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Presumed Guilty

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Abstract

It would probably surprise the average American to learn that prosecutors need only prove guilt beyond a reasonable doubt *sometimes*. Although the Due Process Clauses of the Constitution require that the government prove each element of an alleged criminal offense beyond a reasonable doubt, the use of statutory presumptions has relieved the government of this responsibility, and in some cases, has even shifted the burden to the defendant to disprove the presumption. Likewise, the Sixth Amendment grants a criminal defendant the right to have the jury and the jury alone determine whether the government has met its burden and ultimately whether the person is guilty or not. By legislative fiat, statutory presumptions have taken the place of proof, and as a consequence, usurped the jury's role as the ultimate authority on whether the prosecution has satisfied its burden of proof. These presumptions violate the constitutional guarantees of the right to have the government prove each element of an offense beyond a reasonable doubt and the right to have a jury find all facts necessary to convict. The Supreme Court has heard this argument before and rejected it. It has not, however, reconsidered it in the aftermath of its decisions in *Apprendi v. New Jersey*, *Blakely v. Washington*, and *United States v. Booker*. These cases breathed much needed new life into the Sixth Amendment jury trial guarantee, and in the process put an end to a two decade legislative encroachment on the

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jury's historic function as the sole arbiter of whether the government has proved all the essential facts necessary to convict a person of a crime. *Apprendi*, *Blakely*, and *Booker* cast doubt on the validity of statutory presumptions in criminal cases. This Article will explain why that is so.

INTRODUCTION

American popular culture, particularly television, plays some role in familiarizing the general public about how certain aspects of the country's legal system function. For example, a significant segment of the television watching public can probably recite the *Miranda*[2] warnings to the letter.[3] Perhaps a smaller, but still large cohort of the American public likely knows that in criminal cases the prosecution must prove the defendant's guilt "beyond a reasonable doubt."[4] It is

[2] Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). *Miranda* requires that prior to questioning a suspect, law enforcement inform the person "that he has a right to remain silent, that any statement he makes may be used against him, and that he has a right to an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444-45.

[3] Joshua A. Engel, Frequent Flyers at the Court: The Supreme Court Begins to Take the Experience of Criminal Defendants Into Account in Miranda Cases, 7 Seton Hall Cir. Rev. 303, 309 n.25 (2011) (citing United States v. Harris, 515 F.3d 1307, 1311 (D.C. Cir. 2008) ("every television viewer knows an officer may not interrogate a suspect who is in custody without informing her of her *Miranda* rights"); United States v. DeNoyer, 811 F.2d 436, 439 n.4 (8th Cir. 1987) ("*Miranda* Warnings" "commonly used in court and in television shows to describe the ritual prescribed in *Miranda v. Arizona*"); United States v. Lacy, No. 2:09-CR-45 TS, 2010 WL 1451344, at *2 (D. Utah, Apr. 8, 2010) ("defendant aware of his *Miranda* rights because of television"); Russell Dean Covey, Miranda and the Media: Tracing the Cultural Evolution of a Constitutional Revolution, 10 Chap. L. Rev. 761, 761 (2007) ("television made the *Miranda* warnings famous").

[4] The Supreme Court did not expressly state that the "beyond a reasonable doubt" standard is constitutionally required in criminal cases until 1970. In re Winship, 397 U.S. 358, 364 (1970). Although *Winship* is the first case where the Court "explicitly" said that the beyond a reasonable doubt standard is a constitutional requirement in criminal cases, from 1881 to 1954 the Court assumed as much. Winship, 397 U.S. at 362 (citing Speiser v. Randall, 357 U.S. 513, 525-26 (1954); Holland v. United States, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Coffin v. United States, 156 U.S. 432 (1895); Miles v. United States, 103 U.S. 304, 312 (1881)).

The Court stated without citation that the "beyond a reasonable doubt formulation occurred as late as 1798." *Winship*, 397 U.S. at 361. Ironically, *Winship* is not a criminal case. *Winship*, 397 U.S. at 359. The question in the case was whether a juvenile who has been charged with an offense that would constitute a crime if he was

likely, however, that far fewer people know that in some cases, the prosecution can obtain a conviction without actually having to prove important aspects of its case. Those cases involve the use of statutory presumptions.

Legislatures enacted statutory presumptions primarily to make it easier for prosecutors to convict defendants.[5] The following example demonstrates how a typical presumption in the criminal law works.[6] Assume a person is charged with possession of marijuana with intent to distribute.[7] The offense has two elements: (1) possession of marijuana; and (2) the intent to distribute the marijuana to someone else.[8] The statute forming the basis of the prosecution says that if a person possesses one or more grams of marijuana he[9] is presumed to have the intent to distribute it, but he can overcome that presumption by presenting enough evidence to create a reasonable doubt as to whether he actually intended to distribute it.[10]

Normally, to convict this defendant, the state must prove each element of the offense beyond a reasonable doubt, which means proving that the defendant possessed the marijuana and intended to distribute it.[11] The statutory presumption, however, gives the prosecutor a powerful advantage. If he proves the first element, (i.e., the defendant possessed a gram or more of marijuana), the statute instructs the finder of fact to presume the second element (i.e., the defendant intended to distribute the marijuana), unless the defendant produces evidence that creates a reasonable doubt that he actually intended to distribute the marijuana. As a practical matter, this requires the defendant to prove a

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an adult is entitled to have the government prove he committed the offense beyond a reasonable doubt during the adjudicatory stage. *Winship*, 397 U.S. at 359, 365-68.
A defendant in a criminal case is not required to "put on a case," i.e., he is entitled to rely solely on the presumption of innocence and the government's accompanying duty to prove his guilt beyond a reasonable doubt. Connecticut v. Johnson, 460 U.S. 73, 87 n.16 (1983).

[5] Joseph P. Chamberlain, Presumptions as First Aid to the District Attorney, 14 A.B.A. J. 287, 287 (1928); Note, Statutory Presumptions as Devices to Facilitate the Proof of Crimes, 28 Colum. L. Rev. 489, 489 (1928) [hereinafter Note] ("In order to more easily enforce the criminal law and to make the conviction of the guilty more certain, the legislatures in nearly every jurisdiction have found it convenient to declare what facts shall be sufficient in many situations to make out a prima facie case of guilt.").

[6] Harold A. Ashford & D. Michael Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 172 (1969).

[7] Ashford & Risinger, supra note 6, at 172.

[8] Ashford & Risinger, supra note 6, at 172.

[9] Generic uses of "he," "him," and "his" include "she," "her," and "hers."

[10] Ashford & Risinger, supra note 6, at 172.

[11] *In re Winship*, 397 U.S. at 364.

negative (i.e., he did not intend to distribute the marijuana).[12] If he does not present any evidence, he will be convicted without the prosecution having to do anything more than prove he possessed more than one gram of marijuana.

Presumptions have been the subject of constitutional challenges since at least 1893,[13] principally on the ground that they relieve the prosecution of its burden of proving every element of an offense beyond a reasonable doubt,[14] or they shift the burden of proof from the prosecution to the defendant.[15] The Court's presumption jurisprudence has created a considerable amount of commentary.[16] Some of that

[12] Ashford & Risinger, supra note 6, at 172-73. This is referred to as shifting the burden of "production," i.e., the responsibility of producing "some" evidence to rebut the presumption, to the defense. Sandstrom v. Montana, 442 U.S. 510, 517-19 (1979). In criminal cases, the burden of "persuasion," i.e., the responsibility of proving the elements of the offense beyond a reasonable doubt, always rests with the government. *Sandstrom*, 442 U.S. at 517-19, 524. Shifting the burden of persuasion to a criminal defendant is forbidden under the Due Process Clause. *Sandstrom*, 445 U.S. at 517-19, 524.

[13] Aimee Fukuchi, Note, A Balance of Convenience: The Use of Burden-Shifting Devices in Criminal Cyberharrassment Law, 52 B.C. L. Rev. 289, 311 (2011); Leslie J. Harris, Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness, 77 J. Crim. L. & Criminology 308, 308 n.1 (1986) (citing Agnew v. United States, 165 U.S. 36 (1896); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Marx v. Hanthorn, 148 U.S. 172 (1893)).

[14] Patterson v. New York, 432 U.S. 197, 210, 215 (1977).

[15] *Sandstrom*, 442 U.S. at 520-24; Mullaney v. Wilbur, 421 U.S. 684, 698-701 (1975).

[16] The following is merely a sample: Ronald J. Allen, Structuring Jury Decision Making in Criminal Cases: A Unified Approach to Evidentiary Devices, 94 Harv. L. Rev. 321 (1980); Ronald J. Allen & Ethan A. Hastert, From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?, 58 Stan. L. Rev. 195 (2005); Ashford & Risinger, supra note 6; Ralph C. Barnhart, Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128 (1950); Peter D. Bewley, Note, The Unconstitutionality of Statutory Criminal Presumptions, 22 Stan. L. Rev. 341 (1970); Francis H. Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. Pa. L. Rev. (1920); Paul Brosman, The Statutory Presumption, 5 Tul. L. Rev. 17 (1930); David N. Brown, The Constitutionality of Criminal Presumptions, 34 U. Chi. L. Rev. 141 (1967); Chamberlain, supra note 5; David D. Cook, Note, Presumptive Intent Jury Instructions After Sandstrom, 1980 Wis. L. Rev. 366 (1980); Edward J. Frattaroli, Note, Abrogation of Criminal Statutory Presumptions, 5 Suffolk U. L. Rev. 161 (1970); Allen Fuller & Robert Urich, An Analysis of the Constitutionality of Statutory Presumptions That Lessen the Burden of the Prosecution, 25 U. Miami L. Rev. 420 (1970); Theodore A. Gottfried & Peter G. Baroni, Presumptions, Inferences and Strict Liability in Illinois Criminal Law: Preempting the Presumption of Innocence?, 41 J. Marshall L. Rev. 715 (2008); Michael H. Graham, Burden of Proof and Presumptions in Criminal Cases, 44 Crim. L. Bull. (2009); William G. Hale, Comment, Necessity of Logical Inference to Support a Presumption, 17 S. Cal. L. Rev. 48 (1943); Leslie J. Harris, supra note 13; John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88

commentary says that the use of statutory presumptions violates the Constitution, and the following three relatively recent Supreme Court cases can be read to support that thesis: *Apprendi v. New Jersey;*[17] *Blakely v. Washington;*[18] and *United States v. Booker*.[19]

Apprendi held that a criminal defendant has a Fourteenth Amendment right to have the prosecution prove every element of an offense beyond a reasonable doubt and a Sixth Amendment right to have a jury decide if that proof has been met, including finding facts that might increase his sentence if he is found guilty.[20] *Blakely* held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be [proved to a jury beyond a reasonable doubt.]"[21] Finally, *Booker* held that a Sixth Amendment violation occurs when a judge enhances a sentence based on his own findings of fact and not on facts found by a jury beyond a reasonable doubt.[22]

Apprendi, *Blakely*, and *Booker* reasserted the principle that the jury is the sole finder of fact in criminal prosecutions and suggest that a prosecutor cannot obtain a conviction by simply proving one element of an offense and then relying on a statutory presumption to take care of any remaining elements.[23] The use of statutory presumptions encroaches on the jury's historic function as the sole arbiter of whether the prosecution has proved each element of an offense beyond a reasonable doubt. The proper way for the government to convict a person of a crime is to present proof of each element of the crime to a

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Yale L.J. 1325 (1979); W. Page Keeton, Statutory Presumptions – Their Constitutionality and Legal Effect, 10 Tex. L. Rev. 34 (1931); Charles V. Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953); Edmund M. Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59 (1933); Edmund M. Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906 (1931); Edmund M. Morgan, Tot v. United States: Constitutional Restrictions on Statutory Presumptions, 56 Harv. L. Rev. 1324 (1943); Roy R. Ray, Presumptions and the Uniform Rules of Evidence, 33 Tex. L. Rev. 588 (1955); Barbara D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977); Note, Constitutionality of Rebuttable Statutory Presumptions, 55 Colum. L. Rev. 527 (1955); Presumptions as Devices, supra note 5.

[17] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[18] Blakely v. Washington, 542 U.S. 296 (2004).

[19] United States v. Booker, 543 U.S. 220 (2005).

[20] *Apprendi*, 503 U.S. at 490-92.

[21] *Blakely*, 542 U.S. at 301-02, 305-08.

[22] *Booker*, 543 U.S. at 228-29, 243-44.

[23] Morissette v. United States, 342 U.S. 246, 274 (1952) ("Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact [that] must be submitted to the jury.").

jury; the jury makes findings with respect to each element; and it makes those findings beyond a reasonable doubt.[24] The purpose of this Article is to show that the current use of statutory presumptions does not comport with this process.

Part I of this Article traces and critiques the lengthy and confusing development of the Supreme Court's presumption jurisprudence from the Nineteenth Century through the cases that form the Court's current doctrine. Part II examines how statutory criminal presumptions might fare in the face of a constitutional challenge premised on *Apprendi*, *Blakely*, and *Booker*.

I. THE EVOLUTION OF THE SUPREME COURT'S PRESUMPTION DOCTRINE

A. What are Statutory Presumptions and What Purpose do They Serve?

To obtain a conviction in a criminal case, the government has to prove its case "beyond a reasonable doubt."[25] This is a high hurdle to clear, and it is so for a number of reasons.[26] First, it makes it less likely that a person will be convicted based on factual errors and provides substantive meaning to the presumption that a person is innocent until the government proves him guilty.[27] Second, because a conviction can result in execution, incarceration, or stigmatization, society demands that a person's life not be taken, liberty not be lost, or reputation not be tarnished where reasonable doubt exists as to his guilt.[28] Third, requiring proof beyond a reasonable doubt instills in the citizenry the confidence that a person will not lose his life, liberty, or good name without first being found guilty with "utmost certainty."[29] These principles form the core of the criminal process.[30]

An important corollary to these majestic pronouncements exists, however, which is that the beyond a reasonable doubt standard makes it more difficult for prosecutors to obtain convictions and increases the risk that a guilty person will go free.[31] In response to this, many states

[24] *Morissette*, 342 U.S. at 274 (quoting People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)).
[25] *Winship*, 397 U.S. at 364.
[26] *Winship*, 397 U.S. at 363-64.
[27] *Winship*, 397 U.S. at 363 (citing *Coffin*, 156 U.S. at 453).
[28] *Winship*, 397 U.S. at 363-64 (quoting *Speiser*, 357 U.S. at 525-26).
[29] *Winship*, 397 U.S. at 364.
[30] *Winship*, 397 U.S. at 363; *Winship*, 397 U.S. at 327 (Harlan, J., concurring) ("it is far worse to convict an innocent man than to let a guilty man go free").
[31] *Patterson*, 432 U.S. at 208.

embodied in their criminal statutes what are known as "presumptions," and did so in part to make it easier for prosecutors to convict defendants.[32] Popular culture has not done much—if anything—to inform the population at large of this aspect of the judicial system.

