Professor Thayer himself, the great proponent of View (2), as implicitly propounding a lower standard to burst the legal presumption bubble than that a “reasonable person could find non-B.” They attack View (2) as thus giving too little effect to the policies underlying presumptions and the presumption-creator’s (legislature or courts) desire to boost the inference embodied by the presumption.

But a close reading of Thayer⁵⁹ reveals he did not mean to say any such thing. He meant to adopt the “reasonable person could find” standard. But that in itself may sometimes be too low a standard for bursting the bubble, too, for similar reasons. As Thayer himself recognizes and condones, this standard is satisfied even by evidence which is quite unbelievable—and that we and the judge do not believe.⁶⁰ This is because even though *we* may think the evidence is unbelievable, some reasonable person could find it believable, credibility almost always being held to be something on which reasonable minds could differ.⁶¹ Because the “reasonable person could find...” standard allows (except perhaps in the expert testimony area) very unbelievable evidence to burst the bubble, Thayer and View (2)—even assuming they incorporate the “reasonable person could find” standard—could still be criticized as prescribing too little effect for presumptions. For example, Professors Morgan and Maguire have written:

The so-called “bursting bubble” theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too “slight and evanescent” an effect.⁶²

⁵⁸ See, adopting a variety of this formulation, *Hinds v. Hancock Mutual Life Ins. Co.*, 155 A. 2d 721 (Me. 1959) (presumption against suicide; life insurance policy pays less if insured’s death is a suicide). It is not entirely clear whether this case adopts this formulation in connection with applying View (2) (the case defining what is required to burst the bubble, i.e. to destroy the legal presumption for all purposes) or in connection with applying View (5) (the case defining the degree of the persuasion burden because it feels the legal presumption imposes a persuasion burden).

⁵⁹ Thayer, *Preliminary Treatise on Evidence* (1898).

⁶⁰ See, for example, *In re Barrett*, footnote 54, *supra*.

⁶¹ This last perhaps has a caveat regarding credibility of experts. A number of rules and cases—notably Federal Rule of Evidence 702, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), and *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 923) (a case that has remarkable tenacity even today)—set up special criteria for declaring expert testimony incredible and therefore inadmissible as a matter of law. But this may not really be a matter of “credibility” in the sense we mean, because it is a question not necessarily of whether one thinks the expert is honest, but rather whether one thinks certain inferences can follow from what she says.

⁶² Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv.L.Rev. 909, 913 (1937).

Nevertheless most but not all cases under current Federal Rule of Evidence 301 (a general rule purportedly prescribing, though incompletely, the effect of all presumptions)⁶³ profess to adopt the bursting bubble view, View (2); but they sometimes indulge in subterfuges to get around this problem of too-slight-effect by defining upward how much or what kind of evidence is enough to burst the bubble or what a “reasonable person” would need in order to make the finding; or by formulating rules or advice to judges about the quantum or kind of evidence the jury should demand when deciding whether they are persuaded (i.e. deciding whether the persuasion burden has been discharged).⁶⁴

A variant of this View (2) (which we may designate “View (2)-1”) holds that the presumption disappears for purposes of the jury's deliberations (as distinct from the judge's deliberations over directed verdicts and findings) *only if the jury believes the mailroom clerk*, and the jury is so instructed.⁶⁵ The jury is thus instructed that *if they do not believe the clerk*, the presumption remains, and is entitled to some weight, or in some jurisdictions is compulsory, i.e., receipt *must* be found if mailing is established. (This may depend upon whether the presumption is viewed as permissive or mandatory.)⁶⁶ View (2)-1 affects both the production burden and the persuasion burden.⁶⁷

Except for the presumption of legitimacy of a child born in wedlock (under which the drafters provide there is a persuasion burden to prove the illegitimacy beyond a reasonable doubt), View (2)⁶⁸ has been adopted by Rule 704 of the American Law Institute's Model Code of Evidence:

“(1) . . . [W]hen the basic fact of a presumption has been established⁶⁹ in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence.⁷⁰”

⁶³ See pp.....*infra*.

⁶⁴ E.g. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), on remand, *Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

⁶⁵ See *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. App. 1953) (truck swerving off road and down an embankment; *res ipsa loquitur* presumption).

⁶⁶ This may be the only situation where there is evidence of non-B, that a distinction could be made between permissive and mandatory presumptions. See *Sullivan v. Crabtree* in the note immediately supra.

⁶⁷ A variant view like this is also possible to View (1) above, which we may designate “View (1)-1” but it is not frequently found.

⁶⁸ Not View (2)-1.

⁶⁹ “Established” means established “by the pleadings, or by stipulation of the parties, or by judicial notice, or by evidence which compels a finding of the basic fact, or by a finding of the basic fact from the evidence.” Model Code, Rule 702.

⁷⁰“Support a finding” is always legal jargon for “sufficient that a reasonable person could find”. This provision (1) of the rule makes the presumption a mandatory presumption where there is no decent evidence of non-B.

“(2) . . . [W]hen the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact⁷¹ . . . the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.”

View (3): *The Legal Presumption Continues, Lending Weight for Judge and Jury.*⁷² The presumption continues in the case (for both the trier-of-law (the judge) and trier-of-fact (the jury)) and thus creates or lends strength to a connection of A and B (or to the analogous common-sense inference, if any) even though there is evidence of non-B. Just what strength or how much strength is lent or created is undetermined. Perhaps the judge is to take more account of the connection or inference in deciding motions for directed verdicts and directed findings. Perhaps the jury is instructed that proper mailing can mean delivery, though the jurisdiction does not ordinarily so instruct in the absence of a legal presumption; or, if an instruction is ordinarily given, perhaps it is somehow “beefed up” (i.e., “A strong inference of delivery arises from proper mailing, unless that inference is rebutted. . .”, or “The law presumes—though not irrebuttably—from proper mailing that . . .”). Or merely “there is an irrebuttable presumption that....” It may depend on the strength of the presumption not only in general, but on the specific facts of the case. The burden of persuasion on delivery is still as above (that is, the jury must find it by a preponderance, for plaintiff to win). Under this view (View (3)), in our hypothetical case, where there is at least something of some substance indicating proper mailing, there would be a jury issue on delivery even if proper mailing were so overwhelmingly indisputably established as to be established as a matter of law. (Remember, there is the mailroom clerk's testimony suggesting non-delivery; even with the presumption operating at the directed finding stage, this would still probably be enough to make a jury issue.) But the jury would be impelled a bit more toward finding delivery (from the mailing) than under the other views above.⁷³ Under this View (3), because the presumption affects both the judge and jury, it clearly affects the burden of both production and persuasion.

A good example of this View (3)—continuance of the presumption with judge and jury even after evidence attempting to rebut fact B—is the case of *McDougald v. Perry*.⁷⁴ In *McDougald* plaintiff invoked the familiar Tort law “*res ipsa loquitur*” presumption. Under it, a presumption of negligence on the part of defendant arises if plaintiff establishes an occurrence (such as a single-car crash into the embankment on a clear day on a straight road, injuring plaintiff, a passenger) that according to common experience or expert testimony more often than not happens as a result of negligence, and the instrumentality is in the control of defendant or his agent (for example the car is driven by defendant or his agent).

⁷¹ Thus a choice has been made about the quantum of evidence that will “burst the bubble,” i.e., will cause the presumption to evaporate.

⁷² See, e.g., *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985) (qualified by *U.S. v. O'Brien*, 895 F.2d 810 (1st Cir. 1990)) (presumption that one charged with certain drug offenses will likely flee before trial); *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986) (same presumption; agrees as to effect; rebutting evidence does not mean burden of persuasion is put on defendant, but does not cause the presumption to disappear either; judge as fact-finder (i.e. judge acting as jury in this non-jury case) should still “consider” it, otherwise too slight an effect is given to intention behind presumption).

⁷³ Being notified of the legal presumption may also play a role (as would the common-sense notion in this and the last view) in the jury's deliberations over whether to believe the word of the mailroom clerk.

⁷⁴ 716 So.2d 783 (Fla. 1998).

In *McDougald* the presumption was applied to accidental escape of a spare tire from an undercarriage storage place secured by a chain, on a vehicle owned and being driven by defendant, thereby causing injury to plaintiff who was outside the vehicle. Plaintiff relied only on the presumption, introducing no evidence other than the occurrence even after defendant put in some rebuttal evidence against the presumed fact (defendant's negligence). Plaintiff did not in turn try to rebut that evidence of the defendant, standing pat on evidence of the occurrence. The jurors were instructed on the existence of the *res ipsa loquitur* presumption but making it clear they did not need to follow it. They came in with a verdict for the plaintiff, upheld on appeal. Thus, plaintiff won the case based only on the presumption. This result is quite common under this presumption.

The presumption is essentially this: fact A is an accident from an instrumentality controlled by the defendant, that doesn't ordinarily happen without negligence of the person in control of the instrumentality. Fact B (the fact presumed from Fact A) is that defendant was negligent. It is a doctrine based on the rational logical notion that if negligence usually explains this occurrence, it probably does on this occasion, unless that generality is rebutted, i.e., unless it is shown by case-specific evidence that there is some reason the generality is suspect in this particular case.

In *McDougald*, defendant attempted that rebuttal: He testified he performed a thoroughgoing inspection of the vehicle including the chain on the day of the trip, before the trip. That was his attempt to rebut fact B (his negligence). It is possible the jury, in its discretion, may have dis-believed defendant. But even if there were irrefutable evidence that he must be believed (which is never really found), I think the result would have been the same. I think defendant's problem was that his rebuttal addressed only one of the possible acts of his negligence that could account for the accident. He did not address other possible negligent actions of his that could have resulted in the tire escaping. He rebutted only carelessness in not doing a pre-trip inspection. There are other possible negligent acts: For example, carelessly *performing* the pre-trip inspection, carelessly failing to see in that inspection the defect in the chain, or carelessly failing to remedy what the pre-trip inspection found; or indeed using a chain to hold the tire in the first place. Or going too fast over a bump. Or having a tire in an open undercarriage, etc., etc. All of which might reasonably be deemed not the conduct of a person of average prudence—i.e., negligence. The presumption does not specify what negligent act of defendant is presumed but expresses that some undetermined one or another or several of many from a whole unspecified range of possibly negligent acts by him probably occurred and accounted for the accident. The un-negated possibilities that remained even after the defendant's rebuttal (even if his rebuttal is believed) were still the greater probability than non-negligence. Or at least a jury could rationally so believe from their experience. Had more possibilities been negated by believed testimony, at some point the remaining possible acts of defendant's negligence that could have accounted for the accident, would be the *less* probable explanation for it than his non-negligence (i.e., than unavoidable accident, product defect, etc.). Depending on the facts, this tipping point could be reached based on other factors than the relative quantity of possible explanations—probability does not just depend on quantity but on frequency of each and other factors.

In this case (*McDougald*), as in most cases, the *res ipsa loquitur* presumption is an expression of a rational logical-statistical notion or common sense connection. But based on a suggestion in the primordial case creating the presumption,⁷⁵ some cases have invoked the presumption on a *social policy*

⁷⁵ *Byrne v. Boadle*, 2 H & C 722, 159 Eng. Rep 299 (Court of Exchequer 1863) (flour barrel falls from defendant's high-up open window onto plaintiff passing below; negligence of defendant rebuttably presumed for *two* reasons: things like this don't normally happen without negligence, *and* defendant had better access to proof of why it happened than plaintiff).

basis where, though the inference of negligence may not rationally follow, it is deemed desirable for policy reasons, to treat the case *as though* the inference rationally followed.

Thus, in *Ybarra v. Spangard*,⁷⁶ the Supreme Court of California held that any of a group of attending medical personnel could *each individually* be held fully liable for a very unusual and severe medical mishap that occurred at some undetermined time and way during plaintiff's hospital stay in connection with an operation. The group included the people who had primary contact with the plaintiff in connection with his hospital stay and operation.

Basically the facts and holding were these, streamlined for discussion purposes. A group of five independently-contracting medical doctors—including the surgeon—were involved with the surgery on and care of the plaintiff patient in the hospital in connection with an appendectomy. Plaintiff emerged with a paralyzed arm. The injury was of the unusual kind that ordinarily bespeaks negligence. But *whose* negligence? *Who* was responsible for inflicting the injury? *What actually happened* to cause the injury? It was a mystery. The court nevertheless invoked a version of the *res ipsa loquitur* presumption, as follows.

The court appears to hold that as to any individual member of this group of five who might be sued, there would be a rebuttable presumption that *he* was the culprit, even though the probability that he indeed was the injuring one was really only 20% because the group included five equally likely culprits. Equal likelihood seemed to be the assumption, although it might have been possible to argue some were more likely than others, e.g. the surgeon, or those spending more time with the patient. It also would have been possible to argue somebody outside the group inflicted the injury, thus further reducing the chances it was *this* doctor even more.

So the culprit was more probably one of the others than him. This is clearly a presumption, at least as applied in this case, that is not based to *any* extent on *any* notion of rational probabilities of factual connection—indeed flies in their face—but rather obviously is based on some other policy.

The court indicates that if the defendant doctor declines to present evidence that he was not the culprit, the case would either go to the jury or there would be a directed verdict against him. The case was unclear as to which, so we don't know if this was a permissive or a mandatory presumption. It merely held that the lawsuit brought by the plaintiff patient—who was appealing a dismissal of his lawsuit by the trial judge—should not have been dismissed out of hand before trial by the trial judge without calling on defendant doctor to come forward with any evidence. The case was sent back for trial, which might “smoke out” what happened to the patient, but apparently was then settled in an undisclosed fashion before any trial took place. Consequently we have no answer about how the case would have proceeded.

So, putting the idea of settlement aside, the *Ybarra* holding makes it incumbent on the doctor to come forward with some showing indicating it was not he who committed the injuring act. It is a little uncertain what the individual defendant doctor would have to demonstrate in this regard to get himself off the hook. Ordinarily showing a less than 50% probability he was the culprit would do the trick but if that were so here, it would be automatically satisfied by the fact that there were a number of other members in the group who equally could have been the culprit. That simple showing, however, definitely does not seem to be what the court had in mind. Because if it were, each member of the group could get off on this ground.

⁷⁶ 154 P.2d 687 (Cal. 1944).

This point also raises questions about what the jury could rationally do if it got the issue. Could jurors rationally find it was more probable this doctor was the culprit than the others? It seems based on rational probability they could only find the opposite. So why submit it to the jury if there is only one rational factual outcome they could find?

Nevertheless, the court applied *res ipsa loquitur* to encourage each defendant to come forward with explanations on pain of potential liability if they didn't.

The court's explicit policy behind the presumption was to "smoke out" an explanation from the doctors for what happened: In a case like this, the doctors are in a better position than plaintiff to know what happened or to get evidence about it. They are the "least cost avoiders."⁷⁷ The *Ybarra* holding encourages them to produce an explanation. The court also said the members of the medical group should be encouraged—during joint medical treatment and care of a patient—to watch out for what is happening at the hands of each other; to be aware of what each other are doing; and to try to stop any mistakes any of them might make.⁷⁸

The court seems to countenance a result—if an explanation is not adduced—that goes against the probabilities and against factual accuracy: a doctor who is only 20% likely the culprit, could suffer a judgment of liability for the plaintiff's entire damages. The court apparently views this as an unavoidable cost of the policy.

To be fair to the court, in the actual case the entire group was sued. I streamlined the facts and holding, looking at it from the standpoint of liability of an individual doctor. But I don't think that is a stretch. It is clear the court was talking about each member potentially being individually liable for the whole of plaintiff's damages if he cannot get himself off the hook.

Although there may have been 50+ percent probability with respect to the *group* of defendants, the law, outside this presumption, requires 50+ percent as to any individual who is to be held liable, whether or not they are sued together; yet that was not satisfied here. In *Ybarra*, though the whole group were defendants, the court holds *each individual member* could be fully liable, unless he gets himself off the hook. The result is that plaintiff could (after the verdict for him) draw on any one or more of those who have not gotten themselves off the hook, to make them pay all or any portion of plaintiff's damages bill, at plaintiff's option, in any proportion. Of course plaintiff would be required to stop once his damage bill is fully paid.

This is called "joint and several liability" and is intended to guarantee that a plaintiff has maximum solvent findable sources to pay his damages bill—to protect him from the risk that one or more group members may disappear after the verdict or become insolvent—even if it means a particular defendant may wind up paying more than his "fair share." This "unfairness" is left to be worked out later if

⁷⁷ See note 38, *supra*.

⁷⁸ The court says (1) defendants had better access to proof of what happened than the largely unconscious patient, (2) doctors tend to circle the wagons and engage in a group-protective conspiracy of silence when there is an untoward medical event and (3) doctors should be encouraged to watch and correct the conduct of one another in a joint situation like this, even though they have structured themselves as independent contractors (a notion with which the court seemed impatient, although this is still the way the medical profession is structured). The court wanted to "smoke out" what happened by putting the onus on the putatively reluctant medical professionals to come forward with an explanation for what happened, rather than sit silently and stand pat.

defendants (after plaintiff is paid) want to sue each other for reimbursement so that they wind up only paying their “fair share.” This way any risk that some defendants may be insolvent or beyond reach when it comes to actually collecting money, falls on the defendants rather than the innocent plaintiff.

The language of the court leaves little reason to believe the court would have ruled differently if only one of the group had been made a defendant (as in our streamlined version); but it is not impossible. Because the entire group were defendants in the actual case, there is at least an argument that in the face of uncertainty the court’s approach minimized the chance of an erroneous factual determination because under the court’s ruling the members of the medical group, who collectively had the better access to the truth, were given a motivation to ascertain it and bring it forward.⁷⁹

Aside from this, where does the case fit in our taxonomy of views concerning the effect of presumptions?

Because the case was settled before trial and did not get to a stage where defendant had to introduce any evidence of non-B (non-negligence) we don’t know which of our views the presumption as applied in *Ybarra* fits under. This is because the views are only determined based on what happens procedurally when defendant introduces such evidence. Is *Ybarra* to be placed under our View (2) (bursting bubble) or View (3) (continuation), or even View (5) (shifting the persuasion burden concerning the issue of negligence *vel non* away from the plaintiff and onto the defendant doctors and medical personnel if the case went to the jury)? It seems that View (2) would satisfy the California Court’s main objective because it encourages the medical team to come forward with evidence of what happened. The need to “smoke out” the defendants concerning an explanation seemed to be uppermost in the Court’s mind.

Not all courts agree that *res ipsa loquitur* can be used in cases like *Ybarra*. Those that do feel it can, usually agree only in analogous medical cases. Exceedingly few cases are found applying the doctrine in other areas although theoretically there would seem to be analogous joint enterprises of people or organizations where the reasoning of the *Ybarra* court would seem to apply, for example mishaps on joint construction sites.⁸⁰

A number of courts confine *res ipsa loquitur* to cases where there is a logical factual probabilistic inference and they eschew any policy-based approach to the doctrine. Some of these courts do not view the doctrine as anything other than a statement of circumstantial evidence, and may not call it a presumption at all.

Res ipsa loquitur presumption cases frequently are held to come within View (2) (legal presumption as bursting bubble) or View (3) (legal presumption does not burst but continues), but other views are found as well. Sometimes a jurisdiction’s highest court will adopt a uniform view for all cases involving *res ipsa loquitur*. It may vary from their view of other presumptions. Other times which view is adopted for *res ipsa loquitur* seems to depend on the strength of the inference of negligence on the facts of the

⁷⁹ In an exchange between economist Steven Salop and myself about this paper, Salop says, “In my own decision theory framework, the rationale for this presumption [as utilized in *Ybarra*] ... flows from the fact that the defendants have better access to the relevant information, so it is efficient to place the burden of production (if not persuasion too) on them. In antitrust, we place the burden on the defendant to show efficiency benefits.” This is analogous to the “least cost avoider” concept. See note 38, *supra*.

⁸⁰ In *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988) the court refused to apply it to an inmate claiming injury during the quelling of a prison riot in a lawsuit against a group of police officers.

particular case.⁸¹ Or on whether the presumption is primarily invoked for policy reasons or for logical factual inference reasons. Sometimes, however, the variations of views found concerning this same presumption are inexplicable.

The California Evidence Code⁸² now has a statutory provision on the effect specifically of the *res ipsa loquitur* presumption although it is not certain that the special policy-based use of the presumption in *Ybarra* would necessarily be governed by it. The statutory terms are reflected practically verbatim in a California standardized⁸³ jury instruction:

Plaintiff may prove that defendant's negligence caused her harm if she proves all of the following:

1. That plaintiff's harm ordinarily would not have happened unless someone was negligent;
2. That the harm was caused by something that only defendant controlled; and
3. That plaintiff's voluntary actions did not cause or contribute to the event that harmed her.

If you decide that plaintiff did not prove one or more of these three things, you must decide whether defendant was negligent in light of the other instructions I have read.

If you decide that plaintiff proved all of these three things, you may, but are not required to, find that defendant was negligent or that defendant's negligence was a substantial factor in causing plaintiff's harm, or both.

Defendant contends that he was not negligent or that his negligence, if any, did not cause plaintiff harm. If after weighing all of the evidence, you believe that it is more probable than not that defendant was negligent and that his negligence was a substantial factor in causing plaintiff's harm, you must decide in favor of plaintiff. Otherwise, you must decide in favor of defendant.

Directions for Use:

The first paragraph of this instruction sets forth the three elements of *res ipsa loquitur*. The second paragraph explains that if the plaintiff fails to establish *res ipsa loquitur* as a presumption, the jury may still find for the plaintiff if it finds based on its consideration of all of the evidence that the defendant was negligent.

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. The last two paragraphs of the instruction assume that the defendant has presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a

⁸¹ See footnote....*supra*.

⁸² Section 646(c).

⁸³ A number of jurisdictions have published standardized jury instructions for trial judges in certain specified situations, based on local statutory and case law. This particular one is California Civil Jury Instruction ("CACI") 417: "Special Doctrines: Res Ipsa Loquitur."

proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of *res ipsa loquitur*.

The jury instruction itself seems to place the presumption within our View (3) (legal presumption may have weight for the jury), but the last sentence of the “directions for use” are inconsistent with that. The sentence instead suggests the applicability of View (2), legal presumption as bursting bubble. The sentence does not seem to comport with the jury instruction itself. The jury instruction, by telling the jury about the factual connection, seems to invite the jurors to give some weight to it as a legal presumption, even after introduction of (or even after their belief in) defendant’s evidence of non-B (non-negligence). That would be our View (3) (presumption has continuing weight with the jury). If the intention of the jury instruction is to implement View (2), additional language is needed in the jury instruction that would caution jurors to no longer at this point give any special additional weight to the factual connection just because it was mentioned. Mentioning the presumption without this caution implies a special legal connection. View (2) (legal presumption as bursting bubble) says the legal presumption should disappear as soon as defendant merely *introduces* or *presents* his evidence. If he does that during the case, there is no need to ever tell the jury there is a special legal connection.

View (4): The Legal Presumption Bursts for Judge, Lends Weight for Jury.⁸⁴ The mailroom clerk’s testimony of non-delivery causes the legal presumption to disappear⁸⁵ for purposes of the judge’s deliberations concerning directed verdicts and directed findings (which, *on the facts of our particular case* probably makes no difference since in either event the clerk’s testimony is probably sufficient to make a jury issue), but cannot do so for purposes of the jury’s deliberations (whether the testimony is believed or not). The effect on the jury is as in View (3).⁸⁶ Thus a View (4) presumption affects both burdens, production and persuasion.

The converse—disappearance for purposes of the jury’s but not the judge’s deliberations—is also found. (We may call this “View (4)-1.”) This kind of presumption also affects both burdens.

View (5): The Legal Presumption Puts the Persuasion Burden on the Presumption’s Opponent.⁸⁷ The presumption continues in the case, by shifting the burden of persuasion on the issue of delivery, to

⁸⁴ This is one interpretation of certain language in both *U.S. v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (antitrust presumption of anticompetitive effect) and *Sullivan v. Crabtree*, 258 S.W.2d 782 (Tenn. App. 1953) (truck swerving off road and down an embankment; *res ipsa loquitur* presumption).

⁸⁵ An aberrant variation very rarely found would include the analogous common sense inference in what disappears. This is also possible with respect not only to our View (4), but also View (4)-1 immediately below.

⁸⁶ Or alternatively, at least conceptually, it could be as in View (5).

⁸⁷ Because this view was championed by Prof. Morgan, as well as by Prof. McCormick, it is sometimes called the “Morgan” or “McCormick” view. See Morgan & Maguire, *Looking Backward & Forward at Evidence*, 50 Harv. L. Rev. 909 (1937); McCormick on Evidence, Sec. 344 (6th Ed. 2006). For examples of this view, see *E. I. du Pont de Nemours & Co. v. Berkley and Co., Inc.*, 620 F.2d 1247 (8th Cir. 1980) (the statutory presumption of the validity of a patent requires the party asserting non-validity to bear the burden of going forward with evidence as well as the burden of persuasion on the issue); *Plough, Inc. v. Mason and Dixon Lines*, 630 F.2d 468 (6th Cir. 1980) (the Carmack Amendment Law allows shippers to sue common carriers for damage to goods; upon establishment of a *prima facie* case, the burdens shifts to the carrier, including both the burden of going forward with the evidence and the risk of nonpersuasion); *Ala. By-Products Corp. v. Killingsworth*, 733 F. 2d 1511 (11th Cir. 1984) (presumption coal miner’s disability is due to pneumoconiosis); *Hood v. Knappton Corp. Inc.*, 986 F.2d 329 (9th Cir. 1993) (in

the defendant, if proper mailing is believed by the jury or otherwise established as a matter of law.⁸⁸ In our hypothetical, since proper mailing might be believed (or even *must* be believed) by the jury, no directed verdict or directed finding could be awarded by the judge either way on the issue of delivery. Assuming the evidence of *proper mailing* is strong enough to satisfy the jury or to establish proper mailing as a matter of law, the defendant would, under this view, have the burden of proving non-delivery by a preponderance of the evidence. His evidence (the mailroom clerk's testimony) on this score is, in our hypothetical case, not terribly strong, although it probably would raise a jury issue. Under the instruction that would be given the jury, that the burden is on him (the defendant) to prove non-delivery (if the jury finds proper mailing or if proper mailing is established as a matter of law, which we are assuming is the case), it is unlikely that the jury would find in his favor on the issue of receipt.

Thus, under this View (5) both the production and the persuasion burden are affected. That is, there is an effect on both the judge's and the jury's function.⁸⁹

A number of commentators⁹⁰ believe this View (5) is the best because it avoids the questions raised above about how jurors are to go about determining the relative weight of a presumption versus evidence contrary to a presumption (the "artificial weight" problem). This View (5) merely asks jurors to decide on common sense inferences whether they are convinced of non-B by a preponderance. However, this gives rather slight effect⁹¹ to the legal presumption in juror deliberations, because it is an effect that comes into play only when the juror's mind is in equipoise on the issue of B/non-B. That is the only time "who has the burden of persuasion" ever makes any difference. Unless, of course, View (5) (shifting the persuasion burden) is combined with View (3) (continuing weight: jury is instructed the presumption has weight). Under this combination view, both "who has the persuasion burden" and "what is needed to discharge that burden" are affected by the legal presumption. This gives the presumption more heft. The combination view is not unheard of. But, though it gives the legal presumption more weight, that weight is "artificial weight" that is hard to gauge. That is, the "artificial weight" problem is re-introduced.

Under View (5), the persuasion burden on the issue of B/non-B is put on the opponent of the evidence (assuming it is not already there, which is usually the case, because we are in this whole section addressing only civil cases and usually only presumptions aiding plaintiffs who customarily have the persuasion burden on most issues in the absence of a legal presumption). The persuasion burden we are

Admiralty cases, the rule of *The Louisiana*, 70 U.S. 164 (1865) shifts to a drifting vessel the burden of production and persuasion).

⁸⁸ A variant of this view would be that the persuasion burden is shifted even if the jury does *not* believe the evidence of proper mailing. Thus the instruction to the jury saying that the burden is on defendant on this issue is not conditioned by saying "only if you believe the mailroom clerk." This variant, relatively infrequently found, may be called "View (5)-1."

⁸⁹ For an example of this view, see *E. I. du Pont de Nemours & Co. v. Berkley and Co., Inc.*, 620 F.2d 1247 (8th Cir. 1980) (the statutory presumption of the validity of a patent requires the party asserting non-validity to bear the burden of going forward with evidence as well as the burden of persuasion on the issue).

⁹⁰ E.g. Morgan & Maguire, *Looking Backward & Forward at Evidence*, 50 Harv. L. Rev. 909 (1937); McCormick on Evidence, Sec. 344 (6th Ed. 2006).

⁹¹ Not as slight as View (2), bursting bubble.

talking about being put on the opponent of the presumption under this View (5), is normally to prove by a preponderance of probability, the usual burden in civil cases.

Some cases, however, have said the persuasion burden placed on the opponent of the presumption under this View (5), is to persuade the jury that non-B is “at least equally as likely as B.” This view may be considered a *variant* of View (5).⁹² There are other variants of what burden of persuasion is placed on the opponent of the presumption under our View (5), for example “to prove by clear and convincing evidence,” or by a “substantial probability,” or “beyond a reasonable doubt.”⁹³

View (6): *The Party Relying on the Legal Presumption Regains the Production Burden.* The fact that the party opposing the presumption of B has introduced evidence of non-B imposes on the party relying on the presumption, the obligation to answer that evidence with evidence of B beyond that furnished by the presumption, or suffer a peremptory judicial ruling of non-B as a matter of law. In other words, the matter does not get to the jury unless this further evidence of B is introduced. It is not that the issue of B/non-B merely gets to the jury to decide in some fashion boosted in some way (or not) by the presumption as under all the other views. Here, the question is taken from the jury and automatically resolved by the law.⁹⁴ This is a different effect, for example, than View (5) (shifting the persuasion burden) because under that view, failure to meet the rebuttal of presumed fact B would merely result in a jury issue, with an altered persuasion burden there in favor of non-B, rather than an automatic decree that non-B exists as a matter of law. It is different from View (4) (presumption continues and lends weight) under which, in such a situation, the issue would go to the jury with the presumption merely bearing some weight.⁹⁵ A prime difference between View (1) (both the legal presumption and the underlying factual

⁹² See, apparently adopting this view, *Hinds v. Hancock Mutual Life Ins. Co.*, 155 A. 2d 721 (Me. 1959) (presumption against suicide; life insurance policy pays less if insured’s death is a suicide). It is not entirely clear whether this case adopts this variant of View (5) (imposing persuasion burden) or View (2) (presumption as bursting bubble) with an alteration of the quantum of evidence needed to burst the bubble from “evidence from which a reasonable person could find Non-B by a preponderance of probability” to “evidence from which a reasonable person could find Non-B at least equally as probable as B” without changing the actual persuasion burden before the jury.

⁹³ See *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S. Ct. 2238 (Supreme Court 2011) (statutory provision expressly stating that an issued patent is “presumed valid” and that party asserting invalidity has “the burden to establish invalidity” was intended to incorporate the common-law cases and history up to the time of enactment, which fairly consistently held that the challenger of the patent had to prove in-validity to the fact finder by clear and convincing evidence, not by a preponderance or any other lower standard); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979) (presumption in antitrust action that patentee has brought infringement suit in good faith can only be rebutted by clear and convincing evidence; error to instruct it can be overcome by preponderance of the evidence); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982) (rebuttable presumption of age discrimination; the plaintiff must prove his case to jury by “substantial probability” rather than “possibility” so as to prevent a jury decision based upon mere speculation). Rule 704 of the American Law Institute’s Model Code of Evidence imposes a persuasion burden of “beyond a reasonable doubt” to prove the illegitimacy of a child born during wedlock.

⁹⁴ This is different from View (4) (legal presumption bursts for the judge, not the jury, upon introduction of evidence of non-B) because under this View (6), both the legal presumption and any logical rational probabilistic factual or common sense inference underlying it burst. View (6) could be deemed a variant of View (4). This variant could be called “View (4)-a: both the legal presumption and the underlying inference burst for the judge but not for the jury.”

⁹⁵ If this production burden is met and the case goes to the jury, there is still a question under this view as to what effect, if any, the presumption is to have on the jury. Some of the other of our enumerated views might be invoked to answer that question at that point.

presumption burst) and View (6) (the party relying on the presumption regains the production burden) is that under View (6) if the plaintiff does come up with additional evidence of B to answer the defendant's rebuttal of B, the presumption/connection has not necessarily disappeared for purposes of the jury's deliberation (or the judge's concerning directed verdicts).

Under View (6), in our example of the properly addressed, stamped, and mailed letter, where the presumed fact B (receipt by the addressee) is met by evidence of non-B (non receipt—the mailroom clerk's testimony), if there is no further evidence of B (receipt by addressee) offered, there would automatically be a directed verdict of non-B (no receipt) against the party who had invoked the presumption of receipt.

It is submitted by the present author that this View (6) is an unsound view: the trier of fact (ordinarily jury) should get to decide the issue of receipt, either unassisted by the legal presumption as in View (2) (legal presumption as bursting bubble) or assisted in the way permitted by Views (3) (legal presumption continues lending weight) or (5) (persuasion burden shifted). Non-B should not win the day just because it seems to be commanded by some legal mandate when the facts would say otherwise. Any policy or other boost intended by the legal presumption, was obviously intended to militate in favor of *fact B*. So there is no justification for the law mandating an artificial finding of *fact non-B*.

Admittedly on occasion in a particular case the evidence introduced of non-B will be so overwhelmingly strong and convincing that no reasonable person could find B, and a directed verdict of non-B would be appropriate, but that does not have anything to do with the presumption. That is a normal principle of burden of persuasion. Absent this situation, however, the trier of fact (jury or judge acting as jury in a non-jury trial) should get to consider the fact issue and, as with fact-issues generally, their determination of the fact issue should not be reviewable by an appellate court (unless, as said, it was unreasonable).

When non-B wins the day pursuant to our View (6)—on grounds that the regained production burden on B has not been satisfied—that is a ruling by the trial judge as a matter of law, and she is acting as trier-of-law in such a ruling, even in a non-jury trial. That is a role separate from her function as trier-of-fact in a non-jury trial. The roles are distinct even if they are not played by separate players—judge and jury—as they would be in a jury trial. The reason I point this out is that the issue seems to have surfaced in some antitrust and discrimination cases where frequently there is no jury, and there may have been some confusion on this score.

For example, the case of *U.S. v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) was an antitrust case indulging a legal presumption that a merger will have anticompetitive effects (fact B, the presumed fact) if the market in which it will take place has certain features such as concentration etc. (collectively deemed fact A, the basic fact from which the presumption arises). The legal presumption is based on likelihoods from statistical and other studies, scholarly articles, judicial decisions, and some common sense. The government asserted (and the court found) that the defendants' proposed merger was taking place in a market that met those conditions of concentration, etc. So fact A was established by the government (plaintiff). Thus the presumption of fact B (anticompetitive effect) arose. The government therefore had satisfied its production burden on anticompetitive effect.

But the defendants then introduced evidence tending to rebut fact B (i.e. rebut anticompetitive effect), such as, among other things, that there were low barriers to entry into the market. The court held this shifted the *production burden* back to the government. The government (plaintiff), apparently content to rely primarily on the presumption, did not in any substantial way try to rebut this evidence. The court said that therefore the government (plaintiff) failed to meet its production burden on B (anticompetitive

effect) which burden was regained by the government because the defendant had introduced rebuttal evidence on B; and consequently the trial judge properly issued a directed verdict or directed finding of *no* anticompetitive effect—i.e., of non-B—apparently as a matter of law. This is our View (6).⁹⁶ The court relies on, *inter alia*, a Supreme Court case involving illegal employment discrimination,⁹⁷ that it says set up a similar scheme prescribing what the plaintiff's *prima facie* case must include (such as disparities in hiring or promotion) to raise a presumption of illegal discrimination; and holding that if this is done, defendant employer must then show legitimate non-discriminatory reasons for the employment action, and that the plaintiff may (*not necessarily must*)⁹⁸ then rebut those non-discriminatory reasons by, e.g., showing they were pretextual.

It is my contention that the discrimination case⁹⁹ relied upon by *Baker Hughes* does not support View (6) because it was not saying the plaintiff *must offer rebuttal evidence or suffer a directed verdict*. It instead said plaintiff *may* offer rebuttal, but whether or not plaintiff does, the issue of B or non-B (anticompetitive effect or not) would be for the fact-finder to decide (the fact-finder inherently realizing or specifically instructed that the persuasion burden is on the government, as plaintiff, as always throughout the case). Because they said “may,” they were not saying the production burden shifts back. The production burden shifting back would mean “must” rather than “may” and is the thing that would put the case within View (6).

This all leads me to conclude that *Baker Hughes* inadvertently and carelessly said the legal presumption shifts the *production burden* back to the government, in reaching a result that more properly *could have been reached on other grounds*. This statement of the court is the key statement resulting in categorizing the case as a View (6) case.

⁹⁶ *Baker Hughes* is probably not an example of View (1) (both the legal presumption and the underlying inference burst for all subsequent purposes) because if the government *had* offered some cognizable rebuttal of defendants' rebuttal, the court probably would *then* have restored the bubble, i.e. would have allowed some role to be played in the case going forward, by at least the logical factual inference underlying the legal presumption—and maybe even a role by the legal presumption itself. But that latter *might* be View (4) (legal presumption bursts for the law-finder but not the fact-finder) depending upon *what* role would be allowed to *whom*. By “role in the case going forward” I mean “in the subsequent decisions to be made in the case,” i.e. the decision to *now* enter a directed verdict (law-finder decision) and/or the decision whether the persuasion burden is now satisfied (fact-finder decision). Since it is hard to know what the court would have done with a situation not before it, it is somewhat difficult to classify the case according to the various views, but I have done what I regard as some sound reading between the lines to prognosticate on that counter-factual.

Additionally, something is worth noting regarding the *legal presumption* (as opposed to the rational probabilistic factual inference). Assuming the plaintiff does not respond to defendant's rebuttal of B, the presumption disappears under View (6). (This was the actual case.) But if plaintiff does respond, the other views may then come into play even under View (6), and at least some of them give the *legal presumption* a role at that point.

⁹⁷ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

⁹⁸ This is a significant difference from what *Baker Hughes* seems to be saying, and puts those cases under a different one of our views.

⁹⁹ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (on showing of apparent discrimination, employer must produce evidence that denial of promotion or employment was not motivated by racial animus; Supreme Court here agrees as to this production burden, but holds that the lower court erred by placing persuasion burden on defendant (to persuade court of “convincing, objective reasons” for choosing one applicant over another); Supreme Court says the persuasion burden remains on plaintiff).

These other grounds probably better express what the court really meant. Let us amplify the point:

The government's loss in *Baker Hughes* can more properly be explained on the ground that the defendant produced such a kind and degree of evidence in rebuttal of B (i.e. in rebuttal of anticompetitive effect), that, when compared with the weak generalized inference that underlies the legal presumption, all reasonable fact-finders would have to find non-B, i.e., that defendants' merger would not have anticompetitive effect even upon properly considering any rational probabilistic factual logical weight the presumption of anticompetitive effect might have. That articulation fits comfortably within View (2). It is different from saying, as the court mistakenly said, that as a matter of law plaintiff government regained the production burden and had to offer rebuttal or would automatically suffer a directed verdict—i.e. the View (6) view. Those two articulations have different consequences, maybe not in this case, but in other cases.