Generally, there are three types of presumptions: (1) conclusive; (2) mandatory; and (3) permissive.[33] Under a conclusive presumption, once a fact is proved, one is not allowed to dispute a fact presumed to flow from the proven fact.[34] Under a mandatory presumption, if a fact is proved, one is required to accept a presumed fact flowing from the proven fact if the presumed fact is not rebutted.[35] Under a permissive presumption, once a fact is proved, one is allowed, but not required, to accept a presumed fact flowing from the proven fact.[36]

In a troika of cases decided between 1979 and 1985, the Supreme Court articulated the current framework courts are to use when deciding whether a presumption violates the Constitution.[37] First, a court must determine whether the presumption is mandatory or permissive.[38] It is mandatory if the finder of fact is told that he is

[32] Chamberlain, supra note 5, at 287; Note, supra note 5, at 489.

[33] Bewley, supra note 16, at 342.

[34] Bewley, supra note 16, at 342. For example, if an official government document states that an item weighs a certain amount, the actual weight of the item is presumed to be the weight stated on the document. Bewley, supra note 16, at 342 n.14 (citing Vega S.S. Co. v. Consol. Elevator Co., 75 Minn. 308, 311-12, 77 N.W. 973, 974 (1899)). One is allowed to dispute the legitimacy of the government document itself, but if the finder of fact believes the document is legitimate, he is required to accept the weight stated on the document. Bewley, supra note 16, at 342 n.14 (citing *Vega S.S. Co.*, 75 Minn. at 311-12, 77 N.W. at 974).

[35] Bewley, supra note 16, at 342, 343. For example, if a person properly stamps, addresses, and mails a letter, receipt of that letter will be presumed, and the presumption will be mandatory. Bewley, supra note 16, at 343 n.15 (citing John E. Stumbo, Presumptions – A View at Chaos, 3 Washburn L.J. 182, 189 (1964)) (If, however, the intended recipient disputes receipt but cannot prove non-receipt, the presumption of receipt "becomes conclusive."); Bewley, supra note 16, at 343 n.15 (citing Stumbo, supra note 35, at 189). On the other hand, if the intended recipient does prove non-receipt, the presumption will fail notwithstanding proof of proper postage, addressing, and mailing. Bewley, supra note 16, at 343 n.15 (citing Stumbo, supra note 135, at 189).

[36] Bewley, supra note 16, at 343.

[37] Francis v. Franklin, 471 U.S. 307 (1985); *Sandstrom*, 442 U.S. 510; Cnty. Ct. of Ulster Cnty. v. Allen, 442 U.S. 140 (1979). University of Miami Law Professor Michael H. Graham describes these decisions as "less than well[-]reasoned[,] partially inconsistent, [and] unfortunately confusing." Graham, supra note 16.

[38] *Francis*, 471 U.S. at 313, 314 (citing *Allen*, 442 U.S. at 157-63; *Speiser*, 357 U.S. at 514, 520-24).

required to accept a presumed fact flowing from a proven fact.[39] It is permissive if the finder of fact is allowed, but not required, to accept a presumed fact flowing from a proven fact.[40] Mandatory presumptions violate the Due Process Clause if they relieve the prosecution of its burden of proving every element of an offense beyond a reasonable doubt.[41] A permissive presumption is constitutional so long as it requires the prosecution to prove to the finder of fact that a presumed fact should be accepted based on proof of a "predicate fact."[42] If, however, acceptance of the presumed fact is not reasonable or cannot be justified in light of the proven fact, the permissive presumption is unconstitutional.[43] If an instruction to a finder of fact read in isolation would lead a reasonable person to believe that the prosecution is not required to prove an element of an offense, the instruction has to be considered in light of other instructions given before a court can conclude that the presumption is unconstitutional.[44]

B. Presumptions as Rules of Evidence

The Supreme Court first addressed a constitutional challenge to a statutory presumption in 1893 when it upheld the constitutionality of the "Geary Act," which Congress passed on May 5, 1892 to prohibit Chinese immigration into the United States.[45] Section Six of the Act required that "Chinese laborers" present in the country as of May 5, 1892 obtain a "certificate of residence" from the "collector of internal revenue" by May 5, 1893.[46] If a Chinese laborer did not obtain a certificate of residence, Section Six of the Act required his arrest and a

[39] *Francis*, 471 U.S. at 314 n.2 (citing *Sandstrom*, 442 U.S. at 517-18). A mandatory presumption can be conclusive or rebuttable. *Francis*, 471 U.S. at 314 n.2. Conclusive presumptions remove presumed elements from the case once the State proves what is necessary to trigger the presumption. *Francis*, 471 U.S. at 314 n.2. Rebuttable presumptions require the jury to find the presumed element unless the defendant convinces it not to. *Francis*, 471 U.S. at 314 n.2. (citing *Sandstrom*, 442 U.S. at 517-18).

[40] *Francis*, 471 U.S. at 314.

[41] *Francis*, 471 U.S. at 314 (citing *Sandstrom*, 442 U.S. at 520-24; *Patterson*, 432 U.S. at 210, 215; *Mullaney*, 421 U.S. at 698-701). *Francis* declined to answer the question of whether a mandatory presumption that shifts the burden of production to a defendant violates the Due Process Clause. *Francis*, 471 U.S. at 314 n.3.

[42] *Francis*, 471 U.S. at 314.

[43] *Francis*, 471 U.S. at 314-15 (citing *Allen*, 442 U.S. at 157-63).

[44] *Francis*, 471 U.S. at 315 (citing Cupp v. Naughten, 414 U. S. 141, 147 (1973)).

[45] *Fong Yue Ting*, 149 U.S. at 698-99 n.1.

[46] *Fong Yue Ting*, 149 U.S. at 699-700 n.1.

judicial declaration that his presence in the country is unlawful.[47] The Act required a federal judge to enter a deportation order unless the laborer produced "clear" and "[satisfactory]" evidence that he did not obtain a certificate because of "accident, sickness, or other unavoidable cause."[48] The laborer also had to have "at least one credible white witness" testify that he [the laborer] lived in the country on May 5, 1892.[49]

Three Chinese laborers were arrested under the Act and challenged the validity of Section Six.[50] The Court held that the presumption in Section Six that a person arrested for not having a certificate was presumed to be in the country illegally did not create a conclusive presumption, rather it represented "prima facie" evidence that the laborer was unlawfully in the United States.[51] The laborer could rebut this presumption by appearing before a federal judge and proving that he had just cause for not obtaining a certificate and having a white witness testify that he resided in the United States on May 5, 1892.[52] The Court held that Congress had the authority to "prescribe the evidence [that] shall be received, and the effect of that evidence, in the courts of its own government."[53] The Court went on to hold that the judicial proceeding contemplated by Section Six of the Act did not constitute a criminal trial, therefore, the Fourth Amendment right to be free from unreasonable searches and seizures, the Fifth Amendment right to due process, the Sixth Amendment right to a jury trial, and the Eighth Amendment prohibition on cruel and unusual punishments did not apply.[54] *Fong Yue Ting* left open the question of whether the burden shifting allowed in a judicial proceeding under Section Six of the Act would be permissible in a conventional criminal case. The Court's next presumption case, *Wilson v. United States*,[55] went a step in the direction of answering that question.

[47] *Fong Yue Ting*, 149 U.S. at 699-700 n.1.
[48] *Fong Yue Ting*, 149 U.S. at 699-700 n.1.
[49] *Fong Yue Ting*, 149 U.S. at 699-700 n.1. The Act further provided that if the "Chinaman" lost his certificate or had it stolen, he would be detained for a reasonable time in order to obtain a duplicate certificate. *Fong Yue Ting*, 149 U.S. at 699-700 n.1.
[50] *Fong Yue Ting*, 149 U.S. at 698-99, 704.
[51] *Fong Yue Ting*, 149 U.S. at 727.
[52] *Fong Yue Ting*, 149 U.S. at 727.
[53] *Fong Yue Ting*, 149 U.S. at 729 (citations omitted).
[54] *Fong Yue Ting*, 149 U.S. at 730.
[55] Wilson v. United States, 162 U.S. 613 (1896).

On May 15, 1895, a jury convicted Mr. Wilson[56] of murder and sentenced him to be hanged.[57] During his trial, the prosecution introduced evidence that on the day of his arrest, authorities found several items of property belonging to the decedent in his possession.[58] The trial court instructed the jury that if a person suspected of committing a murder is found with the victim's property in his possession, the suspect is presumed guilty of the murder unless he proves that his possession of that property is "innocent and honest."[59] The Supreme Court held that evidence that a defendant possessed the "fruits" of a recently committed crime justified the inference that the defendant is guilty of the crime unless the defendant explained his innocence.[60] The Court pointed out that the trial court left it up to the jury to "draw the inference" that Mr. Wilson committed the murder if he failed to "satisfactorily explain" the physical evidence the State introduced at his trial.[61] The Court did not, however, address the issue of a jury instruction that required Mr. Wilson explain why he had the decedent's property in his possession on the pain of being presumed guilty if he did not. This instruction not only shifted a burden of persuasion[62] to Mr. Wilson in that it placed an affirmative duty on him to prove his possession of the decedent's property was "innocent and honest," but it also amounted to a mandatory presumption in that it required the jury to presume him guilty if he offered no explanation.

The *Wilson* Court did not conduct a constitutional analysis of the challenged jury instructions.[63] It affirmed the trial court's use of the instructions on the basis of the evidentiary principles of relevance and

[56] Neither the case caption nor the text of the opinion says what Mr. Wilson's first name is.
[57] *Wilson*, 162 U.S. at 613-14.
[58] *Wilson*, 162 U.S. at 614-15.
[59] *Wilson*, 162 U.S. at 616-17.
[60] *Wilson*, 162 U.S. at 619-21.
[61] *Wilson*, 162 U.S. at 620. The Court said that the bloodstained linens on Mr. Wilson's bed constituted "relevant, admissible evidence" that a violent, deadly act was inflicted on the person connected with those linens, and if Mr. Wilson did not explain why the linens were soaked in blood, the jury should infer that a murder occurred. *Wilson*, 162 U.S. at 620.
[62] There is a meaningful difference between the burden of persuasion and the burden of production. Underwood, supra note 16, at 1300 n.3. When a party bears the burden of production on an issue, the judge rather than the jury decides if the party has met that burden. Allen & Hastert, supra note 16, at 203 n.46 (citing Allen, supra note 16, at 329). If the burden of production on an issue is met, the party bearing the burden of persuasion will lose that issue unless he produces enough evidence to convince the jury otherwise. Underwood, supra note 16, at 1300 n.3.
[63] *Wilson*, 162 U.S. at 619-21.

admissibility.[64] After *Fong Yue Ting* and *Wilson*, the rule on criminal presumptions seemed to be that if the prosecution produces prima facie evidence of a defendant's guilt, a jury is allowed to conclude that the defendant is guilty unless he puts forth evidence that negates his guilt or explains to the satisfaction of the jury why the prima facie evidence should not be accepted as evidence of guilt.[65] Neither case, however, examined presumptions for their constitutional validity.

C. The Constitutional Standard for Statutory Criminal Presumptions

Adams v. New York is the first case in which the Court considered whether a criminal presumption violated the Constitution.[66] A jury convicted Albert Adams for possessing gambling paraphernalia known as "policy slips."[67] New York statutory law made possession of policy slips by someone other than a public official "presumptive evidence" that the person possessed the slips unlawfully.[68] The Supreme Court held that one should presume that a person found possessing policy slips possessed them unlawfully, unless he offered an explanation to the contrary.[69] The Court said that evidence of possession of the slips represented only prima facie evidence of guilt that the statute "permitted" a defendant to rebut.[70] The Court cited *Fong Yue Ting* for the proposition that legislatures have the authority to prescribe rules of evidence, and in Mr. Adams's case, New York's legislature acted within that authority.[71]

The *Adams* Court did not conduct a very detailed or complex constitutional analysis with respect to statutory presumptions in criminal cases. Moreover, its citation to *Fong Yue Ting* is curious given the Court's holding in that case that the Fifth Amendment Due Process Clause did not even apply to the petitioners' claims.[72] *Adams* presented

[64] *Wilson*, 162 U.S. at 619-21.
[65] *Wilson*, 162 U.S. at 619-21; *Fong Yue Ting*, 149 U.S. at 727-32.
[66] Adams v. New York, 192 U.S. 585 (1904).
[67] *Adams*, 192 U.S. at 586. People of that era used policy slips to play the illegal "game of policy," which operated like a lottery. *Adams*, 192 U.S. at 588. Players would purchase policy slips with numbers on them representing the players' guess as to what numbers would be "drawn" later in the day. *Adams*, 192 U.S. at 588. When the drawing took place, if a player had the right number, he would receive the money paid for that day's slips. *Adams*, 192 U.S. at 588.
[68] *Adams*, 192 U.S. at 586-87.
[69] *Adams*, 192 U.S. at 599.
[70] *Adams*, 192 U.S. at 599.
[71] *Adams*, 192 U.S. at 599 (citing *Fong Yue Ting*, 149 U.S. at 698-729).
[72] *Fong Yue Ting*, 149 U.S. at 730-31. *Fong Yue Ting* involved the Fifth Amendment's Due Process Clause rather than the Fourteenth's because the petitioners

the Court with an opportunity to articulate a standard that statutory presumptions in criminal cases must satisfy in order to pass constitutional muster, but it did not do so.[73] Instead, it assessed the presumptions in terms of the rules of evidence and a legislature's power to enact such rules.[74] *Adams* left unanswered what limit, if any, the Constitution places on a legislature's power to enact statutory presumptions. In 1910, a dispute between a railroad company and the administrator of a decedent's estate presented the Court with an opportunity to provide that answer.[75]

Ray Hicks, a foreman for a railroad company, died when a derailed train fell on him.[76] His estate sued the railroad and obtained a judgment in a Mississippi trial court.[77] The railroad appealed to the Supreme Court and argued that a Mississippi railroad liability statute that imputed negligence to railroads violated the Equal Protection Clause.[78] The Court responded by saying that the statute established prima facie evidence only, statutes like Mississippi's were rules of evidence legislatures had the power to enact, and the validity of such statutes had withstood numerous challenges.[79] The Court found that the rule created a "temporary inference" of negligence, which "cast upon the railroad company the duty of producing some evidence to the contrary."[80] If a railroad fulfilled this duty, a jury would decide the ultimate issue of negligence; if not, the defendant would lose because in civil cases, prima facie evidence is sufficient for a plaintiff to prevail.[81]

The Court concluded that the statute did not violate the Equal Protection Clause or the Due Process Clause.[82] The Court reached the due process issue even though neither party raised it. It also did what it had previously not done; it announced a standard that statutory

challenged acts of the Federal government. Dusenbery v. United States, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of [life, liberty, or,] property without 'due process of law.'").

[73] *Adams*, 192 U.S. at 598-99.

[74] *Adams*, 192 U.S. at 599.

[75] Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35 (1910).

[76] *Turnipseed*, 219 U.S. at 41.

[77] *Turnipseed*, 219 U.S. at 39.

[78] *Turnipseed*, 219 U.S. at 41-42.

[79] *Turnipseed*, 219 U.S. at 42. One of the cases the Court cited as a "leading" case on this point is *Adams*, 192 U.S. 585. *Turnipseed*, 219 U.S. at 42.

[80] *Turnipseed*, 219 U.S. at 43.

[81] *Turnipseed*, 219 U.S. at 43.

[82] *Turnipseed*, 219 U.S. at 43.

presumptions must satisfy in order to comply with the Constitution.[83] The Court said that statutory presumptions satisfy due process if there is some "rational connection between the fact proved and the ultimate fact presumed, and the inference from one fact from proof of another is not so unreasonable as to be a purely arbitrary mandate."[84] *Turnipseed* is a landmark case because it represented the Court's first articulation of a constitutional standard for assessing the validity of presumptions.

Given the novelty of what it did, however, it is arguable that the Court went further than it should have. The Court equalized the standard for judging criminal and civil statutory presumptions.[85] This is problematic for at least two reasons.

First, *Turnipseed* is a civil tort case, not a criminal case, and in civil cases, the stakes for a defendant are far less grave than they are for a defendant in a criminal case. After all, a tort defendant will not be executed or imprisoned if he loses a lawsuit. On the other hand, a criminal defendant's life or liberty is on the line; therefore, the standards for conviction should be considerably higher than the standards a tort plaintiff must satisfy in order to obtain a judgment. The distinction between a civil defendant and a criminal defendant are substantial enough that the Court should have considered subjecting statutory presumptions in criminal cases to a more rigorous level of judicial scrutiny than a mere "rational connection between the fact proved and the ultimate fact presumed."

Second, the "rational connection" language the *Turnipseed* Court used is similar to the "rational basis" standard the Court uses in its Equal Protection Clause jurisprudence. Legislation subject to a rational basis standard is presumptively valid and will withstand a constitutional challenge as long as it is "rationally related to a legitimate state interest."[86] This is a very easy standard to meet. In fact,

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[83] *Turnipseed*, 219 U.S. at 43.
[84] *Turnipseed*, 219 U.S. at 43.
[85] *Turnipseed*, 219 U.S. at 43.
[86] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985) (citations omitted). Legislation that classifies persons by race, alienage, or national origin, or that impinges on a fundamental right is subject to the most searching form of judicial examination, strict scrutiny, which means the legislation is unconstitutional unless the government proves it is necessary to fulfill an important government interest and the means chosen to fulfill that interest are narrowly tailored. *Cleburne Living Ctr.*, 473 U.S. at 440 (citing Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. Florida, 379 U.S. 184, 192 (1964)). Strict scrutiny is so exacting and legislation subject to it so rarely survives a constitutional challenge that it has been described as "strict in theory, but fatal in fact." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, Brennan & Blackmun, JJ., dissenting) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, Brennan & Blackmun, JJ.,

the Court has said that it will uphold government action subject to a rational basis standard if there is "any conceivable" rationale for it, and the government is not required to state what that rationale is.[87]

Legislative action regarding burdens of production[88] in the criminal procedure arena, however, should have to meet a more rigorous standard because state action that impinges on a fundamental right is unconstitutional unless it is necessary to fulfill a compelling government interest and the means chosen to fulfill that interest are narrowly tailored.[89] A right is considered "fundamental" if it is "deeply rooted in the history and tradition of the country,"[90] or it is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed."[91]

In re Winship observed that the right of a criminal defendant to require the government to prove "every fact necessary to constitute the crime with which he is charged beyond a reasonable doubt" became a part of this country's law in 1798,[92] which strongly suggests that this is a fundamental right rooted in "history and tradition." Statutory criminal presumptions substantially affect this right because they make it easier for the government to obtain convictions.[93] Because of this, legislatures should have to demonstrate that these presumptions are more than merely "rational" or not "a purely arbitrary mandate."[94]

D. Application of the Constitutional Standard

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concurring in judgment)). Government classifications based on sex or illegitimacy are subject to a heightened standard of review, but not strict scrutiny. *Cleburne Living Ctr.*, 473 U.S. at 440-41. Such laws are constitutional if they are "substantially related to an important governmental interest." *Cleburne Living Ctr.*, 473 U.S. at 441 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976)).

[87] Nordlinger v. Hahn, 505 U.S. 1, 27-28 (1992) (Thomas, J., concurring in part and concurring in the judgment) (citing Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 702-06 (1981) (Rehnquist, J., dissenting); United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

[88] See Underwood, supra note 16, at 1300 n.3. for an elaboration on the definitions of the burden of production and the burden of persuasion.

[89] *Cleburne Living Ctr.*, 473 U.S. at 440 (citing *Graham*, 403 U.S. 365; *McLaughlin*, 379 U.S. at 192).

[90] Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[91] *Glucksberg*, 521 U.S. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[92] *In re Winship*, 397 U.S. at 361.

[93] See supra note 5.

[94] *Turnipseed*, 219 U.S. at 41.

Fifteen days after *Turnipseed*, the Court invalidated a statutory criminal presumption for the first time in *Bailey v. Alabama*.[95] *Bailey* involved a challenge to an Alabama statute that made it a crime to terminate a written contract for services without just cause and without refunding any money paid to render the services.[96] Terminating such a contract coupled with a refusal to repay constituted prima facie evidence of an intent to "injure or defraud" the employer.[97] The Court invalidated the law on the ground that an intent to defraud could not be presumed based on a breach of contract and an accompanying debt.[98] Criminalizing the failure to render services or repay debts amounted to compulsory servitude, which violated the Thirteenth Amendment.[99] Because the Court invalidated the statute on Thirteenth Amendment grounds, it did not reach the question of whether the law violated due process.[100]

Following *Bailey*, the Court decided two more cases in which parties argued that certain statutory presumptions violated the standard established in *Turnipseed*, and in each case, the Court rejected the

[95] *Bailey*, 219 U.S. 219.
[96] *Bailey*, 219 U.S. at 227-28 (citing 1907 Ala. Acts 636 (amending Ala. Code § 4730 (1896)). The statute required that the person act "with intent to injure or defraud his employer." *Bailey*, 219 U.S. at 227-28.
[97] *Bailey*, 219 U.S. at 228-29.
[98] *Bailey*, 219 U.S. at 234-35 (citing *Bailey*, 161 Ala. at 78, 49 So. at 887).
[99] *Bailey*, 219 U.S. at 239-45. Section One of the Thirteenth Amendment says, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend XIII, § 1. Mr. Bailey was a black man, but the Court "dismissed" this fact from its consideration. *Bailey*, 219 U.S. at 231.
[100] *Bailey*, 219 U.S. at 245.

challenge.[101] That changed in 1916 in *McFarland v. American Sugar Refining Co.*[102]

The American Sugar Refining Company obtained a court order enjoining the enforcement of a Louisiana regulation stating that any sugar refinery located in the State of Louisiana that paid the state less for sugar than it paid any other state would be presumed to be "a party to a monopoly or combination or conspiracy in restraint of trade and commerce."[103] The Supreme Court unanimously affirmed the injunction.[104] The Court said a legislature could not "declare an individual guilty or presumptively guilty of a crime."[105] This marked the first time the Court declared a presumption unconstitutional using the *Turnipseed* standard. Like *Turnipseed*, *American Sugar* is not a criminal case, thus it remained to be seen how rigorously the Court would apply *American Sugar*'s admonition to legislatures that they could not "declare an individual guilty or presumptively guilty of a crime."[106] *Hawes v. Georgia* provided the Court that opportunity.[107]

The State of Georgia indicted Robert Hawes ("Mr. Hawes") for knowingly allowing a "still" to be on his property.[108] Under Georgia law, the discovery of a still on one's property constituted prima facie evidence that the owner of the property knew the still was there.[109] The law explicitly placed the burden of proof on the owner to disprove he knew it was on his property.[110] The trial court instructed the jury that if the government proved it discovered the still on Mr. Hawes's property

[101] Luria v. United States, 231 U.S. 9, 19-22, 25-28 (1913) (upheld a federal law that declared if an "alien" who obtained a "certificate of citizenship" returned to his native country or went to another country for the purpose of becoming a permanent resident within five years of obtaining the certificate, the fact that he did so would be prima facie evidence that when he obtained the certificate he never intended on becoming a permanent resident of the United States, therefore, his certificate would be cancelled); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 81-83 (1911) (upheld a New York statute that said, "in proceedings for [the] enforcement of [an environmental protection statute], the fact that one who, for the purpose of collecting and vending gas as a separate commodity, engages in pumping water from wells bored or drilled into the rock, is prima facie evidence of being within the prohibition of the statute [that makes such drilling unlawful], and [bears the burden of producing proof] that he comes within an exception [to the law.]).

[102] McFarland v. Am. Sugar Refining Co., 241 U.S. 79 (1916).

[103] *McFarland*, 241 U.S. at 81.

[104] *McFarland*, 241 U.S. at 85-86.

[105] *McFarland*, 241 U.S. at 86.

[106] *McFarland*, 241 U.S. at 86.

[107] Hawes v. Georgia, 258 U.S. 1 (1922).

[108] *Hawes*, 258 U.S. at 2.

[109] *Hawes*, 258 U.S. at 2.

[110] *Hawes*, 258 U.S. at 2.

and he did not disprove that he knew it was there, it "should" find him guilty as charged.[111] The Supreme Court concluded that a rational connection existed between the discovery of alcohol distilling equipment on his property and the presumption that he knew about the equipment being on his property.[112]

It is difficult to reconcile *Hawes* with *Bailey v. Alabama*,[113] which held that a statutory criminal presumption is not valid simply because it does not require a jury to convict upon proof of a predicate fact and a presumption flowing from that fact.[114] Such a law is still problematic if it authorizes a jury to convict based on a tenuous link between the proven fact and the presumed fact.[115] *Hawes* cited *Bailey*, but nevertheless concluded the link between the proven fact (i.e., the discovery of alcohol distilling equipment on Mr. Hawes's property) and the presumed fact (i.e., he had knowledge of the equipment being on his property) was not so attenuated as to make the presumption irrational.[116]

And while *Hawes* also cited *McFarland v. American Sugar Refining Co.*,[117] which held that a legislature cannot simply "declare an individual guilty or presumptively guilty of a crime,"[118] the Court did not consider the question of whether Georgia's law effectively presumed Mr. Hawes guilty. The Court ended up ratifying a jury instruction that said all the prosecution had to do was prove the equipment was on Mr. Hawes's property and "stop there."[119] If Mr. Hawes did not then prove his ignorance of the equipment's presence on his property, the trial court instructed the jury that it "should find the defendant guilty as charged in the indictment."[120] This arguably mirrors the instruction the Court rejected in *Bailey* that effectively required the jury to find an intent to defraud if the prosecution proved nothing more than a breach of contract or a failure to repay a debt,[121] yet *Hawes* did not offer much in the way of explaining how the instruction given to Mr. Hawes's jury did not have substantially the same effect as the instruction given to the jury Mr. Bailey's case.

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[111] *Hawes*, 258 U.S. at 2.
[112] *Hawes*, 258 U.S. at 4, 5.
[113] Bailey v. Alabama, 219 U.S. 219 (1911).
[114] *Bailey*, 219 U.S. at 235-37.
[115] *Bailey*, 219 U.S. at 235-37.
[116] *Hawes*, 258 U.S. at 4 (citing *Bailey*, 219 U.S. 219).
[117] *Hawes*, 258 U.S. at 4 (citing *McFarland*, 241 U.S. 79).
[118] *McFarland*, 241 U.S. at 86.
[119] *Hawes*, 258 U.S. at 2.
[120] *Hawes*, 258 U.S. at 2.
[121] *Bailey*, 219 U.S. at 230.

The *Hawes* presumption is a "mandatory presumption" because it required the jury to convict Mr. Hawes if the government proved the discovery of the alcohol manufacturing equipment on his property and he did not prove a lack of knowledge.[122] This put Mr. Hawes in a bind; rebut the presumed fact or suffer a conviction. Statutes like the one in *Hawes* affirmatively require the defendant to rebut the presumption—or else.[123] Arguably, the most effective way for a defendant to do this is to take the stand in his own defense. This, however, implicates another constitutional right, i.e., the Fifth Amendment right against self-incrimination and the accompanying right to not have a jury draw an adverse inference if a defendant does not testify.[124] Whether mandatory presumptions violate the Fifth Amendment is an issue the Court addressed in *Yee Hem v. United States.*[125]

A jury convicted Yee Hem for violating a federal law making it illegal to knowingly conceal illegally imported smoking opium.[126] The law authorized a conviction based on mere possession of smoking opium unless the defendant explained why he had the opium in his possession.[127] Finally, the law said all smoking opium found in the United States was presumed to have been imported illegally, and placed the burden of proving otherwise on the accused.[128] The Court found it logical to infer "that opium found in the country more than fourteen years[129] after its importation had been prohibited was unlawfully imported."[130] The Court said that for more than fifty years, using opium for anything other than medical purposes was unlawful, and anyone possessing opium for any purpose other than a medical one assumed the risk that he would have to explain why he had it or risk being convicted.[131]

The law in *Yee Hem* comes very close to "declaring an individual presumptively guilty of a crime."[132] The Court addressed this by saying "the presumption of innocence can be overcome, even when the facts alone are not enough, by the additional weight of a

[122] *Allen*, 442 U.S. at 157 n.16 (citation omitted); *Hawes*, 258 U.S. at 2.
[123] *Hawes*, 258 U.S. at 2.
[124] Griffin v. California, 380 U.S. 609, 613-15 (1965).
[125] Yee Hem v. United States, 268 U.S. 178 (1925).
[126] *Yee Hem*, 268 U.S. at 181.
[127] *Yee Hem*, 268 U.S. at 182.
[128] *Yee Hem*, 268 U.S. at 182.
[129] When law enforcement arrested Yee Hem in August 1923, he had a "quantity of smoking opium" in his possession. *Yee Hem*, 268 U.S. at 182.
[130] *Yee Hem*, 268 U.S. at 184.
[131] *Yee Hem*, 268 U.S. at 184.
[132] *McFarland*, 241 U.S. at 86.

countervailing legislative presumption."[133] According to the Court, if the presumption happens to give "artificial value" to the proven fact, it is not unlike "a great variety of presumptions" that are commonplace in the law and never considered problematic in the past.[134] The Court said the following with respect to Yee Hem's Fifth Amendment argument:

> The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune [that] the statute under review does not create but [that] is inherent in the case.[135]

Legislatures seemed to be enacting presumptions to serve as substitutes for actual evidence, particularly in cases where intent would be difficult to prove.[136] At this point in the Court's development of its presumption jurisprudence, however, no justice agreed with this point of view. It took another "opium" case—this time with a lawyer as the defendant—before a member of the Court would suggest that presumptions were indeed being used as substitutes for evidence.