On the facts of *Baker Hughes*, which one of these rationales was used probably wouldn't have made any difference. So sloppy language could be indulged. And perhaps the court was thrown by the fact that the trial judge was both trier-of-law and trier-of-fact in this non-jury trial. But in other cases the rationale might make a great deal of difference. For example, the View (6) theory would seem to resolve the matter regardless of whether the defendants' rebuttal evidence was of a kind and degree that reasonable people could reach only one conclusion.

Alternatively to all this, this appeals court decision may be saying the trial judge quite reasonably felt the persuasion burden of the government was not satisfied and we (the appeals court) will therefore not overrule him because persuasion burden satisfaction is always within the discretion of the finder-of-fact (the trial judge here; the jury in a jury trial) unless that finder's finding one way would be unreasonable; and the judge's finding here of non-anticompetitive effect (non-B) was not an unreasonable finding on the evidence as a whole in this case. Unlike View (6) and our other alternative rationale for the case, above, this rationale would mean an opposite decision on the B-or-non-B issue by the trial judge as finder-of-fact might also have been upheld, because decisions of fact under the persuasion burden are for the finder-of-fact whichever way he goes unless totally unreasonable.

Any of these alternative explanations would reach the same result the court of appeals did on the facts of this case. But in other cases, which particular rationale is used could make a great deal of difference.

Baker Hughes' language suggests a kind of sliding scale¹⁰⁰ concerning how strong the rebutting evidence of the defendant must be. The decision states that the stronger the evidence suggesting anticompetitive effect (suggesting B) that the government (plaintiff) puts into its *prima facie* case (i.e., their case of A), the greater defendant's rebuttal evidence must be to combat B (i.e., to show non-B). I think the sliding scale in *Baker Hughes* means my alternative explanations of the case (that on the facts reasonable people would be compelled to agree on non-competitive effect or that the trial judge acted within her range as decider-of-fact under an unaltered persuasion burden) are probably the right explanation because my explanations involve just such a sliding scale that slides depending on the

¹⁰⁰ See Salop, An Enquiry Meet for the Case: Decision Theory, Presumptions and Evidentiary Standards in Antitrust Legal Standards [Forthcoming on SSRN and Georgetown Law Scholarly Commons, Fall 2017], p. 37.

Statistically and legally astute Professor Joseph Gastwirth called to my attention that the sliding scale concept was used in *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224 (1980) where Judge Higginbotham discusses the p-value of a statistical test, stating the smaller it is, the more convincing evidence of the null hypothesis, e.g. the two groups have the same probability of promotion is contradicted by the data.

facts.¹⁰¹ At any rate, we cannot be certain what position *Baker Hughes* may stand for, but if we take it at its word, it is most consistent with View (6).

Baker Hughes and some of the employment discrimination cases,¹⁰² regardless of which presumptions view they are following, discuss and sometimes specify exactly what kind or quantity of evidence are required to satisfy the various burdens or to burst the bubble of a presumption in the particular case. These are efforts to explicate and give concrete content to generalities like “such quantum or kind of evidence as would allow a reasonable person to find” anticompetitive effect or discrimination, or “you must be persuaded by a preponderance....” They are “fleshing out,” in a particular context, the abstract

¹⁰¹ In one of many exchanges I have had with Prof. Salop he raised the point that some of the discrimination cases (like *Burdine* on which *Baker Hughes* relied) do not seem to specifically say there is a sliding scale. Texas Dept. of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) (alleged racial discrimination by employer; for result on remand see *Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981)). *Burdine* involved a presumption of employment discrimination (fact B) if plaintiff establishes something that looks on its face like discrimination, i.e., a showing of apparent discrimination (fact A). Upon such a showing, the defendant employer must produce evidence that denial of promotion or employment was not motivated by racial animus. Prof. Salop believes the court should have explicitly recognized a sliding scale: that the greater the plaintiff’s *prima facie* showing (showing of A, apparent discrimination) the greater must be the showing of defendant employer to rebut that (i.e., to show non-discrimination, non-B). He says in an e-mail to me:

“If the plaintiff’s only evidence is that she is African-American with ‘good credentials’ and was not hired, that should deserve a much weaker presumption of discrimination than would evidence that zero African-Americans with ‘good credentials’ have been hired in the past 5 years, whereas plenty of Caucasians have been hired. The firm should be required to produce much more evidence in the second situation to burst the bubble.”

He tentatively generalizes that in most situations, not just discrimination cases, there should be a sliding scale. It may be, however, that a sliding scale is only appropriate in cases where fact A can include any of a range of facts, of varying strength. In that respect, discrimination cases may be distinguishable from, for example, the fact of proper mailing in the mailing presumption—although I suppose there is a range of sorts there, too: e.g. the address may be written with varying degrees of clarity; or some of the components of proper mailing may be proved with varying clarity or convincingness, etc.

But I have what I think is a more fundamental answer: I think a sliding scale is inherent in the bursting bubble theory, view (5), which *Burdine* presumably applies: The amount of evidence needed to burst the bubble is “evidence sufficient that a reasonable person could find non-B.” Depending on how strong a case plaintiff put on to raise the presumption, a reasonable person would require a greater or lesser amount of evidence to rebut it. And if this reasonable person standard were satisfied to the judge, and the case got to the jury (or fact finder), there would similarly be a sliding scale in their mind depending on how much plaintiff had put in. In other words, specifying there is a sliding scale may not be needed in most cases, whether in the discrimination area or not, because when the judge decides directed findings (or directed verdicts, i.e. production burdens), and when the jury decides persuasion, a sliding scale can often automatically come into effect because the question before the judge of what evidence puts something in issue to get to the jury can vary (at least under most of the views); and the jury or fact-finder if and when they get the fact issue, can always vary what they think is convincing, depending on the total state of the evidence. Consequently, I think the sliding scale mentioned in *Baker Hughes* means my alternative explanations of *Baker Hughes* (that on the facts reasonable people would be compelled to agree on non competitive effect or that the trial judge acted within his range as decider of fact under the unaltered persuasion burden) are probably the right explanation (rather than that they adopted view (6)) because these explanations automatically involve a sliding scale depending on the facts.

¹⁰² See, e.g., *Burdine*, last footnote above (alleged racial discrimination by employer); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (semble; holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (alleged age discrimination by employer).

generalities. This is especially needed in difficult areas of substantive law and inference. Whatever it is called, sliding scale or not, I think this is an appropriate function for appellate courts in these areas where the substantive law is complex and beyond the range of ordinary experience. It is not very informative to trial judges and juries to just refer to a “reasonable person” or a “preponderance of evidence.” Also some social policy boosting mixes in, and should, in defining evidence that suffices.

Sometimes when a judge seems to be specifying the kind of evidence needed to burst the bubble or to persuade, the court may be explaining what the various elements of the substantive law are for the evidence to address. For example, in racial discrimination in employment cases, where there might be a presumption of discrimination from certain apparent disparities in treatment, it might be necessary to explain what elements—like a certain intention, mere disparity, pretext—are and are not elements of the offense of discrimination. This may entail discussion of the kind of evidence that may establish or defeat those elements.¹⁰³

Attempts at Codification of the Views

(a) The Early (Unenacted) Drafts of the Federal Rules of Evidence

View (5) above (legal presumption imposes persuasion burden) was the one adopted by Rule 301 of the initial, unenacted *Supreme Court Draft* of the Federal Rules of Evidence (“F.R.E.”).¹⁰⁴ Rule 301 codified the effect of presumptions in those civil cases where federal presumption law was to govern. This draft provision was *not* ultimately adopted for federal courts. But the view is viable today in a number of states, especially since it was adopted by the 1974 Uniform Rules of Evidence.¹⁰⁵ The Uniform Rules were a kind of model body of rules recommended to the states. They were drafted by the prestigious National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and approved by the American Bar Association. While the Uniform Rules did not themselves have the force of law, their Rule 302 substantially copied Rule 301 of the Supreme Court Draft F.R.E. and recommended it to the states, many of which adopted it and still have it today. The provision as it appeared in the Supreme Court Draft Federal Rules of Evidence was as follows:

“In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.”

An earlier draft of the F.R.E.¹⁰⁶ had an additional, very enlightening (though turgid) section purporting to explain what the above language means¹⁰⁷ in terms of the production and persuasion burdens:

¹⁰³ See, e.g., cases in immediately preceding footnote.

¹⁰⁴ Proposed Federal Rules of Evidence, Rule 301 (1972).

¹⁰⁵ The provision is continued in the current Uniform Rules. See NCCUSL Uniform Rules of Evidence Act 1999 (P. Rothstein, American Bar Association Advisor) with 2005 Amendments (M. Raeder, American Bar Association Advisor), http://www.uniformlaws.org/shared/docs/rules%20of%20evidence/uroea_final_99%20with%2005amends.pdf.

¹⁰⁶ Proposed Federal Rules of Evidence (Advisory Committee Draft, March 1969).

¹⁰⁷ Caveat: Although the March 1969 draft about to be reproduced here adopts our View (5), it is not clear that the Supreme Court draft we have reproduced just above is meant to do that, or alternatively whether it means to adopt

“(1) DETERMINATION ON EVIDENCE OF BASIC FACTS. When no evidence is introduced contrary to the existence of the presumed fact, the question of its existence depends upon the existence of the basic facts and is determined as follows:

“(A) If reasonable minds would necessarily agree that the evidence renders the existence of the basic facts more probable than not, the judge shall direct the jury to find in favor of the existence of the presumed fact; or

“(B) If reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts more probable than not, the judge shall direct the jury to find against the existence of the presumed fact; or

“(C) If reasonable minds would not necessarily agree as to whether the evidence renders the existence of the basic facts more probable than not, the judge shall submit the matter to the jury with an instruction to find in favor of the existence of the presumed fact if they find from the evidence that the existence of the basic facts is more probable than not, but otherwise to find against the existence of the presumed fact.

“(2) DETERMINATION ON EVIDENCE OF PRESUMED FACT.¹⁰⁸ When reasonable minds would necessarily agree that the evidence renders the existence of the basic facts more probable than not, the question of the existence of the presumed fact is determined as follows:

“(A) If reasonable minds would necessarily agree that the evidence renders the nonexistence of the presumed fact more probable than not, the judge shall direct the jury to find against the existence of the presumed fact; or

“(B) If reasonable minds would necessarily agree that the evidence does not render the nonexistence of the presumed fact more probable than not, the judge shall direct the jury to find in favor of the presumed fact; or

“(C) If reasonable minds would not necessarily agree as to whether the evidence renders the nonexistence of the presumed fact more probable than not, the judge shall submit the matter to the jury with an instruction to find in favor of the existence of the presumed fact unless they find from the evidence that its nonexistence is more probable than its existence, in which event they should find against its existence.

“(3) DETERMINATION ON EVIDENCE OF BOTH BASIC AND PRESUMED FACTS. When evidence as to the existence of the basic facts is such that reasonable minds would not necessarily agree whether their existence is more probable than not and evidence as to the nonexistence of the presumed fact is such that they would not necessarily agree that its nonexistence is more probable than not, the judge shall submit the matter to the jury with an instruction to find in favor of the existence of the presumed fact if they find from the evidence that the existence of the basic facts is more probable than not and unless they find the nonexistence of the presumed fact more probable than not, otherwise to find against the existence of the presumed fact.”

our View (5)-1, described in [footnote 88](#), *supra*. The language of the Supreme Court draft is consistent with both views, but it probably was meant to adopt our View (5) which was more prevalent in cases than (5)-1.

¹⁰⁸ Note that throughout all sections of the rule, the quantum of evidence for the judge that causes different effects is the “sufficient to support a finding by a reasonable person.”

The provision can be criticized for, among other things, assuming only a binary situation: that the only evidences to consider bearing on the presumed fact are the evidence of the basic and the evidence of the presumed fact. See, for example, the uppercase headings of sections (1), (2) and (3) of the provision. And more particularly see sections (1)(B) providing if evidence of fact non-A is established as a matter of law, the jury may not find fact B—but the present writer asks “Couldn’t there be other evidence of fact B justifying a jury finding fact B?” See also, to similar effect (1)(C) (if jury finds non-A, they must find non-B—I have the same question), and the end of section (3) (if they find the basic fact not to exist they must find the presumed fact not to exist—again, same question).

Further, this rule, when it describes the conditions which assign the persuasion burden to the party opposing the presumption (see sections (1)(B), end of (1)(C), (2)(B), end of (2)(C), and end of (3)) seems to assume that in the absence of those conditions, the persuasion burden will be on the party invoking the presumption. It assumes that is the normal default or background rule if the conditions for applying the presumption are not met. But that is only true of cases like our example, where it is the plaintiff invoking a presumption on which normally she has the burden of persuasion. That is ordinarily but not always the context in which a presumption is invoked. Sometimes the defendant invokes a presumption on an issue on which the plaintiff normally bears the persuasion burden in the absence of a presumption; or plaintiff invokes a presumption on an issue on which the defendant normally has the persuasion burden (e.g., usually, the issue of contributory negligence in a tort case). Several of the other rules quoted in this article suffer from a similar assumption. Admittedly, the assumption is usually sound, and facilitates discussion of presumptions. But in a rule or statute which is proposed in order to have force of law, it should not be made.

In addition, the phraseology of the whole rule is so complex as to be understandable only by law professors. It was jettisoned in the later draft.

(b) The Model Code of Evidence and Related Positions

A preliminary draft of yet another recommended codification, the American Law Institute’s (“A.L.I.’s”) Model Code of Evidence,¹⁰⁹ and a 1954 draft of the Uniform Rules of Evidence¹¹⁰ took a mixed approach, applying two of the above views, depending upon the kind of presumption involved, which required the courts to make a difficult distinction:

Model Code, Preliminary Draft Rule 904:

“(2) . . . [W]hen the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact

¹⁰⁹ This model code was recommended to the states by the A.L.I., a distinguished organization of jurists, but had more success with scholars than with the states. It essentially was superseded as a set of model rules for the states by the Uniform Rules of Evidence and the Federal Rules of Evidence as models for, even though not binding on, the states. See A.L.I. Model Code of Evidence Rule 904 (Preliminary Draft 1940-41).

¹¹⁰ NCCUSL Uniform Rules of Evidence (1954).

“(a) if the basic fact has no probative value¹¹¹ as evidence of the existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if the presumption had never been applicable in the action;

“(b) if the basic fact has any probative value as evidence of the existence of the presumed fact, whether or not sufficient to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact has the burden of persuading the trier of fact that its non-existence is more probable than its existence.”

1954 Uniform Rule 14:

“. . . (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

Both the Model Code and the Uniform Rules, in their final versions, abandoned the dichotomy between types of presumptions. The Model Code ultimately¹¹² adopted View (2) (legal presumption bursts like a bubble) for all presumptions except the presumption of legitimacy, which imposed a persuasion burden to prove illegitimacy beyond reasonable doubt. The Uniform Rules ultimately¹¹³ adopted View (5) (imposing a persuasion burden to prove non-B by a preponderance).

(c) California's Codification

Among the jurisdictions picking up this mixed approach was California, but with important differences. Indeed, the California provisions make the opposite allocation. They ascribe to the policy-based, non-probative value presumptions the persuasion-burden-shifting effect (our View (5)), and give the probative value presumptions the bursting bubble effect (our View (2)). This is apparently based on the notion that the policy-based ones are backed by policies that are too important to evaporate so easily as the bursting bubble theory would provide; and that the probative-value presumptions will still, in a sense, have an effect even if the bubble of presumption is burst, because of their probative value, that is, because of the underlying common sense or rational probabilistic logical factual inference.

The California reasoning also appears to be that the policy-based (the illogical) presumptions cannot be factored in and weighed by the jury against the evidence because that would be an irrational process, weighing a non-probative decree against probative evidence. Furthermore, the policy is sufficiently served by merely requiring the opponent of the presumption to come up with something. That reason may

¹¹¹ By “probative value” is meant what we have called a logical common sense or rational probabilistic connection or inference between facts A and B. A presumption having probative value would be one based on a common sense or logical rational probabilistic factual inference. A presumption with no probative value would be one we have called a presumption based on social policy.

¹¹² See footnote 68, *supra*.

¹¹³ See footnote 105, *supra*.

be sound if the policy is based on the notion that the opponent of the presumption has better access to proof or has more resources, but seems a poor reason where some other policy is behind the presumption.

The California provision is as follows:¹¹⁴

“ . . . Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof [i.e., the burden of persuasion] . . .

“ . . . A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied. . . .

” . . . The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate. . . .

“ . . . A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

“ . . . The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. . . .”

In addition, California attempts to give some further guidance as to which particular presumptions are in which category. Examples of these provisions appear in the margin. They express some fairly typical presumptions, although the effects of these presumptions vary around the country, and they are not always classified as here.¹¹⁵

¹¹⁴ Cal. Evid. Code §§ 601, 603-606.

¹¹⁵ Cal. Evid. Code, §§ 630 et seq. state that the following, among others, are presumptions affecting production burden:

“ . . . Money delivered by one to another is presumed to have been due to the latter. . . . A thing delivered by one to another is presumed to have belonged to the latter. . . . An obligation delivered up to the debtor is presumed to have been paid. . . . A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly. . . . An obligation possessed by the creditor is presumed not to have been paid. . . . The payment of earlier rent or installments is presumed from a receipt for later rent or installments. . . . The things which a person possesses are presumed to be owned by him. . . . A person who exercises acts of ownership over property is presumed to be the owner of it. . . . A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined. . . . A writing is presumed to have been truly dated. . . . A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. . . . A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest. . . . A book, purporting to be printed or published by public authority is presumed to have been so printed or published.”

A major problem in differentiating between presumptions, is that it is very difficult to determine which kind a particular presumption is, and presumptions are seldom the one or the other, but are mixed.¹¹⁶ In the A.L.I. debates over the drafting of the A.L.I.'s Model Code of Evidence, Professor Morgan, the prime drafter of the Model Rules, defended making a differentiation between the treatment of policy based presumptions and probative presumptions. He was asked a question, for which he had nothing but an evasive answer:

MR. PEPPER: Is there any criterion for determining when the presumed fact is a subject of logical inference from the basic fact and when it is not?

MR. MORGAN: I am afraid I will have to use Mr. Zimmerman's retort to that---We do not attempt to furnish intelligence for the trial judge or for the appellate court either.¹¹⁷

Morgan eventually was forced to retract and the draft was changed to eliminate the distinction and to provide a general effect for all presumptions—the bursting bubble effect, our View (2)—except for the presumption of legitimacy, for which a persuasion burden of beyond a reasonable doubt was imposed to rebut the presumption.

Sections 660 et seq. state that the following among others, are presumptions affecting “burden of proof”:

“. . . A child of a woman who is or has been married, born during the marriage or within 800 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof. . . . The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof. . . . A ceremonial marriage is presumed to be valid. . . . It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant. . . . A person is presumed to intend the ordinary consequences of his voluntary act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged. . . . Any court of this state or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack. . . . A person not heard from in seven years is presumed to be dead. . . . An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged. . . . “

The statutory list in each category is not meant to be exhaustive. Any presumption from other case or statutory law that fits the general definition for the category will be in that category.

Other commonly found and helpful statutory or rule provisions are illustrated by § 602 of the Cal. Evid. Code and Rule 301(b) of the 1974 Uniform Rules, respectively (they do not appear in the F.R.E.):

“A statute providing that a fact or group of facts is *prima facie* evidence of another fact establishes a rebuttable presumption.”

“If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.”

¹¹⁶ See footnote 45, *supra*. [where I list mixed presumptions like black lung].

¹¹⁷ Debates, Model Code of Evidence (American Law Institute 1940-41).

(d) Codification of Civil Presumptions as it Currently Appears in the Federal Rules of Evidence (“F.R.E.”)