1.The Emergence of Justice Pierce Butler

A jury convicted criminal defense lawyer Thomas J. Casey for sending towels soaked with a morphine solution to his incarcerated clients.[137] Congress made it a crime to "purchase or sell opium and its derivatives except in or from the original stamped package."[138] That same law said the "absence of the required stamps from the drug shall be prima facie evidence of a violation by the person found possessing the drug."[139] A majority of the Court found that a rational connection existed between the presumption that Mr. Casey sold opium without the required stamps and the proven fact that he possessed the morphine

[133] *Yee Hem*, 268 U.S. at 184-85.
[134] *Yee Hem*, 268 U.S. at 185.
[135] *Yee Hem*, 268 U.S. at 185.
[136] *Bailey*, 219 U.S. at 233, 235 (citing Bailey v. State, 158 Ala. 18, 25, 48 So. 498, 499 (1908)).
[137] Casey v. United States, 276 U.S. 413, 416-17 (1928).
[138] *Casey*, 276 U.S. at 417.
[139] *Casey*, 276 U.S. at 417.

soaked towels before sending them to his clients.[140] Next, the Court said something rather remarkable:

> The statute here talks of prima facie evidence, but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates.[141] It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government.[142]

The *Casey* majority held that it is perfectly consistent with the Constitution to shift the burden of proof to the defendant in a criminal case to disclose what only he knows, i.e., whether he actually intended to commit the offense, rather than the prosecution bearing the burden of proving his intent to commit the offense.[143] What is striking about this announcement of a rule of constitutional law is the fact that the majority did not cite the Constitution itself or one of the Court's prior presumption cases to support it; instead, it cited John Henry Wigmore's treatise on evidence.[144] Had this been a matter of first impression, Dean Wigmore[145] might have been the best source available; however, twice in the preceding six years the Court issued decisions involving mandatory presumptions strikingly similar to the one before it in *Casey*.[146] *Casey* went further than the Court's prior presumption cases, however, because it held that there is no constitutional bar to requiring the defendant to prove he lacked the intent to commit an offense.[147]

Justice McReynolds dissented.[148] He considered any rational connection between possessing morphine and the presumption that the possession was unlawful to be "imaginary."[149] He also said presumptions exist to "lighten the burden of the prosecutor" and

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[140] *Casey*, 276 U.S. at 418.
[141] *Casey*, 276 U.S. at 418 (citing 4 Wigmore, Evidence § 2494).
[142] *Casey*, 276 U.S. at 418 (citing 4 Wigmore, Evidence § 2486).
[143] *Casey*, 276 U.S. at 418 (citing 4 Wigmore, Evidence § 2486).
[144] *Casey*, 276 U.S. at 418 (citing 4 Wigmore, Evidence § 2486).
[145] John Henry Wigmore served as the dean of Northwestern University School of Law from 1901 to 1929. http://www.law.northwestern.edu/news/history/ (last visited Aug. 17, 2012).
[146] *Yee Hem*, 268 U.S. 178; *Hawes*, 258 U.S. 1. *Casey* cited *Yee Hem*, but only for the proposition that a rational connection had to exist between the fact proved and the presumed fact in order for the statutory presumption to comply with the Constitution.
[147] *Casey*, 276 U.S. at 418.
[148] *Casey*, 276 U.S. at 420-21 (McReynolds, J., dissenting).
[149] *Casey*, 276 U.S. at 420 (McReynolds, J., dissenting).

compared the one in *Casey* to the discredited practice of coercing a confession by using a thumbscrew; "The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry."[150] Justice Butler also dissented, saying the government used the statutory presumption to make up for its lack of proof on how Mr. Casey came to possess the morphine.[151] He and Justice McReynolds became the first members of the Court to express skepticism at the idea of using presumptions not only to make it easier to convict defendants, but to serve as evidence where it might otherwise be lacking. A little more than ten months later, Justice Butler's view became the majority view in *Manley v. Georgia*.[152]

In *Manley*, the Court invalided a Georgia statute declaring that all bank insolvencies resulted from fraud.[153] The presumption of fraud could be overcome if a defendant showed that he managed the bank in a "fair and legal" manner and with the "same care and diligence that agents receiving a commission for their services are required and bound by law to observe."[154] Writing for a unanimous Court, Justice Butler stated "Mere legislative fiat may not take the place of fact in the determination of issues involving, life, liberty[,] or property."[155] One could not reasonably infer that a bank president committed fraud simply because the bank became insolvent, thus the Court found the presumption to be "unreasonable and arbitrary."[156] *Manley* started a trend of invalidating statutory presumptions under the *Turnipseed* formulation.[157]

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[150] *Casey*, 276 U.S. at 420 (McReynolds, J., dissenting).
[151] *Casey*, 276 U.S. at 426 (Butler & McReynolds, JJ., dissenting).
[152] Manley v. Georgia, 279 U.S. 1 (1929).
[153] *Manley*, 279 U.S. at 3-4.
[154] *Manley*, 279 U.S. at 3.
[155] *Manley*, 279 U.S. at 6. Justice Butler said nearly the same thing in *Ferry*. *Ferry*, 277 U.S. at 97 ("But here the state by legislative fiat substituted such proof on its part the prima facie presumption set forth.").
[156] *Manley*, 279 U.S. at 7.
[157] Rossi v. United States, 289 U.S. 89, 90-92 (1933) represented a departure from the trend. Peter Rossi ("Mr. Rossi") and Edward Ehrett ("Mr. Ehrett") were convicted of running a commercial distillery without giving the bond required by federal law. *Rossi*, 289 U.S. at 89-90. At their bench trial, the government introduced evidence that Messrs. Rossi and Ehrett operated a distillery and did not post the required bond. *Rossi*, 289 U.S. at 89-90. Neither defendant testified, and the government argued because they bore the burden of proving that they executed a bond and offered no such proof, they should have been declared guilty. *Rossi*, 289 U.S. at 90-91. The Supreme Court affirmed their convictions, finding that proof of persons operating distilleries for an unlawful purpose gave rise to an inference that they operated them without a bond, and they bore the burden of proving otherwise. *Rossi*, 289 U.S. at 91.

By the time the Court decided *Western and Atlantic Railroad v. Henderson*[158] in 1929, the *Turnipseed* formulation had been in place for more than eighteen years, and the Court used it in nine cases,[159] yet for some reason, in its next presumption case, *Morrison v. California*,[160] the Court decided that a new formulation was in order. In *Morrison*, the Court struck down a California statute that made it a crime for persons ineligible for United States citizenship to possess real property.[161] If the government alleged that an ineligible person possessed real property, that person bore the burden of proving his citizenship or eligibility for citizenship.[162] The law required this burden shift in both civil and criminal cases.[163] The Court found that no rational connection existed between proof of a person alleged to be a non-citizen possessing property and the presumption that if he did not rebut the allegation of non-citizenship, he lacked eligibility for citizenship.[164] That is not all the Court did, however; it reformulated the test for a constitutionally valid presumption.[165]

The Court said legislatures can create presumptions and change burdens of proof, but in order for a presumption to pass constitutional muster, "What is proved must be so related to what is inferred in the

[158] Western and Atlantic Railroad v. Henderson, 279 U.S. 639 (1929). In *Henderson*, the Court invalidated a railroad liability statute almost identical to the one it upheld in *Turnipseed*. *Henderson*, 279 U.S. at 640-44.

[159] *Henderson*, 279 U.S. at 640-42; *Manley*, 279 U.S. at 3-4; Ferry v. Ramsey, 277 U.S. 88, 93-97 (1928); *Casey*, 276 U.S. at 416-17; *Yee Hem*, 268 U.S. at 181-85; *Hawes*, 258 U.S. at 2-5; *McFarland*, 241 U.S. at 85-86; *Luria*, 231 U.S. at 19-22; *Lindsley*, 220 U.S. at 81-83.

[160] Morrison v. California, 291 U.S. 82.

[161] *Morrison*, 291 U.S. at 84, 89. In an earlier iteration of this case, the Court rejected a due process challenge to a section of the California law that said when the government proved that a person ineligible for United States citizenship used or occupied real property, the burden shifted to the defendant to prove his citizenship or else he would be convicted. *Morrison*, 291 U.S. at 87, 88 (citing Morrison v. California, 288 U.S. 591 (1933) (appeal dismissed for the want of a substantial federal question)) ("*Morrison* I"). The Court said that once the State has proved the two things the California law required it to prove, i.e., a person's use or occupation of real property and that person's ineligibility for United States citizenship, shifting the burden of proof to that person to rebut the proof of his ineligibility for citizenship did not "impair his immunities under the Constitution." *Morrison*, 291 U.S. at 89-90.

[162] *Morrison*, 291 U.S. at 84. This section of the law differed from the section of the law the Court upheld in *Morrison* I because it shifted the burden of proof based on the government merely alleging the defendant could not become a citizen, whereas the law in *Morrison* I shifted the burden after the State actually proved the defendant's ineligibility for citizenship. *Morrison*, 291 U.S. at 87-90.

[163] *Morrison*, 291 U.S. at 84.

[164] *Morrison*, 291 U.S. at 90-91.

[165] *Morrison*, 291 U.S. at 90-91.

case of a true presumption as to be at least a warning signal according to the teachings of experience."[166] The Court said the following with respect to shifting the burden of proof:

> For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance or, if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to everyone who is unable to bring himself within the range of an exception.[167]

Morrison created a second presumption formulation and Court opined that in future cases, shifting the burden of proof to a defendant might be warranted based on "strong considerations of convenience,"[168] which the Court said would be the case if the normal burden of proof proved too difficult for the prosecution to satisfy.[169] A decade later, however, in *Tot v. United States*, the Court effectively shelved the *Morrison* "balance of convenience" test.[170]

2. Justice Hugo Black Picks Up Where Justice Pierce Butler Left Off

Tot involved a challenge to the Federal Firearms Act, which made it unlawful for persons convicted of a violent crime to possess a firearm shipped or transported in interstate commerce.[171] The law also said that if such a person possessed a firearm, it is presumed he obtained it in interstate commerce.[172] The government proved that Frank Tot had been convicted of a violent crime, but it did not prove

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[166] *Morrison*, 291 U.S. at 90.
[167] *Morrison*, 291 U.S. at 90-91 (citing 1 Greenleaf, Evidence § 79). The Court gave the following examples of how this rule could be applied in particular cases: (1) if a defendant is found in possession of a game the law makes it illegal to possess, the burden can be shifted to him to prove "his special qualifications"; (2) if a defendant is prosecuted for bigamy and the government proves he entered into a second marriage during the life of his first wife, the burden can be shifted to him to prove the lawfulness of the second marriage; and (3) if a defendant is found operating an illegal business or profession, he can be charged with proving he has a license to do so. *Morrison*, 291 U.S. at 91 n.4.
[168] *Morrison*, 291 U.S. at 94.
[169] *Morrison*, 291 U.S. at 94.
[170] Tot v. United States, 319 U.S. 463 (1943).
[171] *Tot*, 319 U.S. at 464; United States v. Tot, 42 F. Supp. 252, 254 (D.N.J. 1941).
[172] *Tot*, 319 U.S. at 464.

that he receive his firearm in interstate commerce.[173] The government argued the presumption satisfied *Turnipseed* because a rational connection existed between the proven fact that Mr. Tot had been convicted of crimes of violence and had a firearm in his possession, and the presumed fact that he received the gun in interstate commerce.[174] The government also argued that the presumption satisfied *Morrison* because proving that Mr. Tot actually obtained the weapon in interstate commerce worked too much of an inconvenience on the government, therefore, he should have been required to prove he did not obtain the gun in interstate commerce.[175]

The Court said the *Turnipseed* and *Morrison* tests "are not independent tests[,] but that the first [*Turnipseed*] is controlling and the second [*Morrison*] but a corollary."[176] Applying *Turnipseed*, the Court held that the presumption that Mr. Tot received a weapon in interstate commerce simply because he had been convicted of crimes of violence at the time he got the gun did not satisfy the test of rationality.[177] Next, the Court rejected the argument that a presumption could be justified on the ground that the defendant possessed knowledge of certain facts known only by him.[178]

Justice Black wrote a concurrence in which he agreed that "mere possession of a pistol coupled with [a] conviction of a prior crime is no evidence at all that the possessor acquired it in interstate commerce."[179] He said this particular statutory presumption effectively compelled the jury to convict Mr. Tot notwithstanding the absence of proof that he actually received the gun in interstate commerce, which is not something the Constitution allows.[180] He also raised the prospect that statutory presumptions that put defendants in the position of having to testify in order to avoid a conviction violate the Fifth Amendment's prohibition on self-incrimination.[181] This would not be the last word Justice Black would have on the Fifth Amendment implications of statutory presumptions.[182]

Between 1958 and 1970, the Court would take up the issue of statutory presumptions six more times, and in each case, Justice Black,

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[173] *Tot*, 319 U.S. at 464-65.
[174] *Tot*, 319 U.S. at 467.
[175] *Tot*, 319 U.S. at 467.
[176] *Tot*, 319 U.S. at 467-70.
[177] *Tot*, 319 U.S. at 468.
[178] *Tot*, 319 U.S. at 469.
[179] *Tot*, 319 U.S. at 472 (Black & Douglas, JJ., concurring).
[180] *Tot*, 319 U.S. at 472 (Black & Douglas, JJ., concurring).
[181] *Tot*, 319 U.S. at 472 (Black & Douglas, JJ., concurring).
[182] Fuller & Urich, supra note 16, at 420-34.

sometimes alone and sometimes with Justice Douglas, took the position that statutory criminal presumptions violated the Fifth Amendment Self-Incrimination Clause, the Sixth Amendment right to a jury trial, and the Fourteenth Amendment Due Process Clause.[183] Despite his impassioned persistence, Justice Black never convinced four other justices to adopt his views on the infirmity of statutory presumptions.[184]

a. *Leary v. United States*[185]

In 1969, the Court added a new wrinkle to its presumption doctrine in a case involving Harvard University professor Timothy Leary.[186] A jury convicted Mr. Leary for knowingly smuggling marijuana into the United States[187] The federal law that served as the basis for the conviction said that unless the defendant explained otherwise, possession of marijuana alone would be sufficient evidence that the drug was illegally imported and that the possessor knew it was illegally imported.[188] Before answering whether the statutory presumption violated the Due Process Clause, the Court had to decide which "test" to use to make that determination.[189] The Court said it had articulated three tests in its prior decisions: (1) the "rational connection" test;[190] (2) the "legislature can criminalize the act giving rise to the presumption" test;[191] and (3) the "balance of convenience" test.[192] The Court then said *Tot* "singled out the [rational connection] test as controlling and had been adhered to in [two subsequent

[183] Turner v. United States, 396 U.S. 398, 425-34 (1970) (Black & Douglas, JJ., dissenting); Leary v. United States, 395 U.S. 6, 55-56 (1969) (Black, J., concurring); United States v. Romano, 382 U.S. 136, 144 (1965) (Black, J., concurring); United States v. Gainey, 380 U.S. 63, 74-88 (1965) (Black, J., dissenting); Harris v. United States, 359 U.S. 19, 24 (1959) (Black & Douglas, JJ., dissenting); *Speiser*, 357 U.S. at 529-32.

[184] *Turner*, 396 U.S. at 425-34 (Black & Douglas, JJ., dissenting); *Leary*, 395 U.S. 6, 55-56 (1969) (Black, J., concurring); *Romano*, 382 U.S. at 144 (Black, J., concurring); *Gainey*, 380 U.S. at 74-88 (Black, J., dissenting); *Harris*, 359 U.S. at 24 (Black & Douglas, JJ., dissenting).

[185] *Leary*, 395 U.S. 6.

[186] *Allen*, 442 U.S. at 160 n.17.

[187] *Leary*, 395 U.S. at 10-11.

[188] *Leary*, 395 U.S. at 12 (citing 21 U.S.C. § 176a).

[189] *Leary*, 395 U.S. at 33-36.

[190] *Leary*, 395 U.S. at 32 n.56 (citing *Henderson*, 279 U.S. at 642; *Yee Hem*, 268 U.S. at 183; *McFarland*, 241 U.S. at 86; *Turnipseed*, 219 U.S. at 43).

[191] *Leary*, 395 U.S. at 32 n.56 (citing *Ferry*, 277 U.S. 88, 94-95).

[192] *Leary*, 395 U.S. at 32 n.56 (citing *Morrison*, 291 U.S. at 91; *Rossi*, 289 U.S. at 91-92; *Yee Hem*, 268 U.S. at 185).

cases.]"[193] The Court read *Tot* as "reduc[ing] to the status of a 'corollary' [the 'balance of convenience' test]" and rejecting outright the notion that a presumption "should be sustained if Congress might have legitimately made it a crime to commit the basic act from which the presumption allowed an inference to be drawn."[194]

At this point in *Leary*, one could reasonably conclude that the Court settled on the "rational connection" test as the single standard by which presumptions would be assessed, which is also what *Tot* attempted to do.[195] *Leary* recognized the need to bring some clarity to its presumption jurisprudence, which is evidenced by its five page exegesis of the Court's presumption decisions dating back to *Turnipseed* in 1910, but what it did next undermined that effort.[196] The Court said the "upshot" of *Tot*, *Gainey*, and *Romano* means

> a criminal statutory presumption must be regarded as irrational or arbitrary, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the [proven] fact on which it is made to depend. And in the judicial assessment[,] the congressional determination favoring the particular presumption must, of course, weigh heavily.[197]

This represented yet another "new" formulation of the standard to determine the validity of statutory presumptions in the criminal law. The Court did not say if its "presumption more likely than not flowing from the proven fact" framework added to the "rational connection" test or replaced it. Moreover, the "more likely than not" assessment of an element of an offense is not proper in a criminal case, which requires proof of the essential elements of an offense beyond a reasonable doubt.[198] Notwithstanding these unanswered questions, *Leary* settled on the "presumption more likely than not flowing from the proven fact" standard and reversed Mr. Leary's conviction.[199]

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[193] *Leary*, 395 U.S. at 34 (citing *Tot*, 319 U.S. at 467). The two subsequent cases are *Romano*, 382 U.S. at 139 and *Gainey*, 380 U.S. at 66-67.
[194] *Leary*, 395 U.S. at 34 (citing *Tot*, 319 U.S. at 469, 472).
[195] *Tot*, 319 U.S. at 467-70.
[196] *Leary*, 395 U.S. at 32-36.
[197] *Leary*, 395 U.S. at 36.
[198] The Court did not reach the issue of whether a statutory criminal presumption would be unconstitutional if it more likely than not flowed from a proven fact but did not do so beyond a reasonable doubt. *Leary*, 395 U.S. at 36 n.64.
[199] *Leary*, 395 U.S. at 37-54. The Court said its assessment of the validity of the "knowledge" presumption required it to determine whether it authorized a jury to

Justice Black agreed that it violated the Constitution to presume Mr. Leary knew the origin of the marijuana found in his possession simply because he possessed it.[200] He did not, however, agree with the reasoning the Court employed to reach that conclusion.[201] In Justice Black's view, the presumption violated the Fifth Amendment, Sixth Amendment, and the Fourteenth Amendment for the same reasons he expressed in his *Tot* concurrence and his dissent in *United States v. Gainey*.[202] As he said more than once before, Congress does not have the authority "to instruct the judge and jury in an American court what evidence is enough for conviction."[203] He also found the law "irrational" and "arbitrary," but made a point of saying he rejected the "rational connection" test as too "nebulous" a standard for gauging whether a statutory presumption violated the Due Process Clause.[204] With this, Justice Black made clear what he hinted at in his *Gainey* dissent, i.e., the "rational connection" test does not sufficiently respect the values of the Fifth, Sixth, and Fourteenth Amendments.[205]

Justice Black would have one more opportunity[206] to convince four of his colleagues to join his view that statutory presumptions violate the right against self-incrimination, the right to a jury trial, and the right to due process of law, and that opportunity would arrive eight months later.[207]

b. *Turner v. United States*[208]

convict a defendant even if the government's proof of his knowledge turned out to be insufficient. *Leary*, 395 U.S. at 37. The Court found that Congress enacted this presumption "to relieve the Government of the burden of having to adduce such evidence at every trial," which marked the second time the Court expressly found that Congress enacted a presumption to take the place of actual proof in a criminal trial. *Leary*, 395 U.S. at 38; *Gainey*, 380 U.S. at 65-66. Justices Butler and McReynolds expressed this precise sentiment in their dissent in *Casey*, 276 U.S. at 426 (Butler & McReynolds, JJ., dissenting).

[200] *Leary*, 395 U.S. at 55-56 (Black, J., concurring).

[201] *Leary*, 395 U.S. at 55-56 (Black, J., concurring); *Romano*, 382 U.S. at 144 (Black, J., dissenting).

[202] *Leary*, 395 U.S. at 55-56 (Black, J., concurring) (citing *Gainey*, 380 U.S. at 74-88 (Black, J., dissenting); *Tot*, 319 U.S. at 472 (Black & Douglas, JJ., concurring)).

[203] *Leary*, 395 U.S. at 55 (Black, J., concurring).

[204] *Leary*, 395 U.S. at 56 (Black, J., concurring).

[205] *Leary*, 395 U.S. at 56 (Black, J., concurring) (citing *Gainey*, 380 U.S. at 74-88 (1965) (Black, J., dissenting)).

[206] Justice Black resigned from the Court on September 17, 1971 and died eight days later. Noah Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 424 (2010).

[207] *Turner*, 396 U.S. 398.

[208] *Turner*, 396 U.S. 398.

A jury convicted James Turner for four drug offenses: (1) concealing heroin while knowing the heroin was brought into the United States illegally; (2) distributing heroin that was not in or from the "original stamped package"; (3) concealing cocaine while knowing the cocaine was brought into the United States illegally; and (4) distributing cocaine that was not in or from the "original stamped package."[209]

The prosecution put the heroin and cocaine into evidence, but did not present any proof that the drugs were brought into the country illegally.[210] The trial judge instructed the jury that because Mr. Turner did not explain why he had heroin and cocaine in his possession, it could infer he knew the drugs were brought into the country illegally.[211] The judge further instructed the jury that Mr. Turner's possession of the heroin and cocaine established prima facie evidence that he "purchased, sold, dispensed, or distributed the drugs not in or from [the] original stamped package."[212] The Supreme Court agreed to hear Mr. Turner's case to decide if his conviction should stand in light of *Leary*.[213]

Turner described the standard for assessing the constitutional validity of statutory presumptions as "requiring the invalidation of the statutorily authorized inference 'unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the [proven] fact upon which it is made to depend.'"[214] *Turner* got this from *Leary*, and *Leary* got it from a synthesis of *Tot*, *Gainey*, and *United States v. Romano*.[215] *Leary* left open the question of whether the "presumed fact more likely than not flows from the proven fact" formulation replaced *Turnipseed*'s "rational connection" formulation. *Turner* did not answer this question either.

Applying *Leary*, the Court concluded that because it was illegal to import or manufacture heroin in the United States, it was sound for the jury to infer that if a person had heroin in his possession, he knew it was illegally imported.[216] The Court then invoked *Turnipseed* and said that in the six decades since that decision, defendants were on notice

[209] *Turner*, 396 U.S. at 400-02.
[210] *Turner*, 396 U.S. at 402.
[211] *Turner*, 396 U.S. at 402.
[212] *Turner*, 396 U.S. at 402-03.
[213] *Turner*, 396 U.S. at 403.
[214] *Turner*, 396 U.S. at 404-05 n.4 (citing *Romano*, 382 U.S. 136; *Gainey*, 380 U.S. 63; *Tot*, 319 U.S. 463).
[215] *Turner*, 396 U.S. at 404-05; *Leary*, 395 U.S. at 36.
[216] *Turner*, 396 U.S. at 406-08.

that juries could infer guilt from heroin possession alone; that the inference could be rebutted by proof that the heroin was domestic in origin; and that if proof of heroin possession was not "sufficiently connected" to the presumed fact that the possessor knew the heroin was illegally imported, then the inference "itself" could be "[subjected] to attack."[217] This marked the eighth time the Court used *Turnipseed* as a baseline for assessing the constitutionality of a statutory presumption in a criminal case.[218] The Court said that the statutory inference that a possessor of heroin knows the drug was illegally imported made simple possession of heroin a criminal offense, and if a defendant in such a case wanted to avoid a conviction, he needed to prove his heroin was domestic heroin by either testifying himself or having someone conversant with drug trafficking testify.[219]

The Court had "no reasonable doubt" that in 1970, no one produced heroin in the United States, therefore, it affirmed Mr. Turner's heroin convictions.[220] It had a different view when it came to cocaine. Domestic production of cocaine was "sufficiently large" that under *Leary*, the presumption that one who possesses cocaine knows it was illegally imported could not be sustained, and the Court reversed Mr. Turner's cocaine convictions.[221] The Court used *Leary* to evaluate the cocaine law, but used *Leary* and *Turnipseed* for the heroin law.[222] The Court then overruled *Casey v. United States*[223] to the extent it could be read to authorize a conviction for purchasing, selling, dispensing, or distributing cocaine "not in or from the original stamped package" based on proof of possession alone.[224]

Justice Black, joined by Justice Douglas, dissented, and wrote what would be his final judicial words on the issue of statutory presumptions in the criminal law.[225] The first sentence set the tone for his entire dissent: "Few if any decisions of this Court have done more

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[217] *Turner*, 396 U.S. at 409 (citing *Turnipseed*, 219 U.S. at 43).
[218] *Romano*, 382 U.S. at 139-40; *Gainey*, 380 U.S. at 67-71; *Tot*, 319 U.S. at 467-72 (1943); *Casey*, 276 U.S. at 418-20; *Yee Hem*, 268 U.S. at 183-85; *Hawes*, 258 U.S. at 4-5; *Bailey*, 219 U.S. at 238-45.
[219] *Turner*, 396 U.S. at 409.
[220] *Turner*, 396 U.S. at 408, 415-16 ("We have no reasonable doubt that at the present time[,] heroin is not produced in this country[,] therefore[,] the heroin Turner had was smuggled heroin…. Concededly, heroine could be made in this country, at least in tiny amounts. But the overwhelming evidence is that the heroin consumed in the United States is illegally imported. To possess heroin is to possess imported heroin.").
[221] *Turner*, 396 U.S. at 418-19.
[222] *Turner*, 396 U.S. at 408-10, 417-19.
[223] *Casey*, 276 U.S. 413.
[224] *Turner*, 396 U.S. at 423-24.
[225] *Turner*, 396 U.S. at 425-34 (Black & Douglas, JJ. dissenting).

than this one today to undercut and destroy the due process safeguards the [F]ederal Bill of Rights specifically provides to protect defendants charged with crime in United States courts."[226] He would have reversed each of Mr. Turner's convictions because the government did not so much as attempt to prove that the heroin or cocaine was actually imported illegally or that Mr. Turner had actual knowledge that the drugs were imported illegally.[227] This failure of proof violated the principle that the government "must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense."[228]

He went on to say that statutory criminal presumptions would astound the drafters of the Constitution and the Bill of Rights because they did not intend to allow the government to "create crimes of several separate and independent parts and then relieve [it] of proving a portion of them."[229] He added that, "It would be a senseless and stupid thing for the Constitution to provide [the safeguards found in the Bill of Rights] to protect the accused from governmental abuses if the Government by some sleight-of-hand trick with presumptions make[s] nullities of those [protections.]"[230] What caused Justice Black the most consternation was that the jury did not explicitly find that Mr. Turner knew the heroin and cocaine were illegally imported or that he actually got the

[226] *Turner*, 396 U.S. at 425. Justice Black then listed which constitutional rights he thought the Court "weaken[ed]": (1) the Fifth Amendment right not to be compelled to answer for capital or infamous crimes except on a presentment or indictment of a grand jury; (2) the Sixth Amendment right to be informed of the nature and cause of the accusation; (3) the Fifth Amendment right against self-incrimination; (4) the Fifth Amendment right to due process of law; (5) the Sixth Amendment right to confront witnesses; (6) the Sixth Amendment right to compulsory process; (7) the Sixth Amendment right to counsel; and (8) the Sixth Amendment right to a trial by jury. *Turner*, 396 U.S. at 425. Using language strikingly familiar to what is commonly heard in contemporary discussions of judicial decisions and the judges who make them, Justice Black accused the justices in the majority of using an "activist philosophy" that led them to "construe [the] Constitution as meaning what they now think it should mean in the interest of 'fairness and decency' as they see it." *Turner*, 396 U.S. at 426.