The Federal Rules of Evidence make no attempt to divide civil evidentiary presumptions into two groups—those based upon common sense or logical rational probabilistic factual inference and those based upon other notions of policy, or into classes according to whether they should affect production burden or persuasion burden. In that respect it is different from some of the codifications we have just examined. As indicated above, the 1953 Uniform Rules of Evidence drew a distinction between policy-based and probativity-based presumptions, prescribing a different effect for each category; and the California Evidence Code draws a similar distinction to roughly opposite effect. Also we have seen that current 1999 Uniform Rules of Evidence are practically identical, as respects presumptions, to the Supreme Court draft of the Federal Rules of Evidence which made none of these distinctions, and provided a different effect for presumptions—that of imposing a preponderance-of-probabilities burden on the opponent of the presumption—than the current version.

Current F.R.E. 301 provides:

Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

This effectively prevents View (5) (imposing persuasion burden on opponent of the presumption). We will discuss *infra* whether it does any more than that and commits to any other view.

The Federal Rules of Evidence, like the Uniform Rules and the Model Code, do not codify particular presumptions. They deal only with the *effect* of presumptions, once a presumption is found in other sources of law. Thus, the question of whether or not there is a presumption is left to other decisional and statutory law and other rules, in which particular presumptions may be found. The effect of presumptions is prescribed in F.R.E. 301.

Excepted from 301 are presumptions for which some different effect has been provided by a rule or statute (does this mean expressly provided, or is interpretation enough?); criminal cases (see section *infra*); and presumptions that presume elements of a claim or defense that is governed by state substantive law (i.e., state rules of decision) in the federal court. As to this last category, the state law of the effect of presumptions is to govern (presumably also, the state law would have to be the source for the existence of the presumption).¹¹⁸ This deference to state law is important because frequently state law adopts a different one of our six views of the effect of presumptions, than the federal view. The clash is usually over whether View (5) applies, which provides for shifting the persuasion burden, a view unequivocally forbidden by the Federal Evidence Rule on the effect of presumptions, but often adopted by states.

Federal Rule of Evidence 302 is the rule that provides that this state law situation is carved out of Rule 301 and is to be governed by state presumption law. What this normally means is that state

¹¹⁸ The F.R.E. defer to state evidence law only in three areas: presumptions (Rule 302), privileges (Rule 501), and witness competency (Rule 601). In each area, the deference is on the same basis as here: state evidence law applies where a state issue is involved in the federal-court lawsuit.

presumption law governs in civil cases based on state law claims in federal court—so called “diversity jurisdiction” cases¹¹⁹—and federal presumption law (including Rule 301) governs in federal question cases in federal courts. As discussed above, the state law of effect of presumptions is apt to be different from F.R.E. 301, especially since the Uniform Rules position on the effect of presumptions is different from F.R.E. 301. As indicated Uniform Rules' position has been adopted by a number of states.¹²⁰

But this statement as to when the state evidence law will govern on the effect of presumptions in federal courts is an overgeneralization. Diversity cases often contain questions upon which federal rather than state substantive law governs. And federal question cases often contain questions upon which state substantive law governs. Mixed or joined state and federal claims and defenses, or issues, are possible, as are mixed jurisdictional bases, in federal lawsuits. What evidence law governs—state or federal—on the effect of presumptions, is linked under the rule to the particular issue attempting to be proved, not to the general nature of the case. The matter is further complicated by the fact that under the rule state evidence law governs only if the state issue being proved is an *element* (i.e., an ultimate fact, as opposed to a mediate or subordinate fact or step along the way). The rule presents the confusing specter of two different laws of presumption having to be applied in the same case—even on an identical factual issue (the same factual issue could come up under both the state claim count and the federal claim count), and even as to the selfsame piece of evidence.

The restyling of the Rules that took place in 2011 committed an error that still stands. The restylers (apparently inadvertently) removed the limitation to “elements,” which appeared in the unrestyled Rule 302, the Rule that says the effect of presumptions in state law cases in federal court is to be governed by state law. The limitation is that state law governs *only if the presumption presumes an “element” of a state law claim or defense*. The omission of the word “element” in the restyling removed this limitation and expanded the instances in which state law of presumptions applies. The original Advisory Committee that drafted the unrestyled rule explained carefully that by the limitation to “elements” the Committee meant to distinguish between presumptions of ultimate and mediate (or “tactical”) facts in a state claim. Only presumptions presuming ultimate elements of the cause-of-action would be governed by state presumption law. See Advisory Committee Note, 56 F.R.D. 183, 211. Congress adopted this language. See Publ. Law No. 93-595, Sec. 1, Jan. 2, 1975, 88 Stat. 1931.

Thus imagine a diversity jurisdiction case in federal court involving state negligence law. Suppose the defendant is charged with negligence because a reasonable person who would have received the letter sent by plaintiff to defendant would have done a certain thing to protect against injury to the plaintiff, which defendant did not do. The elements limitation would mean the presumption of receipt from proper mailing¹²¹ is not to be given the effect the state gives the presumption (say the state effect is our View (5), shifting the persuasion burden), but rather must be given the effect Rule 301 provides, i.e. the federal effect, which forbids View (5). That is because receipt of the letter is a mediate (or “tactical”) proposition of fact, not the ultimate element, negligence. Receipt is just a step along the way to proving negligence.

¹¹⁹ These are the so-called “diversity jurisdiction” cases. The only reason there is jurisdiction of a federal court over these cases, when there is, is because the parties are citizens of different states, and the basic notion in providing this kind of federal jurisdiction in the law was that the courts of neither state could be trusted to be unbiased.

¹²⁰ E.g. Nebraska Evidence Code Sec. 27-301. See Neb. Laws 1975, LB 279, Sec. 72. Sometimes a position like that taken in the Uniform Rule is adopted by a state through case law, sometimes even for a particular case or presumption.

¹²¹ See *supra*....

If, however, the presumption was directly a presumption of negligence (as for example the *res ipsa loquitur* presumption¹²²), that would be a different story. The reasoning of the Advisory Committee in making this distinction is that the Committee felt the deference to state presumption-effect-law was not justified unless the federal effect would have some clear direct effect on a state policy. It was felt that if this distinction were not made, there might be a constitutional question and a question about authority to make such a rule under the Act of Congress authorizing the making of rules for these kinds of cases, which Act confines the authority to making procedural rules that do not affect substance. However, the fact that the restyling omitted the word “element”—and hence this limitation to ultimate proposition—may not have the effect it seems plainly to have as detailed in this note, because the restylers expressly said they intended to change no rule or ruling, but just wished to make the rules more readable. Nor would they have had authority to make a substantive change like this. So courts may not enforce the change. But it remains to be seen.¹²³

(e) Open Questions About Civil Presumptions Under the Federal Rules of Evidence

1. Will State, or Federal, Law Govern the Presumption’s Effect in Mixed Substantive Law Cases?

As said, F.R.E. Rule 302 mandates state law concerning a presumption’s effect rather than Rule 301’s effect, if the rule of decision in the case will be state law, as in civil cases in federal court based on diversity jurisdiction.¹²⁴ State law of presumption effect may radically differ from the federal effect (F.R.E. Rule 301’s effect), particularly since the widely-state-adopted Uniform Rules position prescribes our View (5) (shifting the persuasion burden), which 301 expressly forbids.¹²⁵

Thus, in cases in federal court where state and federal claims or defenses are intermingled, the literal terms of Rule 302 may require that the jury be instructed that, in considering the state claim, the persuasion burden to prove a presumed fact is on the defendant, but in considering the federal claim, that

¹²² See *supra* at footnotes 50, 65, 74.

¹²³ The same deference to state law in the same kinds of federal court cases is not only made in F.R.E., 301-302 (presumptions), but also in F.R.E. 501 (privileges) and 601 (competency of witnesses to testify). The restylers also apparently inadvertently eliminated the “elements” requirement there, too. That is bad for the same reasons, and probably also will be ignored by the cases. Perhaps in all three cases the restylers did it purposely, leaving it to the courts, lawyers, and litigants to realize the “elements” limitation is compelled by the Constitution and the Rules enabling Act, which are superior to the evidence rules, but that is a bad argument for two reasons: (1) the original enactment of the limitation was a reasoned policy choice whether or not it is ultimately ruled that other superior law compels it, and (2) the omission of the express “elements” limitation from the text of the Rules themselves misleads lawyers, judges, and litigants, who tend to look mainly to the presumption provisions in the Rules as being a relatively complete expression of the applicable principles concerning the effect of presumptions.

¹²⁴ Essentially this probably also means state law will be the source of the actual presumption itself in such cases, in addition to state law governing the effect of the presumption.

¹²⁵ However, the deference to state law of a presumption’s effect in the F.R.E. is not as simple as it sounds. Under the law of federal court jurisdiction, there can be cases where two claims may be joined in federal court, one where state law governs the rule of decision, and one where federal law does—for example, a claim of civil violation of federal antitrust law and of state unfair competition law (or consumer protection law). The same problem could arise with mixed state and federal defenses, or a claim under one body of law and a defense under the other. This is called “pendant” or “ancillary” jurisdiction. The same critical fact may mean defendant is liable under both claims. Whose law should govern the effect of an evidentiary presumption of that critical fact? For example, it could be the presumption of anti-competitive effect discussed in *Baker Hughes*, *supra* at footnotes 4, 35.

burden on the same fact is on the plaintiff. Courts facing the issue have improvised simpler, more practical solutions, even if unauthorized by the text of the rule: apply the federal effect across the board; or determine the *predominant* character of the lawsuit as state or federal; refuse to join state with federal claims; or manufacture some other single effect for the presumption that appears to serve the policy of both the state and federal substantive law being adjudicated.

2. Are Formerly “Permissive” Presumptions Covered by F.R.E. 301?

Rule 301 expressly says it is prescribing the effect of “presumptions.” Perhaps the most fundamental question of coverage not answered by F.R.E. Rule 301 is whether the rule applies to what were formerly permissive presumptions, as well as to those that were formerly mandatory presumptions. Assuming they are covered, the rule gives all covered presumptions the mandatory effect.

What is a “presumption” within the meaning of the Rule? Does it include what were formerly permissive presumptions as well as mandatory presumptions? McCormick, for example, implicitly takes a position the Rules *might* take—that the word presumption is properly used only to apply to mandatory presumptions.¹²⁶ While it is true that the Rule does prescribe the mandatory effect to the presumptions that are covered, that does not necessarily mean that formerly permissive presumptions are not meant to be swept up into the new mandatory regime.

The courts, surprisingly, have not definitively answered this question. When they wish to apply 301, they do so regardless, without acknowledging any question of this kind.

I submit that permissive presumptions are indeed presumptions covered by the rule. The Original Advisory Committee Note to Rule 301 makes this intention clear, and although Congress before enactment amended the Rule to no longer adopt View (5) (imposing a burden of persuasion), there was no objection to including permissive presumptions, and certain language in the Congressional history supports covering permissive presumptions. Whether we agree with it or not, and whether it was accomplished fully or not, the overarching intentment of all these drafting bodies seemed to be to provide a uniform effect for all presumptions or mechanisms that act like presumptions.

3. Are Prescriptions in Cases, Statutes, and Regulations, About What Constitutes a “Prima Facie Case” of Something, Actually “Presumptions” and Therefore Covered by Rule 301?

Rule 301 describes the evidentiary devices it covers in the title and first few lines. It says it covers “presumptions” in civil cases. But there are devices that function like presumptions but may not be considered “presumptions” as that term is used in the Rule. For example, are statutory or regulatory provisions or court decisions describing what is a “*prima facie* case” of some civil wrong, actually creating an evidentiary *presumption* of the wrong? If so, they should be held covered by Rule 301. This is important because some other effect than prescribed by the Rule may be given to uncovered evidentiary devices.

¹²⁶ McCormick on Evidence, Sec. 342 (6th ed. 2006). “Inference” is the appellation he prefers for permissive presumptions. Some other scholars, and a number of courts, such as those in New York, agree, regarding permissive presumptions as “not true presumptions.”

Decisions are not uniform in recognizing such “*prima facie*” prescriptions as presumption terminology and thus covered by Rule 301.¹²⁷

They should be deemed covered when they are in effect declarations of law as a generalized matter, subject to particularized defeat, that a certain constellation of facts (the “*prima facie* case”) may or will entail liability. This is the very definition of a presumption.¹²⁸

For example, a number of cases in the Supreme Court involving claims against employers, alleging various kinds of discrimination under various statutes, have addressed the question of how a plaintiff makes out a case of discrimination sufficient to oblige defendant employer to answer with evidence attempting to explain that the questionable employment decision was not illegal discrimination, which explanation itself can be challenged. The court often describes the initial showing of plaintiff that calls for an answer, a “*prima facie* case” of discrimination. In these cases, it is not the statute that uses the phrase, but the courts.

*Reeves v. Sanderson Plumbing Products, Inc.*¹²⁹ is somewhat typical of these cases. Plaintiff was fired allegedly owing to age discrimination. Following the precedent of, and elaborating somewhat on, earlier Supreme Court decisions in various discrimination areas, the court holds there is a sequential procedure in age discrimination and other discrimination cases as follows: (1) plaintiff makes out a “*prima facie* case” (the Court’s term) by evidencing facts suggesting, if unexplained, some probability of discriminatory reasons for defendant-employer’s act, which then shifts the production-of-evidence burden, i.e. risk of a directed verdict, to defendant unless defendant (2) evidences a non-discriminatory reason, which then causes the disappearance of the “presumption” (the court’s words) but not necessarily the common sense or rational logical or probabilistic factual inference arising from the *prima facie* case; plaintiff then must have a chance to introduce evidence that (3) the proffered explanation is a pretext, and (4) if the fact-finder finds the defendant’s proffered explanation to be a pretext, this may or may not be sufficient, without more, to sustain a verdict of discrimination, depending on the facts and the inferences that arise from the “*prima facie*” case plus the strength of the negative inference from offering a false pretext. The decision interprets a long line of cases of other kinds of discrimination governed by the same procedure,

¹²⁷ Expressly treating them as establishing presumptions are *In re Barrett*, 2 B.R. 296 (Bankr. E.D. Pa. 1980) (holding in a case involving a fraudulent credit application and recovery of the loan in a subsequent bankruptcy proceeding, that once the creditor makes out its “*prima facie* case,” the burden of going forward with evidence to show lack of intention to deceive shifts to the other side, and the credibility of that other side’s evidence, when proffered, is irrelevant; the simple production of evidence to the contrary causes the “presumption” to disappear; court expressly applies Rule 301); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (in the Court’s employment discrimination decisions “*prima facie* case” means fact A in a “presumption,” quoting Wigmore on various meanings of “*prima facie* case” including fact A in a presumption); *Poncy v. Johnson & Johnson*, 460 F. Supp. 795 (D.N.J. 1978) (statutory provision that non-use for two years is *prima facie* evidence of abandonment of trademark); *U.S. v. Banafshe*, 616 F.2d 1143 (9th Cir. 1980) (statutory presumption in form of “*prima facie*” provision in naturalization matter); and *Baker Hughes*, discussed *supra*. While *Poncy* applies 301, *Banafshe* and *Baker Hughes* do not mention 301 but reach a result consistent with it based on policy. *Burdine* mentions 301 only in passing, relying on the policy of anti-discrimination laws. These cases are fairly representative of a number of other cases, but there are also numerous cases involving the “*prima facie*” notion used the same way that do not seem to recognize they are dealing with a “presumption” at all.

¹²⁸ See, e.g., Salop, *supra* at footnotes 4, 8, 79.

¹²⁹ 530 U.S. 133 (2000).

including *McDonnell Douglas Corp. v. Green*¹³⁰ involving allegations of denial of re-employment because of race. You will note from the description of *Reeves* that the decision uses the phrase “*prima facie* case” and “presumption” somewhat interchangeably, indicating the Court, at least in this case, regards the *prima facie* case as giving rise to a presumption.

I submit that when the phrase “*prima facie* case” is used in this fashion, it is indeed setting forth a “Fact A” that gives rise to a “Fact B,” and that this is a presumption that Rule 301 covers if not exempted from coverage by some other provision. This is because it fits any reasonable definition of evidentiary presumption as implicit above in this article. It is a prescription by a court, statute, or regulation meant to set forth a generalized connection of two facts or sets of facts—a frequency of association that makes the association probable unless there are other facts in the specific case not comprehended in the generalization—that is meant to be heeded whenever it comes up in all cases of the same type. While *Reeves* recognizes that it is applying a presumption and reaches a result consistent with Rule 301, it strangely fails to mention Rule 301 although some of the cases it cites do.

The California Evidence Code treats statutory *prima facie* provisions as rebuttable presumptions.¹³¹

4. Which of the Six Views of Effect are Prescribed by F.R.E. 301?

Questions of coverage aside, we may ask which of our six views, above, as to the effect of presumptions, is prescribed by F.R.E. 301? Remember, current F.R.E. 301 simply provides:

Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

It can be seen immediately that this provision does very little. It (1) prescribes (by virtue of the “burden of going forward” language) the *mandatory* (as opposed to the *permissive*) variety of effect (for the situation where there is no evidence of non-B); and (2), in the situation where there is some evidence of non-B (i.e., where the party against whom the presumption is directed meets his burden of going forward with the evidence to rebut or meet the presumption), the provision merely provides that our View (5) (shifting the persuasion burden), *supra*, shall *not* apply; *but does not say which of the other five views shall apply* (all of them being consistent with what is said in the provision). The provision says nothing about what, if any, effect the presumption is to be given by the fact-finder (as opposed to the trier-of-law), and what, if anything, is to be told the fact-finders (other than providing they are *not* to be told the persuasion burden has shifted). Is the presumption to have *any* effect on the fact-finder? Is it to have any reach beyond the role it plays with the *trier-of-law* in deciding motions for directed verdicts, directed findings, and similar peremptory rulings (to which role the “burden of going forward” language is addressed)? If it is to have an effect on the trier-of-fact, *what* effect? These questions are unanswered.

¹³⁰ 411 U.S. 792 (1973) (holding modified in some subordinate respects by *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993)).

¹³¹Cal. Evid. Code § 602.

In addition, the provision has nothing to say about *how much* weight or force (if *any*, once evidence of non-B is introduced) the presumption is to have (over and above any common sense or rational probabilistic logical factual inference one would otherwise indulge) in the trier-of-law's mind in deciding *whether* the production burden (burden of going forward), which the rule casts on the party opposing the presumption, has been met by a *sufficient amount* of evidence to overcome it. If the presumption is supposed to make it more difficult to satisfy the production burden than the judge would require without a presumption, *how much* more difficult? (Remember, production-burden questions, that is, burden-of-going-forward questions, are always for the judge, not the jury.) Similar questions can be raised about *how much* (if any) weight or force the jury is to give it (in comparison to the contrary evidence and what they would do in the absence of a presumption) in deciding whether the persuasion burden (which has not shifted) has been met. (Remember, the question of the satisfaction of the persuasion burden is always for the trier-of-fact.)

The most frequent assumption is that Rule 301 adopts View (2) (legal presumption is a bubble that bursts upon mere introduction of evidence directed against the presumed fact). However, Rule 301's text leaves open the possibility of applying views (1) or (2) (i.e. either of the bursting bubble theories). Rule 301's text even permits View (3) (continuation of the presumption, lending weight to the jury's deliberations, as per instructions given to the jury). Indeed the text permits *any* of our views or some variant of them, other than View (5) (shifting persuasion burden) which is the only one it expressly prohibits. The Senate¹³² and Conference Committee¹³³ Reports on Rule 301 have been assumed by a number of courts to require View (2) (presumption as bursting bubble), but in actuality the language of those reports is ambiguous and the Conference Committee Report even seems to misunderstand the meaning of the text of the rule they were adopting, suggesting that if no evidence against the presumed fact is introduced, the presumption has the permissive rather than the mandatory effect. They seem confused about the effect of presumptions but both reports expressly reject View (5) (imposing the persuasion burden on the opponent of the presumption).