[227] *Turner*, 396 U.S. at 428-29.

[228] *Turner*, 396 U.S. at 427-29. He agreed with the majority that the convictions for possessing illegally imported cocaine and possessing cocaine from an unstamped package should be reversed. *Turner*, 396 U.S. at 429. He did not agree, however, with the majority's reasoning; he would have reversed based on the lack of evidence that the cocaine was illegally imported and the lack of evidence that it came from an unstamped package. *Turner*, 396 U.S. at 429.

[229] *Turner*, 396 U.S. at 430-31.

[230] *Turner*, 396 U.S. at 430.

substances from an unstamped package.[231] Instead, the jury just inferred these two facts based on proof of possession alone.[232]

In a precursor to *Apprendi v. New Jersey*,[233] Justice Black said the Sixth Amendment grants defendants the right to have "the jury and the jury alone" find the facts of a case, including whether each element of the offense has been proved beyond a reasonable doubt, and statutory presumptions violate this right.[234] Furthermore, legislatures, while authorized to declare what a crime is, cannot "define and limit the quantum of evidence necessary to convict."[235] Justice Black concluded his dissent with an analysis of the Fifth Amendment implications of statutory criminal presumptions.[236] He took the view that the presumptions unconstitutionally shift the burden of proof to defendants to prove their innocence.[237] A defendant like Mr. Turner either had to testify regarding what he knew or did not know, or risk having the trial judge instruct the jury that the lack of an explanation regarding his knowledge would be sufficient to convict him.[238] This Hobson's choice undermines a defendant's Fifth Amendment privilege against self-incrimination and the accompanying right to not have a jury draw an adverse inference from his election not to testify.[239]

By the standards of the early 1970s, *Turner* is a long case, covering thirty-seven pages in the United States Reports with forty-seven footnotes.[240] Yet the Court did not use any of those pages or footnotes to clarify whether *Leary* or *Turnipseed* would control when it came to evaluating statutory criminal presumptions. Forty months later, the Court would get that chance in a case about $876.52 in stolen checks.[241]

3. The "Reasonable Doubt and More Likely Than Not Standard"

[231] *Turner*, 396 U.S. at 431.
[232] *Turner*, 396 U.S. at 431.
[233] *Apprendi*, 530 U.S. 466.
[234] *Turner*, 396 U.S. at 431.
[235] *Turner*, 396 U.S. at 431-32.
[236] *Turner*, 396 U.S. at 432-34.
[237] *Turner*, 396 U.S. at 432-33.
[238] *Turner*, 396 U.S. at 432-33.
[239] *Turner*, 396 U.S. at 432-33.
[240] *Turner*, 396 U.S. at 398-434.
[241] Barnes v. United States, 412 U.S. 837, 838-39 (1973).

On July 8, 1971, James Barnes deposited four checks totaling $876.52 into an account he set up for the fictitious "Clarence Smith."[242] The checks did not belong to Mr. Barnes; he intercepted them in the mail and forged the endorsements.[243] The government charged him with two counts of possession of stolen United States Treasury checks with knowledge of their being stolen; forging stolen checks; and "uttering" the checks with knowledge of the forged endorsements.[244] The trial court instructed the jury that unless Mr. Barnes explained why he had recently stolen property in his possession, it could infer that he knew the checks were stolen.[245] Mr. Barnes did not testify, and the jury found him guilty on all charges.[246] The Supreme Court agreed to hear the case to decide whether the trial court's instruction to the jury violated due process.[247]

The Court began by reviewing its holdings in *Turner*, *Leary*, *Romano*, and *Gainey* and concluded that "the teaching of the foregoing cases is not altogether clear."[248] The Court drew this conclusion because of the different formulations those cases used to assess the validity of statutory criminal presumptions.[249] The language varied from "rational connection," to "more likely than not," to "reasonable doubt."[250] The *Barnes* Court explained that "the ambiguity" resulting from these differing formulations owed itself to "variations in language and focus rather than to differences in substance."[251] The Court then recast these three tests into a new one: if the evidence necessary to invoke a statutory inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt, or if the evidence is sufficient for a rational juror to find the inferred fact as more likely than not, the inference complies with due process.[252]

Had the Court limited the use of presumptions in criminal cases to those instances where a reasonable juror could find beyond a reasonable doubt that the presumed fact flows from the proven one, the argument against statutory presumptions in criminal cases would be considerably weaker because at least the criminal law standard of proof

[242] *Barnes*, 412 U.S. at 838-39.
[243] *Barnes*, 412 U.S. at 838-39.
[244] *Barnes*, 412 U.S. at 838.
[245] *Barnes*, 412 U.S. at 838.
[246] *Barnes*, 412 U.S. at 839-40.
[247] *Barnes*, 412 U.S. at 838.
[248] *Barnes*, 412 U.S. at 841-43.
[249] *Barnes*, 412 U.S. at 843.
[250] *Barnes*, 412 U.S. at 843.
[251] *Barnes*, 412 U.S. at 843.
[252] *Barnes*, 412 U.S. at 843.

would still be the guidepost. But that is not what the Court did. It went one step further—and one step too far—and authorized the use of presumptions in criminal cases as long as a reasonable juror could find the presumed fact more likely than not flows from the proven one. "More likely than not" is synonymous with "a preponderance of the evidence," which is the standard of proof in civil cases.[253] The civil standard of proof should not be used when a jury is deciding whether the prosecution has proved an essential element of a crime. If a jury is going to presume the existence of an element of a crime based on proof of a predicate fact, it should only be allowed to do so if it is convinced beyond a reasonable doubt that the presumed fact flows from the proven one. *Barnes* did what *Turnipseed* did and imported a civil burden of proof into a criminal case for the purpose of evaluating the constitutionality of a presumption.[254]

Using its newly announced framework, the *Barnes* Court affirmed Mr. Barnes's convictions, finding that because he did not explain why he had recently stolen checks payable to other persons in his possession, a jury could find beyond a reasonable doubt that he knew the checks were stolen.[255] The Court agreed that "the practical effect" of instructing the jury to infer Mr. Barnes knew the checks were stolen because he did not explain otherwise, shifted the "burden of going forward with evidence to the defendant."[256] It held this is permissible so long as a rational juror could conclude beyond a reasonable doubt that the inferred fact flows from the proven one.[257] In doing so, however, the Court relied on language in *Tot v. United States* that said the burden of going forward with evidence can be shifted to the defendant when there is a rational connection between the proven fact and the presumed fact.[258] In Mr. Barnes's case, the presumption satisfied the beyond a reasonable doubt standard, therefore it also satisfied the lesser rational connection standard.[259] There is, however, a problem with the way the Court framed the issue: *Tot* did not say what the Court says it did.[260]

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[253] Sturdivant v. Target Corp., 464 F. Supp. 2d 596, 598 (N.D. Tex. 2006) ("'More likely than not' is the classic restatement of the preponderance of the evidence standard used by juries to decide civil cases….").
[254] *Barnes*, 412 U.S. at 843; *Turnipseed*, 219 U.S. at 43.
[255] *Barnes*, 412 U.S. at 845-46.
[256] *Barnes*, 412 U.S. at 846 n.11.
[257] *Barnes*, 412 U.S. at 846 n.11.
[258] *Barnes*, 412 U.S. at 846 n.11 (citing *Tot*, 319 U.S. at 467-68).
[259] *Barnes*, 412 U.S. at 846 n.11 (citing *Tot*, 319 U.S. at 467-68).
[260] Justice Douglas pointed this out in his dissent. *Barnes*, 319 U.S. at 849-51 (Douglas, J., dissenting).

Tot rejected the notion of shifting the burden of going forward with evidence to the defense based on a mere rational connection between the presumed fact and the proven one.[261] *Tot* also rejected the argument that a rational connection existed between the proven fact of gun possession and the presumed fact of knowledge that the gun was shipped or transported in interstate commerce.[262] At bottom, *Tot* does not support *Barnes*'s conclusion that it is permissible to shift the burden of going forward with evidence to the defendant if there is a rational connection between the presumed fact and the proven one.

Justice Douglas dissented, and took issue with presumptions and inferences in criminal cases more broadly, describing their use as "treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense."[263] He concluded his dissent by echoing what Justice Hugo Black said eight years earlier *United States v. Gainey*: "The step we take today will be applauded by prosecutors, as it makes their way easy.… What we do today, is, I think, extremely disrespectful of the constitutional regime that controls the dispensation of criminal justice."[264]

Barnes held that a statutory presumption "accords with due process" so long as a rational juror could find that a presumed fact flows from a proven predicate fact, and is convinced of that finding beyond a reasonable doubt or by a preponderance of the evidence.[265] *Barnes* also established that a presumption can be used to shift the burden of going forward with evidence to the defendant if a rational juror could find beyond a reasonable doubt that the presumed fact flows from the proven fact, or if there is a rational connection between the presumed fact and the proven fact.[266] This burden shifting formulation would be put to the test twenty-three months later in a murder case from the State of Maine, *Mullaney v. Wilbur*.[267]

In 1966 the State of Maine charged Stillman E. Wilbur with murder.[268] Mr. Wilbur did not testify at his trial, but his lawyer offered

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[261] *Tot*, 319 U.S. at 467-68.
[262] *Tot*, 319 U.S. at 467-68.
[263] *Barnes*, 412 U.S. at 850.
[264] *Barnes*, 412 U.S. at 852; *Gainey*, 380 U.S. at 83 (Black, J., dissenting) ("Undoubtedly a presumption [that] can be used to produce convictions without the necessity of proving a crucial element of the crime charged—and a sometimes difficult-to-prove element at that—is a boon to prosecutors and an incongruous snare for defendants in a country that claims to require proof of guilt beyond a reasonable doubt.")
[265] *Barnes*, 412 U.S. at 841-43.
[266] *Barnes*, 412 U.S. at 846 n.11 (citing *Tot*, 319 U.S. 463).
[267] *Mullaney*, 421 U.S. 684.
[268] State v. Wilbur, 278 A.2d 139, 141 (Me. 1971).

two arguments: (1) he lacked the intent to kill, therefore, the killing was not unlawful; and (2) the killing was manslaughter rather than murder because it occurred in the heat of passion following a provocation by the victim.[269] The trial court instructed the jury that "malice aforethought is an essential and indisputable element of the crime of murder, without which the homicide would be manslaughter."[270] The court further instructed the jury unless Mr. Wilbur "proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation," malice aforethought would be "conclusively" imputed to him if the government proved that he killed the victim intentionally and unlawfully."[271] The jury convicted Mr. Wilbur of murder.[272] After having his conviction vacated in a federal habeas corpus proceeding, the Supreme Court agreed to hear the case to decide whether Maine's law requiring a defendant prove by a preponderance of the evidence that he acted in the heat of passion in order to reduce murder to manslaughter violated due process.[273]

The Court held that Maine's law "affirmatively shifted the burden of proof to the defendant."[274] *Mullaney* made it clear that if intent is an element of an offense, the burden cannot be shifted to the defendant to prove he lacked intent.[275] In light of this holding, the Court said that "[due process] requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."[276] Two years later, the Court would limit this requirement in the case of *Patterson v. New York*.[277]

The State of New York charged Gordon Patterson, Jr. with second degree murder, which required the prosecution to prove he intended to cause the death of another person and actually caused the death of another person.[278] State law allowed a murder defendant to raise the affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," but required the defendant to prove the

[269] *Mullaney*, 421 U.S. at 685.
[270] *Mullaney*, 421 U.S. at 685-86.
[271] *Mullaney*, 421 U.S. at 686.
[272] *Mullaney*, 421 U.S. at 687.
[273] *Mullaney*, 421 U.S. at 687-90.
[274] *Mullaney*, 421 U.S. at 701 (citing *Speiser*, 357 U.S. at 525-26).
[275] *Mullaney*, 421 U.S. at 702 (citing *Leary*, 395 U.S. at 45; *Tot*, 319 U.S. at 469).
[276] *Mullaney*, 421 U.S. at 703.
[277] *Patterson*, 432 U.S. 197.
[278] *Patterson*, 432 U.S. at 198.

affirmative defense by a preponderance of the evidence.[279] If the defendant successfully asserted the defense, he would be guilty of manslaughter instead of murder.[280] The trial court instructed the jury that if it found beyond a reasonable doubt that Mr. Patterson intentionally killed the victim, but he also proved by a preponderance of the evidence that he acted under the influence of an extreme emotional disturbance, it must convict him of manslaughter instead of murder.[281] The jury convicted Mr. Patterson of murder.[282] He petitioned the Supreme Court to reverse his conviction in light of *Mullaney*'s holding that due process forbade shifting the burden to the defendant to prove the absence of malicious intent.[283]

The Court distinguished *Mullaney* and affirmed Mr. Patterson's conviction.[284] The Court reasoned that *Mullaney* prohibited shifting the burden of proof to the defendant to negate an element of an offense; an affirmative defense is not an element of an offense; therefore, there is no constitutional bar to requiring a defendant asserting an affirmative defense to prove the facts establishing that defense.[285] *Patterson* reaffirmed the principle that due process requires that the prosecution prove all elements of an offense beyond a reasonable doubt, but in so doing, declined to require the government to "disprove beyond a reasonable doubt" those facts "constituting any and all affirmative defenses related to the culpability of an accused."[286] The Court did, however, caution legislatures that they could not simply recast elements of offenses as affirmative defenses in order relieve prosecutors of their burdens of proof.[287]

4. *Allen*, *Sandstrom*, and *Francis* Establish the Current Doctrine

Between 1979 and 1985, the Court decided three cases that established its current criminal presumption doctrine.[288] Although the

[279] *Patterson*, 432 U.S. at 199-200.
[280] *Patterson*, 432 U.S. at 199.
[281] *Patterson*, 432 U.S. at 200.
[282] *Patterson*, 432 U.S. at 200.
[283] *Patterson*, 432 U.S. at 200-01.
[284] *Patterson*, 432 U.S. at 205-06.
[285] *Patterson*, 432 U.S. at 210.
[286] *Patterson*, 432 U.S. at 210.
[287] *Patterson*, 432 U.S. at 210 (citing *Speiser*, 357 U.S. at 523-25; *Tot*, 319 U.S. at 469 (a legislature cannot declare that all the elements of guilt have been satisfied based solely on the fact that a person has been charged and identified); *Morrison*, 291 U.S. 82; *McFarland*, 241 U.S. at 86 (a legislature cannot declare someone guilty or presumptively guilty of an offense)).
[288] *Francis*, 471 U.S. 307; *Sandstrom*, 442 U.S. 510; *Allen*, 442 U.S. 140.