Many federal cases assume our View (2) (legal presumption as bursting bubble) is the rule in federal courts adjudicating federal law issues, whether because of 301 or otherwise.¹³⁴ As indicated earlier herein,¹³⁵ some commentators believe that the bursting bubble theory of legal presumptions (View (2), supposedly commanded by Rule 301) gives too slight an effect to the reasons policy-based or even logic-based legal presumptions were created by legislatures or courts. Consequently some courts are escalating

¹³² Senate Comm. on Judiciary, Fed. Rules of Evidence, S.Rep. No. 1277, 93d Cong., 2d Sess., p. 9 (1974); 1974 U.S.Code Cong. & Ad. News 7051, 7055.

¹³³ H.R., Fed. Rules of Evidence, Conf .Rep. No. 1597, 93d Cong., 2d Sess., p. 5 (1974); 1974 U.S. Code Cong. & Ad. News 7098, 7099.

¹³⁴ See, e.g., the federal cases cited *supra* in our discussion of View (2) although some do not expressly mention Rule 301. See especially *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 1 Fed. R. Evid. Serv. 243 (1976) (Coal Mine Health and Safety Act presumptions that certain conditions or injuries are due to a miner's employment for purposes of a miner's claims against his employer are constitutional under the "rational connection" test, especially since the effect of the presumption, is merely the limited "bursting bubble" effect of shifting the burden to go forward, as under Rule 301, notwithstanding some implications of the language of the Congressional Report, which seemingly modified the text of the rule).

¹³⁵ At *supra* [pages 26-27].

the quantum of evidence they are requiring to burst the bubble.¹³⁶ These courts are escalating the quantum beyond the slight evidence (evidence sufficient to support a finding by reasonable persons, whether believed or not) that the bursting bubble theory calls for. In other words, such courts require a higher quantum of evidence of non-B to burst the legal presumption bubble, i.e., to satisfy the production burden with the trier-of-law (judge) in order to avert a directed verdict or directed finding of fact B and get the matter to the jury.

Sometimes it is not clear whether this is indeed what is being done by these courts. They might instead be escalating (usually by means of a jury instruction) the quantum of evidence (of non-B, the presumed fact) needed by the *fact-finder* (the jury) to find against the presumed fact, while still instructing the fact-finder that the proponent of B has the burden of persuasion.¹³⁷ If *this* is what these judges are doing, it is no longer the bursting bubble theory (view (2)) but instead is view (3), i.e. the legal presumption does not burst but rather survives the introduction of evidence of non-B, continuing in the case and lending weight to the evidence of B. This view would be another way to increase the effect of a legal presumption to more fully serve its policy or logic.

As noted above, the language of Rule 301 does not preclude either of these “escalation” approaches, as long as the persuasion burden is not shifted, which it isn’t under them.

Another thing some of these courts may be doing is shifting the persuasion burden on fact B to the opponent of the presumption (an impermissible view if Rule 301 is being followed properly), and telling the jury that some exceptionally strong evidence is needed to satisfy that persuasion burden.¹³⁸

5. *What is the Scope of Rule 301’s Exception for Contrary Statutory Provisions?*

Rule 301 begins: “In a civil case, unless a *federal statute* or these rules *provide otherwise*, the [effect of a presumption is...]” This statutory exception, which allows statutory presumptions to have an effect forbidden by Rule 301 (e.g. View (5), imposing a persuasion burden), is of uncertain scope. Is the exception meant to apply only where an effect contrary to the Rule is *expressly* prescribed by Congress in a statute? What about presumptions established by *regulations under* a statute? What about implicit policy? Can it be argued that the *policy* underlying a statutory presumption (or the statutory area in which it operates) is best served by having a presumption with a different effect than 301? Will judicial interpretations or gloss alone do the trick or does it have to be in express words in formal law sources? What about long-standing and multiple judicial interpretations giving an effect contrary to 301 to a statutory or non-statutory presumption in enforcing a statute or area of law? Are they within the exception?

¹³⁶ See *supra* [pages 26-27].

¹³⁷ See, e.g., *supra* [pages 26-27]

¹³⁸ In some cases—often but not exclusively non-jury cases—it is not clear which of these three “proof escalation” things is being done to ameliorate the perceived excessively slight effect of the bursting bubble theory. See, e.g., *Federal Deposit Insurance Corp. v. Schaffer* 731 F. 2d 1134 (4th Cir. 1984) (letter properly addressed, stamped and mailed by *certified* mail raises a *strong* presumption that the letter was delivered to the addressee; evidence required to overcome the presumption of receipt of certified mail must be *clear and convincing*). As this case indicates, the escalation of the presumption’s strength may be perceived as needed only as to particular presumptions.

The cases are in conflict on these questions but seem to be carving a gaping hole in Rule 301's coverage by expansively interpreting the exception for federal statutes.¹³⁹

Many federal courts apparently feel free to disregard Rule 301 based on the supposed particular policy of the underlying decisional or statutory law they are administering (whether the law pre-dates or post-dates Rule 301), notwithstanding that the Federal Rules of Evidence themselves are binding statutory law and that Rule 301 on its face seems to allow deviation only in the case of statutes that expressly require it (or at least require it by implication of some clear underlying policy).¹⁴⁰

Admittedly, particular policies operable in a particular area properly may influence a court in *interpreting* Rule 301, e.g., in choosing between views (1) through (6) above, except for view (5) which is expressly prohibited by Rule 301. (All the other views, including the “bursting bubble” and the “continuation” positions are licensed by Rule 301 when it is read correctly.) Additionally the court may properly be influenced by policy in deciding the quantum or kind of evidence needed to give rise to or to “burst” the bubble or to persuade the jury under the normal (but not shifted) burden of persuasion.¹⁴¹

¹³⁹ See, generally, McHenry, Federal Rule of Evidence 301 and Congressional Acts: When Does an Act “Otherwise Provide”? 67 Cornell L. Rev. 1085 (1982); Microsoft Corp. v. i4i Ltd. Partnership, 131 S. Ct. 2238 (U.S. 2011) (a statutory provision stating that an issued patent is “presumed valid” and that a party asserting invalidity has “the burden to establish invalidity” intends to incorporate the common-law cases and history up to the time of enactment, which fairly consistently held that the challenger of a patent had to prove invalidity to the fact finder by clear and convincing evidence, not by a preponderance or any other lower standard; note that this is inconsistent with Rule 301); Solder Removal Co. v. U.S. Intern. Trade Com’n, 582 F.2d 628 (Ct. Cus. & Pat. App. 1978) (same presumption; is not covered by 301; so persuasion burden can be and is imposed); Handgards, Inc. v. Ethicon, Inc. (9th Cir. 1979) (presumption in antitrust action that patentee has brought infringement suit in good faith; instruction should have been that this can only be rebutted by clear and convincing evidence, not preponderance of the evidence; note this is inconsistent with 301); Plough, Inc. v. Mason and Dixon Lines, 630 F.2d 468 (6th Cir. 1980) (301 held inapplicable to cases brought under 1906 Carmack Amendment allowing shippers to sue common carriers for damage to goods; further held that contrary to 301, upon establishment of a *prima facie* case, both burdens of proof shift to the carrier including the burden of going forward with the evidence and the risk of non-persuasion; Carmack Amendment itself has no express presumption or burden of proof provision, but the court relies on the policy of the amendment and old judicial gloss and a pre-rules 1964 Supreme Court case which had some language about burdens in such Carmack lawsuits). *Plough* sometimes characterizes the problem as a presumption problem, and sometimes a burden-of-proof allocation problem, suggesting either that 301 is inapplicable because of the judicial gloss, or that burden-of-proof allocations can be made irrespective of 301, thus opening an even deeper chasm in 301. Other courts have used both techniques. See, going even further, Hood v. Knappton Corp. Inc., 986 F.2d 329 (9th Cir. 1993) (in Admiralty cases, the rule of *The Louisiana*, 70 U.S. 164 (1865) shifts to a drifting vessel the burden of production and persuasion; it is not governed by Rule 301). Note the anomaly here that Rule 1101(b) of the Federal Rules of Evidence states that the Federal Rules of Evidence apply even in Admiralty cases. It is important to note respecting all these cases, that the Federal Rules of Evidence themselves are a Congressional enactment and would seem, in theory, to be superior to judicial pronouncements.

Specifically on the regulations-under-a-statute question, see *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984) (301 is inapplicable in an action challenging the Benefit Review Board's decision awarding benefits under the Federal Coal Mine Health and Safety Act because regulations under the Act specifically state that the corporation must establish factors rebutting the presumption).

¹⁴⁰ Cf. discussion in *Com. of Pa. Dept. of Trans. v. U.S.*, 643 F.2d 758 (Ct. Cl. 1981) concerning what should be required in order to invoke Rule 301's statutory exception; *E. I. du Pont de Nemours & Co. v. Berkley and Co., Inc.*, 620 F.2d 1247, 65 A.L.R. Fed. 369 (8th Cir. 1980) (statutory presumption of validity of patent *almost expressly* requires party asserting invalidity to bear both production and persuasion burdens, contrary to Rule 301).

¹⁴¹ See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (to rebut *prima facie* showing of discrimination, employer must produce evidence that denial of promotion or employment was not motivated by

Similarly, in an area where there is ambiguity as to whether 301 applies at all, the underlying policy of the area may be resorted to in order to decide if it is desirable to apply 301's effect. However, many decisions have broader implications, finding vague implied policies in the underlying area, that justify ignoring Rule 301 even when the statute does not expressly provide a presumption effect different than 301.¹⁴²

The cases suggest that courts are unwilling to live with a rule like 301 that they feel prescribes a unified effect for all presumptions regardless of the underlying policies that may operate in the substantive area being regulated or affected; and will seize upon various rationales (such as historical practice in the area. or that Congress intended a different effect or that the administrative proceeding involved is not under the Rule) to avoid applying Rule 301 if some other effect seems more desirable. Often they apparently feel Rule 301 underplays the role the particular presumption should have.

Thus, many federal courts applying federal presumptions nevertheless find subterfuges to avoid using Rule 301 to prescribe the effect of the particular presumption involved in the case. To do so they may simply ignore 301 or invoke the words, policy, old case law interpretations, or other peculiarity, of the statute or regulation in which the presumption appears—or of the general field of law that the presumption affects.¹⁴³

racial animus; Court of Appeals improperly placed burden on defendant to persuade court of “convincing, objective reasons” for choosing one applicant over another; good general discussion of effect of Rule 301); remand of that case, *Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (once some evidence of discrimination is shown, an employer has the burden of producing evidence of business justification; the burden of persuasion, however, remains on the employee); *In re Barrett*, 2 B.R. 296 (Bankr. E.D. Pa. 1980) (holding in a case involving a fraudulent credit application and recovery of the loan in a subsequent bankruptcy proceeding, that once the creditor makes out its *prima facie* case under §17, the burden of going forward with evidence to show lack of intention to deceive shifts to the other side, and the credibility of that other side's evidence, when proffered, is irrelevant; the simple production of evidence to the contrary causes the presumption to disappear).

¹⁴² See, e.g., *U.S. v. Jessup*, 757 F.2d 378 (1st Cir. 1985) (qualified by *U.S. v. O'Brien*, 895 F.2d 810 (1st Cir. 1990)) (Bail Reform Act of 1984's presumption that one charged with certain drug offenses will likely flee before trial is outside the scope of Rule 301 though Congress did not specifically provide a special effect); *U.S. v. Martir*, 782 F.2d 1141 (2d Cir. 1986) (same presumption; agrees with *Jessup* that the presumption is outside scope of 301 (but note effect given presumption is consistent with 301 on our reading, though court thought otherwise); agrees with *Jessup* as to effect: rebutting evidence does not mean burden of persuasion now on defendant, but does not cause presumption to disappear either; judge as fact-finder should still “consider” it, otherwise too slight an effect given to Congress' intended presumption); *U.S. v. O'Brien*, 895 F.2d 810 (1st Cir. 1990) (semble); *U.S. v. Portes*, 786 F.2d 758 (7th Cir. 1985) (semble); *U.S. v. Perry*, 788 F.2d 100 (3d Cir. 1986) (civil nature and constitutionality of certain of Bail Reform Act's presumption provisions); *U.S. v. Banafshe*, 616 F.2d 1143 (9th Cir. 1980) (statutory rebuttable presumption (in form of “*prima facie*” provision) which arises after government proves by preponderance of evidence that naturalized U.S. citizen had established a permanent residence in foreign country within five years of naturalization is not unconstitutional and shifts burden of going forward to defendant to rebut presumption; court calls it a “presumption” and reaches (based on the policy of the underlying statute) a result consistent with Rule 301 without mentioning the Rule). Cf. *Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461, 5 Fed. R. Evid. Serv. 273 (1980) (statutory rebuttable presumption that person who commits expatriating act has done so voluntarily not unconstitutional nor is requirement enacted by Congress that in establishing loss of citizenship government must prove by preponderance of evidence that act has been performed with intent to relinquish citizenship).

¹⁴³ See, in addition to above cases, *N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978) (301 has no effect on the National Labor Relations Board's (NLRB's) use of presumption in unfair labor practice cases; only a superficial reading of Rule 301 would prevent the Board's presumption having the greater effect than 301 that it had been given repeatedly in the past). But see *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, 653 F.2d 450 (10th

Even cases that reach a result consistent with 301 often (1) do not mention Rule 301 but only policies of the underlying law they are administering,¹⁴⁴ or (2) mention 301 merely in passing, reaching a result primarily on the basis of the policy of the law being administered.¹⁴⁵ Because of all of the foregoing, a case which seems to stand for a particular view of presumptions or a particular interpretation of Rule 301, may be confined to the particular substantive area of law in which it is decided.

Cir. 1981) (labor dispute; in determining the unit composition of hospital workers, the NLRB asserted that a unit restricted to registered nurses in one hospital of a multi-hospital system was presumptively appropriate; the Medical Center provided sufficient evidence that a one-hospital unit was inappropriate, but the agency held that the evidence did not overcome the presumption, thereby shifting both the burdens of producing evidence and persuasion to the Medical Center; because 301 prohibits the shifting of the burden of persuasion, the director erred). But contrast *Beth Israel Hosp. and Geriatric Center v. N.L.R.B.*, 688 F.2d 697 (10th Cir. 1982) (the NLRB is bound by 301 only in unfair labor practice matters; thus court's ruling in *Presbyterian St. Luke's* is wrong; Congress did not intend the NLRB to have to prove a bargaining unit is appropriate every time it certifies one; in the health care field, Congress has required the NLRB to justify its determinations more thoroughly; Congress felt that the certification of too many unions could lead to excessive labor strikes and hospital closings; consequently in the present case the NLRB should not have invoked its traditional presumptions and thus erred by certifying a nurses' unit without stating its reasons; two separate dissents argued that 301 applies).

¹⁴⁴ E.g. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982) (addressing burden of proof in an age discrimination action, the creation of a rebuttable presumption of discrimination, and the requirement that the plaintiff prove his case by “substantial probability” rather than “possibility” so as to prevent a jury decision based upon mere speculation; it is worth noting that the policy influencing this decision later also escalated not merely the degree to which plaintiff must prove his case, but *what* his case must include, elevating the definition of causation from motivating factor to “but for” cause; see *Gross v. FBL Financial Services*, 129 S.Ct. 2343 (2009)); *U.S. v. Banafshe*, 616 F.2d 1143 (9th Cir. 1980) (statutory rebuttable presumption which arises after government proves by preponderance of evidence that naturalized U.S. citizen had established a permanent residence in foreign country within five years of naturalization is not unconstitutional and shifts burden of going forward to defendant to rebut presumption; court calls it a “presumption” and reaches (based on the policy of the underlying statute) a result consistent with Rule 301 without mentioning the Rule); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (firing allegedly owing to age discrimination; consistent with 301 but not mentioning the rule, although cases cited by court do; this case, following and elaborating somewhat on earlier Supreme Court precedent, holds that the sequential procedure in age discrimination and other discrimination cases of various kinds is as follows: (1) plaintiff makes out a *prima facie* case by evidencing facts suggesting, if unexplained, some probability of discriminatory reasons for defendant-employer's act, which then shifts the production-of-evidence burden, i.e. risk of a directed verdict, to defendant unless defendant (2) evidences a non-discriminatory reason, which then causes the disappearance of the presumption, but not necessarily the common sense or rational logical or probabilistic factual inference arising from the *prima facie* case; plaintiff then must have a chance to introduce evidence that (3) the proffered explanation is a pretext, and (4) if the fact-finder finds the defendant's proffered explanation to be a pretext, this may or may not be sufficient, without more, to sustain a verdict of discrimination, depending on the facts and the inferences that arise from the *prima facie* case plus the strength of the negative inference from offering a false pretext; the decision interprets a long line of cases of other kinds of discrimination governed by the same procedure, including *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)) (denial of re-employment because of race)); *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978) (rejection of application on racial grounds). *Baker Hughes*, the antitrust case discussed extensively *supra*, also supports the proposition in text. *U.S. v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

¹⁴⁵ E.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

It may have been unwise of Congress to try to prescribe a “one size fits all”¹⁴⁶ rule like 301, since so many different presumptions exist and it seems unlikely that the same effect is appropriate for them all.

6. *What is the Effect of Conflicting Presumptions?*

Finally, there is the question of what to do when there are two conflicting presumptions that govern the finding of a fact at issue in a case. At least one court has determined that both presumptions disappear, and the jury receives the case as one of conflicting evidence, not conflicting presumptions. See *Legille v. Dann*.¹⁴⁷ In an attempt to prove the date upon which a patent application was received, the opposing parties relied upon conflicting presumptions—the regularity of the mails and the regularity of Patent Office procedures—which would have indicated different receipt dates. Under these circumstances, neither presumption was given to the jury. The current version of the Uniform Rules,¹⁴⁸ adds a subsection (b) to Rule 301, which states a court must apply whichever presumption is founded upon “weightier considerations of policy.” If policy considerations are equal, then neither presumption applies. Several state rules make provision for conflicting presumptions. No draft (including the final) of the Federal Rules of Evidence dealt expressly with this topic.

Criminal Cases¹⁴⁹

Current F.R.E. 301, unlike some older drafts of the F.R.E., leaves presumptions in criminal cases to case law, or for later special treatment in some future codification. Thus, criminal presumptions is a subject currently governed by the common law and constitutional law. Neither is particularly clear in this area.

Because of the criminal defendant's constitutional right to require the prosecution to prove its case beyond a reasonable doubt to a jury,¹⁵⁰ the freedom of courts and legislators to prescribe rules of

¹⁴⁶ Not really one size fits all but perceived that way by Congress, many courts, and many commentators. The present author was an Evidence advisor to Congressional committees working on drafting the Federal Rules of Evidence, and there was widespread belief they were prescribing a single view for all civil presumptions. But in fact, Rule 301 as enacted if read carefully does in fact allow some choices amongst our various views, but not View (5) (effect on persuasion burden), as explained above. But many federal courts seem to want to be free to adopt View (5) on occasion. Or they just don't like to be constrained at all concerning the effect of presumptions. Further, many courts feel Rule 301 confines them to only one view, View (2), presumptions as bursting bubbles, and they don't like it or they think it is inappropriate in the particular case. A number of them feel this gives too slight effect to certain policies in some particular areas they are adjudicating.

¹⁴⁷ 544 F.2d 1 (D.C. Cir. 1976).

¹⁴⁸ Uniform Rules of Evidence (1999), *supra*, footnote 105.

¹⁴⁹ See generally, Allen and DeGrazia, The Constitutional Requirement of Proof Beyond a Reasonable Doubt, 20 Am. Crim. L. Rev. 1 (1982); and Notes: Affirmative Defenses After Mullaney v. Wilbur, 43 Brooklyn L.Rev. 171 (1976); Affirmative Defenses and Due Process: Constitutionality of Burden on Criminal Defendant, 64 Geo.L.J. 871 (1976); Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof, 19 St. L. 223 (1975); Statutory Presumptions: A Permissible Instruction, 29 Ark.L.Rev. 247 (1975).

¹⁵⁰ In re Winship, 397 U.S. 358 (1970); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. v. Booker, 543 U.S. 220 (2005); Ring v. Arizona, 536 U.S. 584 (2002); cf. Harris v. U.S., 536 U.S. 545 (2002) (overruled on other grounds by Alleyne v. United States, 133 S. Ct. 2151 (2013)).

presumption and of effect of presumptions is more circumscribed in criminal than in civil cases, at least insofar as presumptions against the accused are concerned.

Thus, in *Sandstrom v. Montana*,¹⁵¹ the Supreme Court held unconstitutional a jury instruction that a person is presumed to intend the ordinary consequences of his acts. The Supreme Court's reasoning was that the jury may have felt too constrained in their freedom to decide the issue of intent, or may even have shifted the burden to defendant to persuade of non-intent. Thus the instruction risked lowering the prosecution's constitutional burden to prove to the jury each element of the crime beyond a reasonable doubt as required by due process.

These constitutional concepts raise multiple questions about presumptions in criminal cases. For example, can we *ever* have mandatory presumptions against a criminal defendant? Can we have presumptions against her that shift or affect the burden of persuasion? The burden of production? The *defendant's* burden of production or persuasion? Does it depend upon whether the matter is an element of the crime, or could be made the subject of an affirmative defense? Can we have ones that affect both the trier-of-law and trier-of-fact? Must we be especially cautious to be sure the jury understands that the presumption weighs lightly compared with their own independent judgment and assessment? More fundamentally, can we have presumptions against the accused at all? Does this depend upon whether or not the particular presumption follows a common sense or rational logical probabilistic factual connection? Common sense or rationality and logic operating on what record—the one compiled at trial, on appeal, or in the legislature? Does the test of validity of a presumption vary with what effects the presumption is to be given?

Not all these questions can be answered with assurance, but some materials follow that can help. The first group are some proposed codifications of the subject of criminal presumptions, that show how some competent draftsmen—scholars, lawyers, judges, legislators—would answer these questions based upon their interpretation of what the existing state of the law will permit. Then we will examine two Supreme Court decisions dealing with certain aspects of the problem:

(a) *Uniform Rules of Evidence, Rule 303 "Presumptions in Criminal Cases"*

This provision¹⁵² has been adopted by a number of states. It is modeled on Supreme Court Draft (unenacted) Rule 303 of the Federal Rules of Evidence. Brackets indicate significant different language in the latter:

“(a) SCOPE—Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are *prima facie* evidence of other facts or of guilt, are governed by this rule.

“(b) SUBMISSION TO JURY—The court may not direct the jury to find a presumed fact against the accused. If a presumed fact establishes guilt, is an element of the offense, or negates a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the

¹⁵¹ 442 U.S. 510 (1979). Accord: *Francis v. Franklin*, 471 U.S. 307 (1985) (similar instruction but somewhat weaker suggesting more strongly the jury was not bound by the presumption).

¹⁵² Citations to the 1974 and 1999 (as amended 2005) Uniform Rules appears *supra* at [footnotes 33, 105](#). The quotation here is of the most recent version, which is not substantially different from the original version.

question of its existence may be submitted to the jury if the basic fact is supported by substantial evidence or is otherwise established, unless the court determines that a reasonable juror could not find on the evidence as a whole the existence of the presumed fact. [The final “unless” clause reads, in the F.R.E. draft: “unless the evidence as a whole negatives the existence of the presumed fact.”]

“(c) INSTRUCTING THE JURY—At the time the existence of a presumed fact against the accused is submitted to the jury, the court shall instruct the jury that [the law declares] it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt, is an element of the offense, or negates a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.”

(b) Proposed Criminal Procedure Rule 25.1

An ambitious proposed revision of the entire multivolume federal criminal code that did not pass¹⁵³ included new sections 5 and 6 to Rule 25.1 of the Federal Rules of Criminal Procedure, as follows:

“(5) PRESUMPTIONS.—If a statute provides that a given fact gives rise to a presumption, the statute has the following consequences:

“(A) TRIAL BY JURY.—In a case tried before a jury:

“(i) if there is sufficient evidence or the fact that gives rise to the presumption to support a reasonable belief as to the fact's existence beyond a reasonable doubt, the court shall submit the issue to the jury unless the evidence as a whole clearly precludes a reasonable juror from finding the presumed fact beyond a reasonable doubt; and

“(ii) in submitting to the jury the issue or the existence of the presumed fact, the court shall, upon request of the Government, charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as strong evidence of the fact presumed.

“(B) TRIAL BY COURT.—In a case tried before the court sitting without a jury, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the court may arrive at that judgment on the basis or the presumption alone.

“(6) *PRIMA FACIE* EVIDENCE.—If a statute provides that a given fact constitutes *prima facie* evidence, the statute has the following consequences:

“(A) TRIAL BY JURY.—In a case before a jury:

“(i) if there is sufficient evidence of the fact that constitutes *prima facie* evidence to support a reasonable belief as to that fact's existence beyond a reasonable doubt, the court

¹⁵³ Draft Recodification of the Federal Criminal Laws, Senate Bill S. 1722, 96th Cong., 1st Sess. (Unenacted) (1979-80). The present author was consultant to both House and Senate committees charged with drafting this recodification. It turned out the recodification affected too many diverse interests to achieve sufficient votes to pass (except for the sentencing guidelines that were part of the effort)—something like the case with the recent attempts concerning “repealing” and/or “replacing” the Affordable Care Act (“Obamacare”). Nevertheless, a vast model criminal code (in two versions) and a book-length report setting forth and analyzing nearly every federal criminal law and every significant case decision under each, were produced that are still useful in ascertaining, analyzing, and interpreting present day criminal law.

shall submit the issue to the jury unless the evidence as a whole clearly precludes a reasonable juror from finding the inferred fact beyond a reasonable doubt; and

“(ii) in submitting to the jury the issue of the inferred fact concerning which the given fact is *prima facie* evidence, the court, upon the request of the Government or the defendant, shall charge that, although the evidence as a whole must establish the inferred fact beyond a reasonable doubt, the jury may consider that the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn.

“(B) TRIAL BY COURT.—In a case before the court sitting without a jury, although the evidence as a whole must establish the inferred fact beyond a reasonable doubt, the court may consider that the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn.”

It can easily be seen that this provision gives stronger effect to presumptions and *prima facie* cases than the Uniform Rule. This provision also differentiates between the effect of a presumption and a *prima facie* provision: A *presumption* is given the stronger effect, more nearly (but not quite) approaching the effect we discussed above for a mandatory presumption; whereas a *prima facie* provision seems to be akin to our permissive presumptions with formal advice tilting the fact-finder a little toward finding the presumed fact. I say “not quite” just above because the conclusion is never commanded, but rather is rather strongly encouraged by saying the presumption is sufficient to authorize a finding of the presumed fact.

(c) *Model Penal Code*

The Model Penal Code, a very influential model used in an advisory capacity in criminal code reform in a number of states,¹⁵⁴ proposes this for criminal presumptions:¹⁵⁵

“(5) When the Code establishes a presumption with respect to any fact *which is an element of an offense*,¹⁵⁶ it has the following consequences:

“(a) when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

“(b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

“(6) A presumption *not established by the Code or inconsistent with it* has the consequences *otherwise accorded it by law*.”

¹⁵⁴ Two such reforms where the Model Penal Code was somewhat influential, that the present author was part of, were criminal code reforms in Texas and the District of Columbia.

¹⁵⁵ American Law Institute, Model Penal Code, Proposed Official Draft (1962), Section 1.12, Subsections 5 and 6.

¹⁵⁶ I am italicizing significant differences from the formulations I have set forth earlier herein.

Significant differences in *this* formulation from the others, is that the restrictions on a presumption's effect thought necessary by constitutional law or policy in criminal cases are only operational when the presumption affects an *element* of an offense. We shall see later that what is an element is a difficult question. Further differences are that *prima facie* provisions are not specifically treated. That seems unwise. As shown above, they perform the same function as presumptions and can be as constitutionally suspect. Presumptions found elsewhere than in the Code are exempted from this provision, and therefore presumably from the limitations on effect that are prescribed. This is troublesome because presumably the limitations are required by federal constitutional law, at least as regards presumptions against the accused. Perhaps the Code's drafters felt the code covers the waterfront of all criminal cases and meant their provision (6) above was meant merely to preserve the law of civil presumptions in civil cases, but that would be a strange reading, and also has unrealistic pretensions of complete criminal law coverage by the Code. The Uniform Rule is subject to a similar objection when it exempts from its coverage presumptions in contrary statutes.

In examining all three provisions quotes above—the Uniform Rules, the Criminal Procedure proposal, and the Model Criminal Code—the reader should notice that some of them provide stronger effect than others; and that some give stronger effect to “presumptions” than to “*prima facie* inferences” while others draw no distinction between these. Also note the prohibition of a directed finding at the outset of Uniform Rule 303(b). Does it appear in the others? Should it? Should there be a distinction drawn with respect to this, between matters that could be made the subject of an affirmative defense, and matters that could not be? That seems to be what the Model Code is providing when it limits itself to “elements.” What is the position of each of the quoted provisions with respect to *non-statutory* presumptions or *non-statutory prima facie* inferences? Two of the provisions (the proposed Criminal Procedure rule and the Model Code) apply only to statutory provisions. This seems unwise, as they would perform the same function as statutory ones. They all are, essentially, presumptions. The Uniform Rules recognize this.

Do all the three make clear whether they mean to cover presumptions and *prima facie* inferences *in favor* of the accused? Should such presumptions and inferences be treated according to the same standards (for example, the beyond-a-reasonable-doubt standard and other prescriptions in these provisions) as presumptions and *prima facie* inferences *against* the accused? Constitutionally it is clear that the right to have a jury decide questions of fact beyond a reasonable doubt applies only to the accused. Since that right is the primary limiting factor in the area of presumptions, it seems that distinctions should be made between presumptions applicable to the accused and those applicable to the prosecution. But granting constitutional “favors” to the accused sometimes engenders arguments that equal treatment for the prosecution is only fair, even though it is not constitutionally required.¹⁵⁷

The proposed Criminal Procedure rule and the Model Code seem to provide the same standard for both. The Uniform Rule makes the distinction.

The proposed Criminal Procedure rule speaks uniformly throughout that both the basic fact and the presumed fact (though it is the subject of the presumption), must ultimately be proven to the jury by a standard of “beyond a reasonable doubt” although the presumption can help that proof of the presumed fact. Even though that may mean that the drafters were probably only thinking about presumptions and *prima facie* provisions that cut *against* the accused, because traditionally such high proof requirements apply only to protect the accused, the proposal itself does not make that distinction. As a result the unwise consequence is that the defendant, as respects a presumption or *prima facie* provision that *helps* him by

¹⁵⁷ EXPLAIN THIS AS THE RATIONALE FOR JENCKS AND REVERSE JENCKS.

presuming a fact in his favor, may, despite the presumption, be saddled with having to prove the presumed fact beyond a reasonable doubt, though the presumption can help. And also, before he can even hope for the presumption's help, he must convince the jury that the basic fact is true beyond a reasonable doubt!

It might be argued that the Model Code provision implicitly makes the distinction between pro-defense and pro-prosecution presumptions by addressing only presumptions "with respect to" an "element" of a criminal charge, which implies they are talking only about prosecution-favoring presumptions. The argument assumes what the drafter meant by a presumption "with respect to" an element means "presuming an element." The latter phraseology would indeed indicate the provision is only addressing pro-prosecution presumptions. But the provision doesn't say "presuming an element." It says we are covering presumptions "with respect to" an element. "With respect to" an element can also mean a presumption *defeating* an element—for example a presumption that one with a certain low I.Q. is rebuttably presumed not to have sufficient *knowledge* (knowledge being an element) to commit a certain specific intent crime (like a complicated white collar crime). That would be a presumption "with respect to an element" but one *in favor* of the defendant, rather than against him. So the provision seems to be addressing both pro-prosecution and pro-defendant presumptions alike, and treating them both by the same high standard of proof.

Further, the Model Code implicitly makes the distinction between pro-prosecution and pro-defense presumptions in other language. It says the presumed fact may be found unless there is "evidence which clearly negatives the presumed fact." This automatically makes the distinction because of the persuasion burden: what "clearly negatives" a presumed fact favorable to the defense implies "negatives beyond a reasonable doubt," whereas a fact favorable to the prosecution is "clearly negated" if there is clearly a reasonable doubt. But then later it says that despite the presumption, there must be proof "beyond a reasonable doubt" before a jury can find the presumed fact, and seems to require this no matter whom the presumption favors. While this may reveal the drafters were only thinking about presumptions against the accused, they did not say that the rule is so limited. So they are imposing this "beyond a reasonable doubt" requirement before the jury can find a presumed fact, regardless of whether the presumed fact favors or disfavors the defendant. To illustrate this, consider the defendant-favorable presumption just mentioned above—that lack of knowledge sufficient to commit the white-collar crime is presumed from low I.Q. It does not make sense to require the defendant who proves low I.Q. to prove lack of knowledge beyond a reasonable doubt, even if making that proof can be aided by the presumption, as the provision provides. Indeed, the other provision we criticized in this respect, the proposed Criminal Procedure Rule on its face would *in addition* require him to prove beyond a reasonable doubt *that he had a low I.Q.* before the presumption would even be available. Both these requirements of such high proof on the part of the criminal defendant are absurd and probably unconstitutional in a traditional system where the prosecution must prove things beyond a reasonable doubt and the defense need only raise a reasonable doubt. While maybe the drafters were only thinking about their rule (which prescribes such a high standard) applying when the prosecution relies on a prosecution-favorable presumption, they did not write that into the rule.

Assuming we have a presumption or *prima facie* inference *against the accused*, do any of the provisions do anything to either party's production burden (particularly the prosecution's)? Or are they confined to affecting the jury's consideration of whether the prosecution's persuasion burden is overcome? While the provisions read as though they only affect the persuasion burden before the jury (we are now assuming they mean the persuasion burden of the prosecution), they do have an indirect effect on the prosecution's production burden, because, as we established earlier in this article, the degree of the

persuasion burden influences the degree of the production burden. The question of whether the prosecutor has met its production burden before the judge (and thereby has avoided an adverse directed verdict or directed finding keeping his case from the jury—that is, a directed acquittal) is always this: Has he produced enough evidence that a reasonable juror could find guilt (or the particular incriminating fact) beyond a reasonable doubt? That being the question, the extent to which the jury can consider a presumption will obviously influence the judge in deciding whether the prosecution’s production burden is met. All the presumption provisions reproduced above say the jury to one extent or another can consider the presumption. Thus, they influence the prosecution’s presumption burden.

The drafters of these provisions would want to prescribe minimal effect on the production burden of the defendant because as to most issues except perhaps some affirmative defense like insanity, the defense has no production burden. A production burden means that if it is not satisfied, there can be a directed finding or directed verdict against the defendant. The law generally frowns on requiring the defendant to prove anything and generally does not allow directed findings or directed verdicts against him to maximize the right to a jury trial. The burden to prove is on the prosecution. From tradition, and constitutionally, this leniency to the accused stems from the imbalance of power between the state and the individual and the right to a jury trial.¹⁵⁸ It is better that ten guilty go free than that one innocent be convicted.¹⁵⁹ The drafters however obviously want to allow use of a presumption to help the prosecution meet its production and persuasion burden. But again, you notice they tread warily, because the same constitutional and traditional values are at stake at some point. A presumption removes a certain amount of the jurors’ freedom to decide issues, or at least influences them. Certainly this influence is too great if they were told by the law they *must* find something against the defendant. Nevertheless these provisions do tell the jury that the jury *must* find against the presumed fact in certain circumstances. They do dictate a compelled result against the presumed fact whenever the judge feels the evidence as a whole would not permit a reasonable juror to find the presumed fact. If that were applied against the defendant, it might be considered an undue interference with the right to a jury trial—the right to have the jury decide.

Which of the provisions draws a distinction between presumptions (or *prima facie* inferences) that would establish guilt (or affect an ultimate element of a charge or defense), on the one hand, and, on the other, presumptions (or *prima facie* inferences) affecting lesser links in the circumstantial chain against defendant? Only the Model Code does so. Should they all? Does it make sense to impose a “beyond a reasonable doubt” standard with respect to both kinds? Do any of the quoted provisions appear to do that? The proposed Criminal Procedure rule and the Uniform Rule do appear to do that.

An argument could be made that presumptions of lesser links against a criminal defendant do not sufficiently interfere with defendant’s constitutional right to have a jury decide whether proof against him is beyond a reasonable doubt, to amount to a constitutional violation. As we shall see shortly in this article, the Supreme Court may be viewing the question of these constitutional violations as hinging on degree of interference.

Is submission to the jury mandatory if the conditions for submission are met, under any of the above provisions; or does the judge still have the choice to not submit? The Uniform Rule appears on its face to make it discretionary, whereas the other two appear to make it mandatory. It would seem that mandatory

¹⁵⁸ Although people may remember that in the famous O.J. Simpson murder trial, there was the opposite imbalance.

¹⁵⁹ Although in the age of terrorism some have questioned this, because the one freed guilty terrorist can do cataclysmic damage. Probably a jury’s interpretation of what is a “reasonable” doubt varies with the stakes, although the law as yet does not formally provide for that in criminal cases.

is the better position, because there is no criteria given to guide the discretion, and this leads to increased inconsistency of rulings from case to case and seems lawless.

It is to be remembered that these provisions express various informed viewpoints, but are not necessarily the law. Until the U.S. Supreme Court makes clearer the constitutional limits on presumptions against the accused in criminal cases, we cannot be sure of the answer to the questions raised by these provisions. The Supreme Court's jurisprudence still leaves many gaps in our understanding of the issues.

(d) U.S. Supreme Court Decisions: Still Some Unanswered Questions

We now turn to two of the most important U.S. Supreme Court decisions in the area of criminal presumptions.

1. Ulster County Court of New York v. Allen:¹⁶⁰ Presumptions Must be Based on a Rational Connection: Rational Connection for These Purposes Explained

The first case deals with the matter of the test to be applied to determine whether particular presumptions (or *prima facie* inferences) against the accused are constitutional under the due process clause of the federal constitution. This area has not been a model of clarity. Usually the matter comes up in connection with particular *statutory* presumptions (or *prima facie* provisions) that provide, in varying language, that proof of fact A (for example, proof of defendant's presence at an unlicensed distillery; or his possession of narcotics; or his presence at a place where an unlawful gun is found) gives rise (with varying degrees of strength) to an inference of the existence of fact B (for example, the fact that he had a part in the ownership or operation of the distillery; or knew the narcotics were imported; or had possession of—i.e., a right to dominion or control over—the gun). The latter fact (fact B) is usually the one essential for conviction.

Owing to a long line of decisions¹⁶¹ it had generally been thought that the test of the constitutional validity of these provisions (be they state or federal) under the federal due process clause, is whether there is a “rational connection” between fact A and fact B. There was some suggestion in the cases that even if no factual background showing a rational connection appeared in the case itself, it would be sufficient if a factual background justifying the linking of fact A to fact B appeared in the legislative history or findings or in research on the part of the appellate judges. What is and is not a “rational connection” seemed to depend upon some instinctual feel of the Supreme Court—“I know it when I see it.”

The court in such cases repeatedly avoided deciding whether “rational connection” meant that a reasonable person must be able to find fact B to exist *beyond a reasonable doubt* from fact A, or merely *by a preponderance of the probabilities* (i.e., more probable than not). This avoidance was accomplished by holding, when a particular presumption was believed to pass constitutional muster, that the presumption would pass *whichever* test was applied. When one did *not* pass constitutional muster, it was said that it did not pass either test.

¹⁶⁰ 442 U.S. 140 (1979)

¹⁶¹ Including, among others, *Tot v. United States*, 319 U.S. 463 (1943), *United States v. Gainey*, 380 U.S. 63 (1965), *United States v. Romano*, 382 U.S. 136 (1965), *Leary v. United States*, 395 U.S. 6 (1969), *Turner v. United States*, 396 U.S. 398 (1970), and *Barnes v. United States*, 412 U.S. 837 (1973).