Court tried to bring some much needed clarity to exactly how statutory presumptions are to be evaluated in criminal cases, it did not do so, and arguably made things even more confusing than they were before it undertook the project.

a. *County Court of Ulster County v. Allen*[289]

On March 28, 1973, two New York state troopers stopped a vehicle for speeding on the New York Thruway.[290] When one of the troopers approached the vehicle he saw two firearms through the window of the car.[291] After prying open the trunk, the officers found a machine gun and heroin.[292] The State charged the four vehicle occupants with illegal possession of firearms.[293] The statute forming the basis of the charge said "the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons [in the] vehicle."[294] The trial court instructed the jury that it could "infer possession from the defendants' presence in the car."[295] The jury convicted all four for illegal possession of the handguns.[296]

The facts of *Allen* are very similar to those of *Tot v. United States* and the case should have been resolved with a straight-forward application of *Tot*. Instead, the Court embarked on yet another reformulation of its presumption jurisprudence, and rather than making it simpler, it made it more confusing.[297] The Court started by saying the validity of "inferences and presumptions … vary from case to case … depending on the strength of the connection between the particular basis and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently."[298] This represented the Court's synthesis of *Barnes v. United States*, *Tot v. United States*, and *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*. This, however, is very different from *Barnes*'s holding that a criminal presumption accords with the Constitution so long as a rational juror could find that the presumed fact flows from the

[289] *Allen*, 442 U.S. 140.
[290] *Allen*, 442 U.S. at 143.
[291] *Allen*, 442 U.S. at 143.
[292] *Allen*, 442 U.S. at 143-44.
[293] *Allen*, 442 U.S. at 142-43.
[294] *Allen*, 442 U.S. at 142.
[295] *Allen*, 442 U.S. at 145.
[296] *Allen*, 442 U.S. at 144.
[297] *Allen*, 442 U.S. at 156-67.
[298] *Allen*, 442 U.S. at 156 (citing *Barnes*, 412 U.S. at 843-44; *Tot*, 319 U.S. at 464, 467; *Turnipseed*, 219 U.S. at 42).

proven fact and can make that finding by a preponderance of the evidence or beyond a reasonable doubt.[299] It sounds more like *Turnipseed*'s holding that a presumption is valid if the presumed fact is rationally connected to the proven fact.[300] Next, the Court said that notwithstanding what the framework had been for assessing the validity of presumptions, "the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."[301]

Then the Court described the various types of presumptions and their effect on a defendant's rights.[302] Permissive presumptions allow, but do not require, the fact finder to presume a fact based on proof of a predicate fact, and place neither the burden of production nor the burden of persuasion on the defendant.[303] With permissive presumptions, the presumed fact can be considered prima facie evidence of the predicate fact.[304] These presumptions allow juries to accept or reject the presumed fact and "affect the application of the 'beyond a reasonable doubt' standard only if … there is no rational way the jury could make the connection permitted by the inference."[305] This suggests that if there is a "rational connection" between the presumed fact and the predicate fact, the presumption is valid. If this is true, it is nothing more than a reprise of *Turnipseed*, which would allow a jury in a criminal case to determine by a preponderance of the evidence if an element of an offense has been proved.

The Court then turned to mandatory presumptions, which it described as "a far more troublesome evidentiary device."[306] These presumptions "affect not only the strength of the 'no reasonable doubt' burden[,] but also the placement of that burden."[307] They require that juries find the presumed fact if the predicate fact is proved, unless the defendant presents evidence to "rebut the presumed connection

[299] *Barnes*, 412 U.S. at 843.
[300] *Turnipseed*, 219 U.S. at 43.
[301] *Allen*, 442 U.S. at 156 (citing *Mullaney*, 421 U.S. at 702-03 n.31; *In re Winship*, 397 U.S. at 364).
[302] *Allen*, 442 U.S. at 157-63.
[303] *Allen*, 442 U.S. at 157.
[304] *Allen*, 442 U.S. at 157.
[305] *Allen*, 442 U.S. at 157.
[306] *Allen*, 442 U.S. at 157-60.
[307] *Allen*, 442 U.S. at 157.

between the two facts."[308] The Court then divided mandatory presumptions into two types: (1) those that shift the burden of production to the defendant; and (2) those that shift the burden of proof to the defendant.[309]

Turning back to the facts in *Allen*, the Court considered the presumption that the presence of a firearm in a vehicle is presumptive evidence of its illegal possession by any occupant of the vehicle a permissive presumption.[310] Because it was permissive, the jury could reject it even if the defendants did not introduce evidence to rebut it.[311] Moreover, the trial court instructed the jurors that a mandatory presumption of the defendants' innocence controlled unless they were satisfied beyond a reasonable doubt that the defendants possessed the handguns "in the manner described."[312] Last, the trial court instructed the jury to consider all the facts, including those that supported or contradicted the presumption that the defendants possessed the firearms, and to decide the case without regard to how much evidence the defendants introduced.[313]

Based on the foregoing, the Court held that the presumption was "entirely rational."[314] The Court said the case was essentially one in which firearms were lying on the floor or the seat of a vehicle in "plain view" of its occupants, therefore, it was "surely rational" to infer that all of them had knowledge of the guns along with the ability and intent to "exercise dominion and control over the weapons."[315] The presumption satisfied the standards announced in *Tot* and *Leary* because there was a "rational connection" between the presumed fact that the guns were possessed illegally and the proven fact that the possessors were in a vehicle with the guns, and the presumed fact "more likely than not" flowed from the proven one.[316]

The vehicle occupants argued that the presumption had to satisfy the more rigorous "beyond a reasonable doubt" standard rather than the "more likely than not standard" and the Court responded by saying permissive presumptions and mandatory presumptions should

[308] *Allen*, 442 U.S. at 157 (citing *Turner*, 396 U.S. at 401-02 n.1; *Leary*, 395 U.S. at 30; *Romano*, 382 U.S. at 137 n.4; *Tot*, 319 U.S. at 469).
[309] *Allen*, 442 U.S. at 157 n.16.
[310] *Allen*, 442 U.S. at 160-61.
[311] *Allen*, 442 U.S. at 160-61.
[312] *Allen*, 442 U.S. at 161-62.
[313] *Allen*, 442 U.S. at 162.
[314] *Allen*, 442 U.S. at 162-63.
[315] *Allen*, 442 U.S. at 164-65.
[316] *Allen*, 442 U.S. at 165 (citing *Leary*, 395 U.S. at 36; *Tot*, 319 U.S. at 467).

be evaluated differently.[317] A permissive presumption is valid "as long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt."[318] The prosecution can rely on a permissive presumption as part of its proof, but if it constitutes the entire proof, it will not pass constitutional muster.[319] If the remaining evidence in the case satisfies the beyond a reasonable doubt standard, the presumption need only satisfy the standard announced in *Leary* that the presumed fact must "more likely than not" flow from the proven fact.[320] On the other hand, if the presumption is mandatory, which means the jury must accept it even if the presumption is the only evidence the prosecution relies on, it has to satisfy the beyond a reasonable doubt standard announced in *Barnes*.[321] The prosecution can rely solely on a mandatory presumption as long as a rational juror could find that the presumed fact flows from the proven fact beyond a reasonable doubt.[322]

When a court has to decide whether a presumption is permissive or mandatory, "the jury instructions will generally control."[323] If a jury is explicitly instructed that a presumption is permissive or it is told to consider the presumption as "'a circumstance to be considered along with all the other circumstances in the case,'" it is permissive.[324] On the other hand, if a jury is instructed that a presumption is or shall be sufficient to authorize a conviction, it is mandatory.[325]

Allen established that the standard a presumption has to satisfy depends on whether it is permissive or mandatory, and it did so without overruling any of the Court's prior presumption cases.[326] It implicitly acknowledged, however, what *Barnes* explicitly stated: "the teaching [of the Court's prior presumption] cases is not altogether clear."[327] *Barnes* actually held that a presumption is valid if it satisfies the beyond a reasonable doubt standard or the more likely than not standard.[328] *Leary* held that a statutory presumption is "unconstitutional

[317] *Allen*, 442 U.S. at 166-67.
[318] *Allen*, 442 U.S. at 166-67.
[319] *Allen*, 442 U.S. at 166-67.
[320] *Allen*, 442 U.S. at 166-67 (citing *Leary*, 395 U.S. at 36).
[321] *Allen*, 442 U.S. at 166-67 (citing *Barnes*, 412 U.S. at 842-43).
[322] *Allen*, 442 U.S. at 167.
[323] *Allen*, 442 U.S. at 157 n.16.
[324] *Allen*, 442 U.S. at 157 n.16 (quoting *Gainey*, 380 U.S. at 69-70).
[325] *Allen*, 442 U.S. at 157 n.16 (citing *Romano*, 382 U.S. at 138).
[326] *Allen*, 442 U.S. at 166-67.
[327] *Barnes*, 412 U.S. at 841-43.
[328] *Barnes*, 412 U.S. at 843 ("[I]f a statutory inference submitted to the jury as sufficient to support [a] conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the

unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the [proven] fact upon which it is made to depend."[329] One could read both cases as authorizing the use of a presumption, be it permissive or mandatory, if it satisfies the more likely than not standard. *Allen* squared both holdings (or at least attempted to) by announcing a novel rule that permissive presumptions have to satisfy the more likely than not standard while mandatory presumptions have to satisfy the beyond a reasonable doubt standard.[330]

Justice Powell dissented and said that he had not "found [any] recognition in the Court's prior decisions that [the] distinction [between permissive and mandatory presumptions] is important in analyzing presumptions used in criminal cases."[331] He was correct; *Allen* marked the first case in which the Court said that such a distinction is critical to the constitutional analysis. He took the position that a presumption is constitutional as long as it more likely than not flows from a proven predicate fact.[332] He did not think, however, that the presumption in *Allen* passed this test because he did not agree that it was more likely than not that one who occupies a vehicle in which there is a handgun possesses the handgun illegally.[333] Fourteen days after announcing its new presumption framework, the Court put it to the test in the second of the three cases that constitute the Court's current presumption doctrine.[334]

b. *Sandstrom v. Montana*[335]

On July 18, 1977, the State of Montana tried David Sandstrom for "deliberate homicide" for "purposely or knowingly" causing the death of another person.[336] Mr. Sandstrom's lawyer argued to the jury that he [Mr. Sandstrom] did not kill the victim "purposely or knowingly" because at the time of the killing he suffered from a

inferred fact beyond a reasonable doubt) *as well as* the more-likely-than-not standard, then it clearly accords with due process.") (emphasis added).
[329] *Leary*, 395 U.S. at 36.
[330] *Allen*, 442 U.S. at 166-67.
[331] *Allen*, 442 U.S. at 170 n.3.
[332] *Allen*, 442 U.S. at 172.
[333] *Allen*, 442 U.S. at 174.
[334] *Allen*, 442 U.S. at 140; *Sandstrom*, 442 U.S. at 510.
[335] *Sandstrom*, 442 U.S. 510.
[336] State v. Sandstrom, 176 Mont. 492, 493, 580 P.2d 106, 107 (1978).

"personality disorder aggravated by alcohol consumption."[337] The prosecution requested that the jury be instructed to "[presume] that a person intends the ordinary consequences of his voluntary acts."[338] Mr. Sandstrom objected, arguing that the requested instruction violated due process because it impermissibly shifted the burden of proof to him on the issue of "purpose or knowledge."[339] He offered the trial judge a number of federal judicial decisions to support his objection, including *Mullaney v. Wilbur*, but the judge responded, "You can give those to the Supreme Court. The objection is overruled."[340] The jury convicted Mr. Sandstrom of deliberate homicide.[341] The Supreme Court agreed to hear the case to decide the question of "whether, in a case in which intent is an element of the crime charged, the jury instruction, 'the law presumes that a person intends the ordinary consequences of his voluntary acts,' violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt."[342]

In answering this question, the Court began by stating that the first question when evaluating the constitutionality of a statutory criminal presumption is what type of presumption it is, which in turn requires an analysis of the jury instructions.[343] The trial judge instructed Mr. Sandstrom's jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" without any other qualifier, and because of this, the Court considered this a mandatory presumption that impermissibly shifted the burden of proof to Mr. Sandstrom to disprove his intent.[344] If a defendant's state of mind or intent is an element of an offense, proof of that element "cannot be taken from the trier of fact through reliance on a presumption of wrongful intent."[345] Because the instruction shifted the burden of proof to Mr. Sandstrom, it violated due process, and the Court reversed his conviction.[346]

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[337] *Sandstrom*, 442 U.S. at 512. Mr. Sandstrom did not rely on the affirmative defense of "mental disease or defect or extreme emotional disturbance" like Gordon Patterson did in *Patterson*, 432 U.S. at 198-200.
[338] *Sandstrom*, 442 U.S. at 513.
[339] *Sandstrom*, 442 U.S. at 513.
[340] *Sandstrom*, 442 U.S. at 513 (citing *Mullaney*, 421 U.S. 684).
[341] *Sandstrom*, 442 U.S. at 513.
[342] *Sandstrom*, 442 U.S. at 512.
[343] *Sandstrom*, 442 U.S. at 514 (citing *Allen*, 442 U.S. at 157-63).
[344] *Sandstrom*, 442 U.S. at 514-515.
[345] *Sandstrom*, 442 U.S. at 522-23 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 430 (1978)).
[346] *Sandstrom*, 442 U.S. at 524, 527.