In addition, the court seemed to indicate that if a presumption *viewed in the abstract divorced of the facts in the particular case* did not meet the test, it could not be saved by facts making the presumption sensible and sound in the particular case.

Thus, for example, in the *Leary* case,¹⁶² it could not be considered that Timothy Leary was a learned professor who studied marijuana, and who had recently traveled in a country that was the world's major exporter of marijuana, and who thus would have known that his marijuana was probably of foreign origin and imported.¹⁶³ These facts could not save the presumption that people who possess marijuana are presumed to know it is imported, since that presumption or proposition must be viewed in the abstract. So viewed, considering data Congress had gathered or the Supreme Court researched, the Court concluded that a majority of people possessing marijuana are generally *not* so aware. Thus, the presumption was held constitutionally invalid.¹⁶⁴

A reason for viewing the proposition in the abstract, divorced of the particular facts about Leary himself, is that the jury possibly may not find that Leary is a learned professor who ought to know. Yet they might still use the presumption. So the presumption must be supportable independent of those facts.

The Supreme Court case to be discussed here, *Ulster County*, addresses a piece of the constitutional presumption area not addressed by these “rational connection” cases: Are there limits to the effect on the trial a presumption expressing a rational connection may have?

The decision draws a distinction between “mandatory” and “permissive” presumptions. But, as we will show later, the Court by these terms means something quite different from what evidence scholars have traditionally meant by the terms “mandatory” and “permissive” presumptions, and thus different from what we have meant by those terms in our discussion of presumptions in this article. The Court also makes clear that, as to its so-called mandatory presumptions, the “rational connection” that must be lived up to is this: the connection of A and B must be such that a reasonable person could believe not just that the inference of B probably follows from A but that it follows “beyond a reasonable doubt.” In such cases the presumption must be tested independently of the facts in the particular case—that is, it must be considered in the general or abstract, as described above in connection with *Leary*.

As respects what the *Ulster County* decision calls *permissive* presumptions (i.e., the kind of presumption actually involved in *Ulster County*), the rational connection that must be lived up to is merely a “preponderance of probabilities” connection. In addition, with respect to permissive

¹⁶² *Leary v. United States*, 395 U.S. 6 (1969).

¹⁶³ Knowledge that it was imported was required to convict of the particular crime.

¹⁶⁴ The government could probably have legislated a crime that would have punished Leary as severely for possession of marijuana regardless of knowledge of foreign import. So it may be wondered why the more lenient position of giving him a way out if he can overcome the presumption violates his constitutional rights, even if the presumption is not based on a rational connection. The answer seems to be this: The Court appears to be concerned with avoiding jury confusion and preserving a rational deliberation process in the jury room concerning the crime that has actually been legislated. The Court may also be concerned that there be clear notice as to what it is that is actually illegal. The same problem came up in another case....**CITATION**...concerning ownership of an illegal distillery. A presumption was employed in the trial that presence at the distillery gives rise to a presumption of ownership of the distillery, which was the crime. The presumption was declared unconstitutional because it did not express a rational connection. Presumably the government could have made it a crime just to be at an illegal distillery. It is not clear if there are any constitutional limitations that would apply to prevent that. If the government could have done that, then why does the presumption, which is just added grace to the defendant, violate his rights? The answer would be the same.

presumptions, the *facts of the particular case* are to be taken into account in deciding whether this standard is met.

Thus, in *Ulster County* itself, the defendants were passengers in a car where a gun was found. The applicable N. Y. State presumption was that, from their presence on the premises (i.e., in the car), possession (defined as a right to dominion and control) of the weapon on the part of each passenger could be inferred. Viewed in general, it does not follow that guns found on premises or in cars are possessed by (subject to the dominion and control of) all persons on the premises or all passengers—for example hitchhikers, or other passengers when guns are hidden in trunks, glove compartments, under seats, in drawers, or otherwise concealed.

Nevertheless, in *this* particular case, the gun was very large, and sticking out of the bag of the only minor passenger, a 16-year-old girl; the bag was in the front seat; and the gun looked as though it was stashed there at the last minute. On such facts, it would be reasonable to assume possession on the part of the other adult passengers, unless shown otherwise (of course, in all cases, the presumed fact is always rebuttable, whether we class the presumption as mandatory or permissive in either our terminology or the court's). Thus, the presumption was constitutional.

The problem, of course, is this: What if the jury disbelieves that the gun was in open view? They may still feel the presumption may be used—yet on such facts it makes no sense. Much depends upon what freedom the words of the instructions convey to the jury to disregard the presumption, and perhaps also on whether there is any genuine dispute as to where within the car the gun was found (i.e., as to whether it was in open view). One of the bones of contention between majority and dissent in *Ulster* seems to be that the dissent feels that this freedom to disregard was *not* sufficiently conveyed in the instructions. It is interesting to note, however, that as to another gun, hidden in the trunk, the jury did not bring in a conviction of the passengers.

What the decision in *Ulster* means by “mandatory” and “permissive” seems to be this:

The presumption is “permissive” if the jury is instructed clearly that the presumption is advisory, not very strong, and dependent upon what facts the jury finds. The jury must understand, for example, that if the jury believes the gun was hidden and believes that therefore no common sense inference of passenger possession arises, they should disregard the presumption concerning the passengers. The decision in some of its language seems to phrase the test of “permissive” or “mandatory” in terms of whether the jury is given to understand that the law declares that proof of fact A (presence in car with the gun) can be *sufficient*, standing *alone*, by itself, regardless of anything else or of anything the jury might believe about the other facts, to bring in a finding of possession (dominion and control) on the part of the passengers. That would be “mandatory” in the Court’s terminology.

Most of the cases, including this one, avoid any discussion of the kind of presumption that might more properly be called “mandatory” in *our* nomenclature above in this article: a presumption where the jurors are told that fact B (possession) *must* be found if fact A (presence in car with weapon) is found and they credit no evidence of non-B (e.g., that the weapon was hidden). In the presumptions *Ulster* calls “mandatory,” the jury is still given to understand that while they *can* find proof of A sufficient alone to establish B in such a situation, they do not necessarily have to so find. A true mandatory presumption as we and most scholars define the term, is probably not permitted in criminal cases. But we cannot be sure that there are not some minor issues on which some effect like a truly mandatory presumption will be tolerated against a criminal defendant.

The approach of the court in *Ulster County* is basically sound. After all, the really important thing to look at is what the jury was told—how far were the jurors constrained from their natural evaluation of the facts? Only to this extent does the defendant have any complaint that the right to jury consideration of his case was infringed. It makes sense, then, to say there is a stricter test or standard for instructions that constrain more. The important questions are: What was the jury told? Is there justification for it? Could it be harmful on *any* picture of the facts the jury may piece together by selectively believing and disbelieving certain facts? It makes no sense to apply the same test to whatever the jury is told. It is important to determine whether they are told, in effect, that they practically *must* find; or that it is up to them, with some advice that certain inferences sometimes follow. It is important to consider where on this spectrum the actual instructions given in the case fall. It is also important to know if the jury told something misleading or unsupportable that could be harmful.

Suppose the judge had told the jury about a possible inference of B from A, in his power to comment on the weight of evidence, allowed in many jurisdictions. The constitutional question would be the same: How strongly did she phrase it; did the jurors understand they had freedom to disregard it and appraise it on the facts as they have found them; was the advice supportable and justified? Indeed *Ulster County* amounts to nothing more than a comment case.

What I would quarrel with, however, is the apparently continued vitality of the doctrine that maintains that facts uncovered by Congress or the Supreme Court and not in the record before the trier-of-fact, can sustain an otherwise invalid presumption. That does seem to me to deprive the defendant of full jury consideration of factual inferences. To that extent the defendant is not being judged by the experience of his peers, or the evidence presented in the case. It is less objectionable where the jury is plainly given to understand that they may reject the inference. It is comparable to putting before the jurors an expert conclusion to choose to believe or not believe, but there the expert's basis for his conclusion or inference is normally revealed.

The question of whether a particular presumption is “mandatory” or “permissive” and thus what test of validity applies, depends, under the *Ulster* Court's analysis, upon exactly what the judge told the jury. Thus, the selfsame statutory presumption will be mandatory or permissive, valid or invalid, depending upon what form of words the judge actually chooses. This is as it should be. The Supreme Court is ruling not on the statutory presumption, but on particular instructions.

The *Ulster* court, to support its decision, and to be consistent with earlier law, declares that some previous Supreme Court authority that applied the test now applicable to “mandatory” presumptions, actually did involve “mandatory” rather than “permissive” presumptions. Very little of what the jury was told appears in that authority; nor, it would seem, does the *Ulster* court go back to the record there to find out. Yet what the jury was told is all important, under this court's analysis, in determining whether a presumption is “mandatory.” How does the Court know that such a presumption was “mandatory” without the instructions? The Court seems to assume, at least at one point, that the precise language of the particular statute was used, without any amplification or qualification, by the trial judge in his instructions. But since the practice of trial judges varies in this respect, this is not necessarily a valid assumption, except in the few instances where the particular decision tells us this was done. Nor can the determination be made from looking at a part of the instructions without scrutinizing the whole.

The *Ulster* decision has certain implications for proposed Rule 25.1 of the Federal Rules of Criminal Procedure, reproduced above. This draft rule has been continually recommended by various sources over the years. The proposed rule, you will remember, provides a uniform effect for all criminal presumptions found in statutes, and a different uniform effect for all criminal statutory provisions purporting to set up

“*prima facie* inferences” (some attempted codifications you will remember have lumped these two together). The effect given both is somewhat more forceful than in some of the other efforts (reproduced above) to prescribe effects in criminal cases. Since statutory *prima facie* provisions and statutory presumptions are usually against the accused, proposed Rule 25.1 may be said to have issued out of pro-law-enforcement sentiments.

But, in the light of *Ulster*, that pro-law-enforcement effort may have backfired. For, in providing a quite forceful effect (in the form of an instruction that fact A is “strong evidence” and “sufficient evidence” of fact B) for all statutory presumptions, proposed Rule 25.1 probably insures that all statutory presumptions will be considered “mandatory” under *Ulster*, with the result that the stricter test for constitutional validity will apply to them and more of them will fail to pass muster. Previously at least some judges were giving at least some of them the “permissive” effect. The same seems also to be true under proposed Rule 25.1 for *prima facie* inferences, since they are given only slightly less forceful effect under that proposed rule. Proposed Rule 25.1 cannot be said to be either constitutional or unconstitutional—it depends upon what particular statutory presumption or inference it is applied to, and whether that presumption or inference can meet the strict version of the rational connection test that applies to “mandatory” provisions.

2. *Mullaney v. Wilbur*¹⁶⁵ and its Progeny: Presumptions That Shift the Persuasion Burden on “Elements” of the Crime Onto the Defendant Cannot Stand: “Elements” Elements” Definition Problematic

The other Supreme Court decision we will discuss in connection with criminal presumptions is *Mullaney v. Wilbur*. Unlike *Ulster County*, it involved a presumption that *shifted the persuasion burden onto the accused* (in the jury instructions), on a matter (malice aforethought, required for murder) arguably as central or more central than that in *Ulster*. Thus, the jury-effect of this presumption was stronger than in any of those criminal cases just discussed. The court struck down the presumption without regard to whether any “rational connection” test could be met. The result is that even presumptions expressing a rational connection can have too great an effect on a case.

Wilbur was convicted of murder by a Maine jury. He claimed he struck deceased in the heat of passion provoked by an indecent homosexual overture. The jury was instructed that “malice aforethought” (necessary for a murder conviction) is presumed and that the defendant must prove *absence* of “malice aforethought” by a preponderance of the evidence, in order not to be guilty of murder but to be guilty of manslaughter instead, a lower and less severely punished offense that did not require malice aforethought.

Maine’s statute defining murder requires as part of that definition “malice aforethought.” It is the presumption of “malice aforethought” as given in the jury instruction that the case deals with.

Wilbur appealed on the grounds that this instruction violated his right to due process, including the presumption of innocence until the state proves guilt (every element of the crime) beyond a reasonable doubt. He cited in support the case that most clearly elevated the “beyond a reasonable doubt” notion into a constitutional requirement, *In re Winship*,¹⁶⁶ that held that, under the constitution, the burden of proof on the state in a juvenile proceeding must be to prove the elements of the offense “beyond a reasonable

¹⁶⁵ 421 U.S. 684 (1975).

¹⁶⁶ 397 U.S. 358, 90 S.Ct 1068 (1970).

doubt” as in a criminal proceeding, and not a lesser standard such as preponderance of the evidence or clear and convincing evidence.

The Maine Supreme Court affirmed Wilbur's conviction on the grounds that under Maine judicial law, murder and manslaughter were but degrees of one crime, felonious homicide, notwithstanding they are two separate statutory provisions; and that *Winship* did not apply to a factor such as “malice aforethought” that merely reduced the degree of the crime.

Wilbur then petitioned the U.S. District Court (through a procedure known as a petition for *habeas corpus*). The District Court overturned the conviction on the grounds that Maine law was *not* to the effect that there was but one crime. Maine appealed to the U.S. Court of Appeals which affirmed the District Court on the same grounds. Maine petitioned the U.S. Supreme Court for a Writ of Certiorari which was granted, and the U.S. Supreme Court then remanded the case to the Court of Appeals for reconsideration in the light of an intervening Maine decision in another case seemingly confirming Maine's view that murder and manslaughter are one crime under Maine law. The Court of Appeals this time accepted Maine's view of its own law, but persisted in overturning Wilbur's conviction, saying that whether there is one or two crimes, in substance the burden imposed on the defendant by the state judge's instruction is the same and such an instruction flouts the reasons for the requirement of proof beyond a reasonable doubt.

Maine thereupon petitioned the U.S. Supreme Court again for a Writ of Certiorari, which was granted and which ultimately led to the U.S. Supreme Court decision on the merits that we are reporting here.

Under the trial judge's instructions to the jury in *Mullaney*, a killing (not justified by war, police powers, etc.) that was intentional, had to be shown by the state before the presumption arose of “malice aforethought” which presumption required the defendant to disprove malice aforethought. “Malice aforethought” and intention may be distinguished in that a person may have intention, in the sense that it is known or obvious death will result; yet may not have “malice aforethought” because the intention arose suddenly in the heat of passion upon adequate provocation. Thus, the burden cast by the trial judge’s jury instructions onto defendant Wilbur to disprove malice aforethought required Wilbur to prove sudden heat of passion on adequate provocation.

It was argued in the U.S. Supreme Court by the state that the presumption was permissible because it did not presume an element of a crime: under the trial judge's instructions, the state was required to prove beyond a reasonable doubt every element necessary to make the defendant a *criminal*—the only thing left to the defendant to show was whether he was a murderer or a manslaughterer (“malice aforethought” or the absence of heat of passion on sudden and adequate provocation being the dividing line between the two). In other words, Maine law *in essence* views the two (murder and manslaughter) as one crime, felonious homicide, with the difference being one of degree—degree of punishment (sentence). Proof beyond a reasonable doubt by the state had never been required in sentence-setting.

Against this it was argued that if the state could do this, it could also consider *involuntary* manslaughter (which does not require intent—just criminal negligence) to be an even lower degree of the same crime, felonious homicide, and make the defendant guilty of murder unless he proves lack of intention by a preponderance of the evidence. There were some grounds for reading Maine law in such a fashion. If this could be done, a state could phrase a whole variety of separate crimes as degrees of one (e. g., assault with intent to kill, assault with intent to rob, and simple assault), and make all assaulters guilty of the highest unless they proved the lack of the requisite intent. To be guilty of the lowest they would have to disprove the requisite intent for the two higher. There would be no end to what the state could do like this with a whole variety of crimes.

It was further argued by defendant that *Winship* itself had required proof beyond a reasonable doubt by the state where all that was at stake was a relatively short sentence (as a juvenile offender). Here much more was at stake—the difference between murder and manslaughter could in Maine be the difference between a life sentence and a very minor or no sentence, not to mention the difference in stigma. Furthermore, in *Winship* the state had not tried to impose the persuasion burden on defendant—merely to reduce its own burden to a showing by a preponderance of the evidence. But even that was held bad.

Against this it could be asked, Can the state make an intentional killing punishable as murder regardless of malice aforethought and heat of passion? If so, isn't it doing the defense a *favor* to allow the defendant a defense of lack of malice aforethought or a defense of heat of passion, even if defendant has to prove it by a preponderance of the evidence? If so, were defendant's rights violated here?

The problem in *Mullaney* arose out of the need to harmonize a number of rules, previously approved by the U.S. Supreme Court, that seemed, at least in spirit, to conflict with the requirement that the state must prove the facts of the crime beyond a reasonable doubt. Let us take a look at some of them:

A. The Supreme Court had relieved the state of some or all of its burden a number of times. It had held (see our earlier discussion under *Ulster*) that certain facts against the accused may be *presumed*—even, it might be added, if the presumed facts were the ultimate constituents of the crime. But in such cases the jurors were always given to understand that if a reasonable doubt existed in their minds as to whether the presumed fact exists, the presumption was overcome and they must acquit. Thus those cases cast a lighter burden on defendant—to raise a reasonable doubt—than the presumption in *Mullaney*. The presumption in *Mullaney* may well have been based on rational connection but the question was, Are there limits on the effect that a valid rationally-based presumption can have? *Mullaney* held there are and that this presumption as instructed to the jury exceeded those limits.

B. The Supreme Court had always made it clear that a state can—by creating “affirmative defenses”—impose on criminal defendants the burden of proving certain facts like lack of sanity, lack of capacity, or self defense, in order to be excused, or can create other such “affirmative defenses.” On at least one of these—insanity—the burden had been that defendant must prove “beyond a reasonable doubt.”¹⁶⁷ On most others, it was “preponderance of the evidence.”

Since it is possible to view sanity, capacity, and lack of self defense as constituent elements (requirements) of the crime, making them affirmative defenses (to be proven by the defendant) seems equivalent to placing the burden on defendant regarding elements of the crime as was done by utilizing a presumption in the trial in *Mullaney*. Yet the Supreme Court in *Mullaney* forbids the latter, while recognizing the propriety of the former, the affirmative defense route. This seems inconsistent, unless malice aforethought is somehow a different issue than involved in the affirmative defenses, or unless achieving the result through the mechanism of presumption is somehow different than achieving it through the mechanism of “affirmative defense.”

Do mere labels make the difference?—that if the state cases or statutes had defined the crime of murder without mentioning malice aforethought and then stated lack of malice aforethought (or presence of heat of passion on sudden and adequate provocation) is an affirmative defense, the jury instruction in *Mullaney* imposing the burden on defendant Wilbur would have been approved? This seems to place form over substance and function. Yet reading *Mullaney* on its face, it seems to say that because malice

¹⁶⁷ Leland v. Oregon, 343 U.S. 790 (1952).

aforethought is in the Maine statute as part of the definition of the crime, it is an element of the crime and the burden to persuade on it cannot be assigned to the defendant.

C. The Supreme Court also approved in a number of previous decisions the common practice that juries are not instructed about certain legal excuses (or even that they exist) unless defendant meets a burden of producing some evidence on them. If that burden is met, the jury is instructed that the prosecution has the persuasion burden to negate the excuse “beyond a reasonable doubt” (except for the above “affirmative defenses”).

If one thinks about it, it becomes apparent that under the principle in our last paragraph (“C”), the issue becomes conclusively resolved against defendant if he produces no evidence on it. For example, if the issue of sanity is treated this way, as it is in some jurisdictions, and the defendant produces no evidence of insanity, the jury would not be told that they can acquit on grounds of insanity, and indeed, may even be instructed that he cannot be acquitted on grounds of insanity (i.e., that he must be taken to be sane). This seems the same thing as a directed finding of fact against accused, or even a truly mandatory presumption of sanity. Again, this seems even harder on defendant than the *Mullaney* jury instruction concerning an issue (insanity) that could equally well be deemed an element of the crime as malice aforethought. Yet it is allowed and the *Mullaney* instruction was not.

Thus, apparently the constitution allowed some burdens, of some kind, on some factual issues, to be placed on the accused. What were to be the limits?

One answer could be simply a grammatical answer: when and only when something is written in the definition of the crime, the persuasion burden on it cannot be assigned to the defendant. But that does not explain some of the cases we have been discussing here. It does seem to be an explanation of *Mullaney*, though maybe a superficial one.

Some language in *Mullaney* supports the following proposition which may also explain earlier cases: When and only when a burden on defendant is considered by the Court to be *too* onerous, central, important, or counter to widespread national practice or current tradition, it will be considered to run afoul of the notion that it is up to the state to prove guilt, not the defendant to prove innocence—and up to the state to prove it beyond a reasonable doubt. In other words, some important issues were to be considered “elements” on which burdens could not be shifted to defendant no matter how it is done—presumption, affirmative defense, etc. This would be in addition to the requirement of rational connection for presumptions. And it might be subject to the proviso that if the requirement is in the definition of the crime, it necessarily also must be considered an “element.”

It is significant to the historical factor in this explanation that *Mullaney* expressly adverts to history. The decision notes that placing the burden on defendant to persuade the jury by a preponderance on the issue of malice aforethought was originally the rule at common law in both England and the U.S., but in the 50 years preceding *Mullaney* the tradition in both England and the large majority of American states had reversed itself.

Perhaps the question, then, in *Mullaney*, seems to have come down to the question of whether making the defendant negate “malice aforethought” by a preponderance of the evidence, is too onerous, central, important, or counter to widespread national practice or current tradition, to comport with the constitution. But the Court did not use precisely this language. Nor did the Court have any tightly coherent explanation for the inconsistencies of doctrine. The most straightforward explanation of *Mullaney* is still simply that malice aforethought is an element of the crime because it is written into the statutory definition of the crime. As such, the burden of persuasion on it cannot be put on defendant.

When I read *Mullaney* when it first came down, I read between the lines. I felt the Supreme Court's reason for holding that malice aforethought must be proved by the state beyond a reasonable doubt was that malice aforethought is very important (in terms of the consequences, among other things) and because modern tradition places that burden on that issue on the state (notwithstanding the relative difficulty to the state of proving such a subjective factor—indeed, proving a negative—and notwithstanding the fact that the defense is likely to have more information on it). Such an important, now traditionally prosecution-allocated issue like malice aforethought might be called an “element” of the crime—even perhaps if it is not in the statutory definition of the crime.

I felt the holding would seem to apply *however* the burden of persuading by a preponderance¹⁶⁸ is placed on the defendant as respects such an element—whether via the mechanism of making “lack of malice aforethought” (“presence of heat of passion on sudden and adequate provocation”) an affirmative defense in the statute itself or via a presumption as in *Mullaney*. Thus, our “View (5)” of the effect of a presumption, that is, the view that imposes the burden of persuasion, would be illegal if applied in a criminal case against the accused as respects such an element, although other of the views, that do not affect persuasion burden, may be acceptable, and even “View (5)” may be acceptable as respects things that are not “elements” in the sense used here.¹⁶⁹ This is assuming the *Ulster* conditions of rational connection are satisfied so the presumption itself is a valid presumption, aside from the effect it might have.

The *Mullaney* decision thus had implications for the recodification-of-criminal-law efforts that were going on in the states and in Congress for the last several decades. Under those efforts, great use was made of the device of affirmative defenses that place on the defendant the burden to persuade by a preponderance as respects the facts that make out the defense. For example, under Senate Bill S. 1722 cited *supra*¹⁷⁰ it is an affirmative defense (sometimes called a “bar to prosecution” rather than “affirmative defense,” for reasons that need not now concern us) to sexual abuse of a minor, that the actor reasonably believed the other person to be over age 16; to arson and property destruction, that the act was consented to or was reasonably so believed; to receiving stolen property, that it was with intent to return or report it; to theft, that the property was intangible government property obtained to disseminate it to the public and not obtained by means of eavesdropping, interception, burglary, or criminal entry or trespass; to obscenity, that the material was disseminated only to someone engaged in teaching at an educational institution or authorized by a licensed physician or psychologist or psychiatrist; to restraint of a child by an unauthorized parent, that the child was returned unharmed within 30 days; to certain crimes of inflicting, risking, or threatening bodily harm (such as assault, menacing, reckless endangerment, and terrorizing), that the conduct was consented to or the hazard was a reasonably foreseeable hazard of a joint undertaking, medical treatment, or an occupation; to murder in consequence of a felony, that death was not a reasonably foreseeable consequence; to pressuring a public servant in various ways, that it was done to compel legal action or compliance with duty and the means used was lawful; to certain false statement offenses, that the false statement was timely retracted; to offenses of failure to obey judicial or other process, that the process was invalid or unconstitutional, that reasonably available, timely means

¹⁶⁸ *A fortiori*, the placing of the burden to persuade *beyond a reasonable doubt* on the defendant as respects an important, traditionally prosecution-allocated element such as malice aforethought or heat of passion, would be bad. Query: How do you distinguish (if at all), the issue of sanity in *Leland v. Oregon*, several paragraphs above?

¹⁶⁹ Among the non-elements, I pondered whether there is a distinction to be drawn between, on the one hand, those that are *almost* elements, and, on the other hand, those that are not like elements at all? As to the former, we could allow only a *preponderance* burden to be placed on the defendant, rather than a *beyond a reasonable doubt* burden.

¹⁷⁰ At footnote 153.

were taken to challenge it, that the process or order constituted a prior restraint on news, that there was a privilege, and/or that the failure was due to circumstances beyond the actor's control; to attempt, conspiracy, and solicitation, that there was abandonment, renunciation, and prevention of the crime; etc. Most of these were purportedly merely restatements in a more coherent fashion, of current statutes and case law, but there was considerable debate about that.

On the simple reading of *Mullaney*, the fact that the drafters did not put these matters in the definition of the offense, but made them affirmative defenses, is the end of the matter. Because they are not in the definition but are grammatically made affirmative defenses to be proved by the defendant means they are constitutionally acceptable.

In each of the instances of affirmative defense listed just above, it would have been possible, instead, to include the issue that is the subject of the affirmative defense, in the definition of the crime itself (i.e., the reverse of the fact that constitutes the defense would become part of the definition of the crime—that is, part of the facts necessary to constitute the crime), with the intended result that the prosecution would have the burden to persuade beyond a reasonable doubt, on it.

However, the fact that conceptually it *could have been* made part of the definition should not, under any sensible view, necessarily make it an “element” whose burden cannot be shifted to defendant. If it is grammatically made part of the definition of the crime in the statute, or by case law, rather than an affirmative defense, as in *Mullaney* itself, it seems it is necessarily an “element” in the *Mullaney* sense, at least on the simplest reading of *Mullaney*.

On my more complex reading of *Mullaney*, to be such an element, at least when not grammatically in the definition of the crime, the issue must be considered to be at least as important and traditionally allocated to the prosecution, as the malice aforethought issue. The Supreme Court has not said, in *Mullaney*, that there are *no* issues upon which the burden to persuade by a preponderance, may be placed upon the accused. The court appears to have merely prohibited it as to *some* issues—those that are in the definition and those that are so important and so frequently prosecution-allocated in the states in this country in recent history, that to go against this trend would be unconscionable. A decision has to be made concerning the *particular factual issue* that has been assigned to the accused. (In *Mullaney* itself, the recent history, the importance of the issue, and the definitional requirements of the crime, all pointed in the same direction. A more difficult case may arise in the future where they do not. *Sandstrom v. Montana*¹⁷¹ mentioned earlier seems to say “intent” is also such an element.

Mullaney may lend support for placing the persuasion burden on defendant under traditional “affirmative defenses” such as self-defense, intoxication, immaturity, defense of property, defense of others, and necessity, especially in view of *Leland*.

It should be noted that the bill S.1722 also provided “defenses” that are not “*affirmative* defenses.” As to these, it was provided that the prosecution still has the burden of persuasion beyond a reasonable doubt. But that burden arises—that is, an instruction will be given that the state must prove it beyond a reasonable doubt—only if *some evidence* to substantiate the defense is introduced. Such defenses (and possibly presumptions having a similar effect, although such criminal presumptions—“mandatory,” in the parlance of evidence scholars—now may or may not be valid as to different exculpatory matters) are known in traditional law, as well. *Mullaney* does not directly affect them. What may be novel under the bill, however, and possibly subject to constitutional challenge, is the quantum of evidence that will

¹⁷¹ 442 U.S. 510 (1979).

qualify as *some evidence* for these purposes. It is defined as *such evidence as will justify a reasonable belief* in the *existence* of the fact, rather than such evidence as would justify a reasonable doubt about its existence. The constitutional challenge would be most serious where the defense consisted of a fact that is in some sense considered central to the concept of culpability or an “element” as we have been using that term.

The upshot of all of this is that on a deeper analysis, *Mullaney* seemed to provide a workable framework for approaching these problems, even though not necessarily answers. The explanation of *Mullaney* that the result was dictated by the placement in the statute of malice aforethought in the definition of the crime, seemed superficial.

But then *Patterson v. New York*¹⁷² came along two years later.

In *Patterson*, the state imposed on the accused the identical burden (to persuade the jury by a preponderance) on an issue (“extreme emotional disturbance”) that is hard to distinguish from (and served exactly the same mitigating function from murder to manslaughter as) the “sudden-provocation-heat-of-passion” issue in *Mullaney*. But this time the state did it by means of statutory draftsmanship: making the issue of extreme emotional disturbance expressly an “*affirmative defense*” in the statute setting forth the crime, rather than placing the issue in the definition of the crime and using a presumption.

The Supreme Court this time upheld the state, confirming the simple explanation of *Mullaney*, that statutory placement is what counts. The Supreme Court seemed to be elevating form over substance, by holding that it matters whether the result is accomplished by use of an affirmative defense or a presumption.

The Court does concede in *Patterson* that there are some matters related to culpability that could not be assigned to the defendant (to persuade the jury by a preponderance) *regardless* of which of the two devices is used. But what are they? Are we going to have a hierarchy—i.e., matters which cannot be assigned to the defendant (to persuade by a preponderance) by either device; matters which can be so assigned to him by means of making it an affirmative defense but not by means of a presumption (i.e., the matter in *Mullaney* and *Patterson*); and matters which can be so assigned to him by either device? What will be the scheme with respect to assigning him the burden to persuade beyond a reasonable doubt as was approved by the Supreme Court respecting insanity in *Leland v. Oregon*?¹⁷³

We have seen that presumptions against the accused like those involved and discussed in *Ulster*, that have some lesser effect on the jury than putting the persuasion burden on the defendant, must meet one version or another of the rational connection test (depending upon the strength of that effect) in order to be valid. What test must a presumption that imposes the burden to persuade by a preponderance on defendant meet, where the hierarchy indicates such a presumption could be allowed? If there are issues which can be assigned (by means of a presumption) to the defendant to prove beyond a reasonable doubt,¹⁷⁴ what test of validity must such a presumption meet?

Maybe the distinction from *Mullaney* the Court in *Patterson* had in mind (vaguely hinted in the decision) was that in *Patterson* the imposing of the burden on the defendant was done by the *legislature* rather than by *common-law-process court decision*. Aside from implying some conception of the relative

¹⁷² 432 U.S. 197 (1977).

¹⁷³ 343 U.S. 790 (1952).

¹⁷⁴ See *Leland v. Oregon*.

roles of the judicial and political processes, this would show the Supreme Court is mindful that the legislature might choose to punish the crime as murder without regard to extreme emotional disturbance (or heat of passion) if the Supreme Court made it too difficult for the state to recognize liberalizing or mitigating factors such as extreme emotional disturbance or heat of passion. The Supreme Court may be worried about the effect on the codification movement generally, of a rule that mitigating or excusing factors can only be enacted if the legislature is willing to put the burden on the state. But that same disincentive might infect courts, too, when they are the ones making certain exceptions to liability. Like legislatures, they may be reluctant to do so if they are told they can only do so if they put the burden on the prosecution. Such a warning to courts and legislatures from the Supreme Court would be counter-productive because it attempts to favor defendants' rights, but may wind up depriving defendants of certain defenses altogether.

Another arguable reason for confining *Patterson's* tolerance of imposing the burden on defendant to legislatively created affirmative defenses is that legislative pronouncements communicate in advance much more clearly.

In *Patterson*, it could be argued that, since the legislature has constitutional power (which they probably do) to punish conduct as murder (with maximum penalty) even when done in the heat of passion or under extreme emotional disturbance, then the legislature surely has power to accord some optional excuses or mitigations like heat of passion or extreme emotional distress—placing whatever burden they want on the defendant concerning those excuses, since the legislature doesn't have to accord the excuses at all. In other words, the power to do the greater includes the power to do the lesser. The generalization would be that if the legislature has constitutional power to make an act criminal regardless of certain mitigating or excusing factors, it may provide for conviction based on those acts alone and relegate those mitigating or excusing factors to the status of affirmative defenses to be proved by defendant by a preponderance (or perhaps even beyond a reasonable doubt).

A substantial argument can be made to that effect, but the Justices have not gone that far. If they did, the only constraint on legislatures in this regard would be whatever constitutional constraints there are on what actions may be made criminal. The Supreme Court has no well-developed jurisprudence on that issue except in a few areas like family and sexual privacy and forms of discrimination.

It must be borne in mind throughout this whole discussion, that any device that imposes the persuasion burden to prove by a preponderance on the criminal defendant allows a conviction even when the jury has a reasonable doubt on that particular issue, for the jury may feel the defendant has succeeded in raising a reasonable doubt but not in showing that the fact is *most probably* as he contends. This effect is even more exacerbated if defendant's burden on something like insanity is to show *beyond a reasonable doubt*, as in *Leland, supra*. Under that scheme, the defendant can be convicted even though it is very probable he is insane—say 80% probable, just not the 90% or so required by the “beyond a reasonable doubt” standard.¹⁷⁵

¹⁷⁵ See footnote 20, *supra*, and accompanying text.

Consider the issues of killing, of duress,¹⁷⁶ of insanity, of self-defense,¹⁷⁷ of intention, etc. Upon which (if any) *should* the jury be allowed to have a reasonable doubt and yet convict? Upon which should the jury be able to convict even though they have much more than a reasonable doubt, indeed even believe the issue is most probably in defendant's favor? Your answer to those questions should determine whether you feel the persuasion burden should be put on the defendant, and whether that burden should be to prove it by a preponderance or beyond a reasonable doubt. The Supreme Court, in *Martin v. Ohio*¹⁷⁸ has upheld imposing the burden to persuade by a preponderance on defendant on the issue of self-defense, on the theory this was made an affirmative defense by the state. The decision relied on *Patterson* even though the declaration that self-defense was an affirmative defense was created by Ohio case law rather than as in *Patterson* statutory law even though a distinction based on source might make a certain degree

¹⁷⁶ See *Dixon v. U.S.*, 548 U.S. 1 (2006) (Court determined that the burden of establishing the defense of duress, much like the affirmative defense of "extreme emotional disturbance" at issue in *Patterson*, could constitutionally be placed on the defendant).

¹⁷⁷ See *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (self-defense; *Mullaney* retroactive; avoids deciding whether *Mullaney* or *Patterson* applies to self-defense).

¹⁷⁸ 480 U.S. 228 (1987). This was a murder case. Under the Ohio Code the burden of proving the elements of a criminal offense is upon the prosecution, but, for an affirmative defense, the burden of proof by a preponderance of the evidence is placed on the accused. Self-defense is an affirmative defense under Ohio law. Petitioner was charged with aggravated murder, defined as "purposely, and with prior calculation and design, causing the death of another." She pleaded self-defense, and testified that she had shot and killed her husband when he came at her following an argument during which he had struck her. As to the crime itself, the jury was instructed (1) that, to convict, it must find, in light of all the evidence, that each of the elements of aggravated murder was proved by the State beyond a reasonable doubt, and that the burden of proof with respect to those elements did not shift; and (2) that, to find guilt, it must be convinced that none of the evidence, whether offered by the State or by petitioner in connection with her self-defense plea, raised a reasonable doubt that she had killed her husband, that she had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. However, as to self-defense, the jury was instructed that it could acquit if it found by a preponderance of the evidence that petitioner had proved (1) that she had not precipitated the confrontation with her husband; (2) that she honestly believed she was in imminent danger of death or great bodily harm and that her only means of escape was to use force; and (3) that she had satisfied any duty to retreat or avoid danger. The jury found her guilty, and both the Ohio Court of Appeals and Ohio Supreme Court affirmed the conviction, rejecting petitioner's Due Process Clause challenge, which was based on the charge's placing on her the self-defense burden of proof. In reaching its decision, the State Supreme Court relied on *Patterson, supra*. The U.S. Supreme Court held as follows: Neither Ohio law nor the instructions violate the Due Process Clause. The instructions, when read as a whole, do not improperly suggest that self-defense evidence could not be considered in determining whether there was reasonable doubt about the sufficiency of the State's proof of the crime's elements. Simply because evidence offered to support self-defense might negate a purposeful killing by prior calculation and design does not mean that elements of the crime and self-defense impermissibly overlap, since evidence creating a reasonable doubt about any fact necessary for a finding of guilt could easily fall far short of proving self-defense by a preponderance of the evidence, but, on the other hand, a killing will be excused if self-defense is satisfactorily established even if there is no reasonable doubt in the jury's mind that the defendant is guilty. It is not a violation for Ohio to place the burden of proving self-defense on a defendant. There is no merit to petitioner's argument that it is necessary under Ohio law for the State to disprove self-defense, since both unlawfulness and criminal intent are elements of serious offenses, while self-defense renders lawful that which would otherwise be a crime, and negates a showing of criminal intent. Unlawfulness in such cases is the conduct satisfying the elements of aggravated murder. The necessary mental state for this crime is the specific purpose to take life pursuant to prior calculation and design. That all but two States have abandoned the common law rule that affirmative defenses, including self-defense, must be proved by the defendant does not render that rule unconstitutional. The Court will follow *Patterson* and other of its decisions which allowed States to fashion their own affirmative defense burden of proof rules.

of sense. A democratically decided imposition of the persuasion burden arguably has more legitimacy than a judicially imposed one. The *Martin* decision relied primarily on the fact that historically England and the states almost universally put the burden of persuading of self defense on the defendant, even though only two states do so in modern times. The dissent wanted to rely primarily on the fact that self-defense makes a big difference in culpability and punishment.

Constitutional jurisprudence clearly establishes the general proposition that the prosecution has the burden to prove beyond a reasonable doubt that “the defendant committed the crime.” Although this begs the question of what constitutes “the crime,” it may imply that there is some irreducible minimum or essence of the charges that must be regarded as “elements” of the crime which cannot be shifted to the defendant to prove, regardless of whether this shifting is done by declaring the matter is an affirmative defense or by presumption or any other way and regardless of whether it is imposed by statute or judicial ruling. The killing, for example, in a homicide prosecution is certainly in this class. The fact it was the defendant who did or instigated it should also be. Requiring defendant to prove his “alibi” therefore should be in this class. But not necessarily only things that are *that* fundamental. History and tradition should have something to do with it. Further, the *degree* of the burden put on the defendant may be significant, in doubtful cases or those on the cusp.¹⁷⁹ And, in such “cusp” cases, it may make a difference whether the allocation is accomplished by statute.

End

¹⁷⁹ Cf. *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (consistently with due process, a state may presume defendant is competent to stand trial, but may not require defendant to prove incompetency by anything greater than a preponderance). Though incompetence to stand trial and insanity excusing crime serve slightly different purposes, the spirit of *Cooper* seems inconsistent with the fact that *Leland v. Oregon*, *supra*, allows requiring proof of insanity beyond a reasonable doubt.