The combination of *Allen* and *Sandstrom* seemed to provide an understandable and workable framework for evaluating relatively straight-forward statutory criminal presumptions. But what if a jury is instructed that a presumption is mandatory, but the defendant may rebut it? Is this a permissive or mandatory presumption? Does it shift the burden to the defendant? The Court answered these questions in the third case that constitutes its current presumption doctrine.[347]

c. *Francis v. Franklin*[348]

On January 17, 1979, Raymond Lee Franklin temporarily escaped from the Cobb County, Georgia jail.[349] At the time, he was at a local dentist's office receiving dental care, and while momentarily free of handcuffs, he took a gun from a guard, took the keys to the dentist's car, and took the dentist's assistant as his hostage.[350] He drove for a while and stopped at the home of Claude Collie.[351] Mr. Franklin "pounded" on Mr. Collie's "heavy wooden front door," and Mr. Collie answered.[352] When Mr. Collie saw Mr. Franklin pointing a gun at him, he slammed the door, the gun went off, and the bullet went through the door and fatally struck Mr. Collie in the chest.[353] Mr. Franklin fled the scene and was captured a short time later.[354] After being captured, he admitted he shot Mr. Collie, but insisted he did so as an accidental response to the slamming of the door.[355]

The State of Georgia charged Mr. Franklin with "malice murder" and kidnaping.[356] During his trial, Mr. Franklin introduced "substantial circumstantial evidence" that he shot Mr. Collie accidentally.[357] The trial court instructed the jury that Mr. Franklin could not be found guilty of a crime committed by accident, but "the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted."[358] The court further instructed the jury that "a person of sound mind and

[347] *Francis*, 471 U.S. 307.
[348] *Francis*, 471 U.S. 307.
[349] Franklin v. State, 245 Ga. 141, 141, 263 S.E.2d 666, 667 (1979).
[350] *Francis*, 471 U.S. at 309-10.
[351] *Franklin*, 245 Ga. at 141-42, 263 S.E.2d at 667-68.
[352] *Francis*, 471 U.S. at 310.
[353] *Francis*, 471 U.S. at 310.
[354] *Francis*, 471 U.S. at 310-11.
[355] *Francis*, 471 U.S. at 310-11.
[356] *Francis*, 471 U.S. at 311.
[357] *Francis*, 471 U.S. at 311.
[358] *Francis*, 471 U.S. at 311.

discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted."[359] The trial court's final instruction said, "A person will not be presumed to act with criminal intention[,] but … the jury may find criminal intention upon a consideration of the words, conduct, demeanor, motive[,] and all other circumstances connected with the act for which the accused is prosecuted."[360] The jury convicted Mr. Franklin and sentenced him to death.[361] The Supreme Court agreed to hear the case to answer whether the jury instructions violated the due process and the principles announced in *Sandstrom*.[362]

The Court framed the question before it as "almost identical" to the question it answered in *Sandstrom*, i.e., "whether the challenged [instructions effectively relieved] the State of the burden of [proving Mr. Franklin's] state of mind by creating a mandatory presumption of intent upon proof by the State of other elements of the offense."[363] The Court answered this question by following the rule laid down in *Allen*, which required it to first determine whether the presumption was permissive or mandatory.[364] The Court followed *Allen*'s formula in defining a mandatory presumption as one requiring a jury to accept the presumed fact if the prosecution proves a predicate fact, but then the Court deviated from *Allen* by subdividing mandatory presumptions into those that are conclusive and those that are rebuttable.[365] *Allen* also subdivided mandatory presumptions, but not into conclusive and rebuttable categories; rather, it divided mandatory presumptions into those that shift the burden of production to the defendant and those that shift the burden of persuasion to the defendant.[366] *Allen* did not say anything about conclusive mandatory presumptions or rebuttable mandatory presumptions. *Allen* notwithstanding, *Francis* defined a conclusive mandatory presumption as one that removes a presumed element from a case once the government has proved the predicate fact.[367] The Court defined a rebuttable mandatory presumption as one that does not remove the presumed element from the case, but

[359] *Francis*, 471 U.S. at 311.
[360] *Francis*, 471 U.S. at 311-12.
[361] *Francis*, 471 U.S. at 312.
[362] *Francis*, 471 U.S. at 309.
[363] *Francis*, 471 U.S. at 313.
[364] *Francis*, 471 U.S. at 313-14 (citing *Allen*, 442 U.S. at 157-63).
[365] *Francis*, 471 U.S. at 314 n.2.
[366] *Allen*, 442 U.S. at 157 n.16.
[367] *Francis*, 471 U.S. at 314 n.2.

nevertheless requires a jury to find the presumed element if the defendant does not rebut the presumed element.[368]

Next, the Court defined a permissive presumption as one that allows, but does not require, a jury to find the presumed fact if the prosecution proves the predicate fact.[369] This definition is consistent with *Allen*.[370] *Francis* remained consistent with *Allen* when it held that mandatory presumptions violate due process if they relieve the government of its burden of persuasion on any element of a criminal offense.[371] What the Court did next, however, is depart from *Allen* a second time.[372] *Francis* held that permissive inferences violate due process if the presumed fact "is not one that reason and common sense justify in light of the proven facts before the jury," and cited *Allen* as support for that proposition.[373] *Allen* said no such thing. What *Allen* did say is that a permissive presumption is valid if there is a "rational" way for a jury to connect the presumed fact and the proven predicate fact.[374] *Allen* did not say anything about a permissive presumption's validity being a function of "reason and common sense in light of the proven facts before the jury." The only language about "common sense" or "common experience" in *Allen* is in Justice Powell's dissent.[375] In further redefining mandatory presumptions and recasting the method for determining the validity of permissive presumptions, *Francis* added two more layers of complexity to the framework announced in *Allen* and applied in *Sandstrom*.[376] The Court then turned to analyzing whether the jury instructions used in Mr. Francis's trial were permissive or mandatory.[377] The Court followed *Allen* and looked to the jury instructions as a whole to determine whether the presumptions were permissive or mandatory.[378] If a jury instruction "considered in isolation" could lead a reasonable juror to conclude that a presumption places the burden of persuasion on an element of an offense on the

[368] *Francis*, 471 U.S. at 314 n.2 (citing *Sandstrom*, 442 U.S. at 517-18).
[369] *Francis*, 471 U.S. at 314.
[370] *Allen*, 442 U.S. at 157.
[371] *Francis*, 471 U.S. at 314 (citing *Sandstrom*, 442 U.S. at 520-24; *Patterson*, 432 U.S. at 215; *Mullaney*, 421 U.S. at 698-701). *Francis* did not address the issue of whether a mandatory presumption that shifts the burden of production rather than the burden of persuasion to a defendant violates due process. *Francis*, 471 U.S. at 314 n.3.
[372] *Francis*, 471 U.S. at 314-15.
[373] *Francis*, 471 U.S. at 314-15 (citing *Allen*, 442 U.S. at 157-63).
[374] *Allen*, 442 U.S. at 157.
[375] *Allen*, 442 U.S. at 170-74 (Powell, Brennan, Stewart & Marshall, JJ., dissenting).
[376] *Francis*, 471 U.S. at 314 n.2, 315.
[377] *Francis*, 471 U.S. at 315-25.
[378] *Francis*, 471 U.S. at 315; *Allen*, 442 U.S. at 157 n.6.

defendant, that instruction is impermissible.[379] If, however, other instructions "might explain the particular infirm language" in a way that a reasonable juror could not conclude that the presumption shifted the burden of persuasion to the defendant, the instructions taken as a whole would save the individually problematic instruction.[380]

The Court held that the instructions given to Mr. Francis's jury constituted a requirement that it presume he intended to kill Mr. Collie once the State proved that Mr. Collie died from Mr. Francis's gunshot.[381] In this respect, the Court considered these instructions no different from the instructions it invalidated in *Sandstrom*.[382] The State tried to distinguish Mr. Francis's instructions from those given in *Sandstrom* on the ground that the trial judge in Mr. Francis's case explicitly told the jury that the presumption of intent could be rebutted.[383] The Court rejected this argument, holding that although a mandatory presumption "does not remove the presumed element from the case if the State proves the predicate facts, it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant [rebuts the presumed element]."[384] This constitutes an impermissible shifting of the burden of persuasion to the defendant to disprove an element of an offense.[385] The Court held that a reasonable juror in Mr. Francis's case would have understood the instructions as creating a requirement that he find that Mr. Francis intended to kill Mr. Collie once the State proved that Mr. Francis shot Mr. Collie.[386] Because the instructions as a whole shifted the burden of persuasion to Mr. Francis on the element of intent, they violated his due process rights, which required that his conviction be reversed.[387]

What does *Allen*, *Sandstrom*, and *Francis* instruct a reviewing court to do when it is asked to decide if a presumption violates the Constitution? First, the court has to determine whether the presumption is permissive or mandatory, and then decide if it accords with due

[379] *Francis*, 471 U.S. at 315.
[380] *Francis*, 471 U.S. at 315 (citing *Cupp*, 414 U.S. at 147).
[381] *Francis*, 471 U.S. at 316.
[382] *Francis*, 471 U.S. at 316 (citing *Sandstrom*, 442 U.S. at 515).
[383] *Francis*, 471 U.S. at 316-17.
[384] *Francis*, 471 U.S. at 317.
[385] *Francis*, 471 U.S. at 317 (citing *Sandstrom*, 442 U.S. at 524; *Patterson*, 432 U.S. at 215; *Mullaney*, 421 U.S. at 698-701).
[386] *Francis*, 471 U.S. at 317-20.
[387] *Francis*, 471 U.S. at 325.

process.[388] A permissive presumption allows, but does not require, a jury to find a presumed fact if the prosecution proves a predicate fact.[389] A permissive presumption accords with due process under two circumstances: (1) if there is a rational connection between the presumed fact and the proven fact, and if the presumption does not constitute the prosecution's sole proof of an element of an offense;[390] or (2) the presumed fact is one that reason and common sense justify in light of the proven facts before a jury.[391] In order to determine if a rational connection exists between the presumed and predicate facts or if reason and common sense justify the presumption, a court has to review the evidence as a whole to see if it satisfies the beyond a reasonable doubt standard without the use of the presumption.[392] If it does, the presumption accords with due process, otherwise, it does not.[393]

A mandatory presumption requires a jury to accept the presumed fact if the prosecution proves a predicate fact.[394] There are two (or perhaps four) types of mandatory presumptions: (1) conclusive mandatory presumptions that shift the burden of persuasion to the defendant on an element of an offense;[395] and (2) rebuttable mandatory presumptions that shift the burden of production to the defendant on an element of an offense.[396] A conclusive mandatory presumption says the presumed element is established by the prosecution proving the predicate element.[397] A rebuttable mandatory presumption does not establish the presumed element if the prosecution proves a predicate element, but it nonetheless requires a jury to find the presumed element if the defendant does not rebut the presumed element.[398] A mandatory presumption, be it conclusive or rebuttable, violates due process if it relieves the government of its burden of persuasion on any element of an offense.[399]

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[388] *Francis*, 471 U.S. at 313-14; *Sandstrom*, 442 U.S. at 514; *Allen*, 442 U.S. at 156-63.
[389] *Francis*, 471 U.S. at 314; *Allen*, 442 U.S. at 157.
[390] *Allen*, 442 U.S. at 157.
[391] *Francis*, 471 U.S. at 314-15.
[392] *Allen*, 442 U.S. at 157-60.
[393] *Allen*, 442 U.S. at 157-60.
[394] *Francis*, 471 U.S. at 313-14; *Sandstrom*, 442 U.S. at 514-15, 517-19, 521-24; *Allen*, 442 U.S. at 157-60.
[395] *Francis*, 471 U.S. at 314 n.2; *Allen*, 442 U.S. at 157 n.16.
[396] *Francis*, 471 U.S. at 314 n.2; *Allen*, 442 U.S. at 157 n.16.
[397] *Francis*, 417 U.S. at 314 n.2.
[398] *Francis*, 417 U.S. at 314 n.2; *Sandstrom*, 442 U.S. at 517-18.
[399] *Francis*, 417 U.S. at 314; *Sandstrom*, 442 U.S. at 520-24; *Allen*, 442 U.S. at 157-60.

To determine whether the burden of persuasion is shifted, a court has to examine the jury instructions as a whole.[400] If a specific instruction could lead a reasonable juror to conclude that the defendant has the burden of persuasion on an element of an offense, that instruction violates due process unless other instructions explain the "infirm" language in such a way that a reasonable juror could not conclude that the defendant bears the burden of persuasion on an element of an offense.[401] An instruction that "merely contradicts and does not explain a constitutionally infirm instruction" will leave a reviewing court with no way to determine whether the defendant was convicted because of the infirm instruction, therefore, such a conviction must be vacated because there is a reasonable possibility that the jury relied on the unconstitutional instruction in reaching its verdict.[402]

The foregoing constitutes the Court's current framework for evaluating the constitutionality of statutory presumptions in the criminal law. From *Fong Yue Ting v. United States*[403] in 1893 to *Francis v. Franklin*[404] in 1985, the Court's presumption doctrine went through quite a metamorphosis. In 1893 and 1896, the Court treated criminal presumptions as rules of evidence that say once the prosecution produces prima facie evidence of the defendant's guilt, the jury can conclude he is guilty unless he puts on evidence to negate the prosecution's prima facie evidence.[405] In 1910, the Court held that a presumption is valid if a rational connection exists between the presumed fact and the proven predicate fact.[406] In 1928, the Court introduced a third method of evaluating statutory criminal presumptions that said a presumption is valid if a legislature has the authority to criminalize the act that gives rise to the presumption.[407] The Court used this test in only one case, however.[408]

In 1934, the Court announced a fourth test, the "balance of convenience" test, which says a presumption is valid if "the normal burden of proof will so thwart or hamper justice as to create a practical necessity, without preponderating hardship to the defendant, for a departure from the usual rule."[409] In other words, if it is too difficult for

[400] *Francis*, 417 U.S. at 315-18, 322 n. 8; *Allen*, 442 U.S. at 157 n.16.
[401] *Francis*, 417 U.S. at 322 n.8.
[402] *Francis*, 417 U.S. at 333 n.8.
[403] *Fong Yue Ting*, 149 U.S. 698.
[404] *Francis*, 417 U.S. 307.
[405] *Wilson*, 162 U.S. at 619-21 (1896); *Fong Yue Ting*, 149 U.S. at 727-32.
[406] *Turnipseed*, 219 U.S. at 43.
[407] *Ferry*, 277 U.S. at 94-95.
[408] *Leary*, 395 U.S. at 37 (citing *Ferry*, 277 U.S. at 94-95).
[409] *Morrison*, 291 U.S. at 94.

the government to prove an element of an offense, the burden of proof can be shifted to the defendant to disprove the element if the hardship on the defendant caused by the burden shift does not outweigh the inconvenience to the government of having to satisfy the "normal burden of proof." The "balance of convenience" test got put to rest in 1943 when the Court held that it was a "corollary" to the "rational connection" test.[410] In 1969, a fifth test emerged that said a presumption passes constitutional muster if the presumed fact "more likely than not" flows from the proven fact.[411]

In 1971, the Court combined the "rational connection" and "more likely than not" tests into what became its sixth formulation, which said a presumption is valid if a rational juror could find the inferred fact from the proven fact beyond a reasonable doubt, or if a rational juror could find the presumed fact more likely than not flows from a proven fact.[412] In 1975, the Court said this test requires that the burden of proving an element of an offense always rests with the government, and it has to prove each element beyond a reasonable doubt.[413] In 1977, however, the Court held that the burden of proving the facts constituting an affirmative defense rests with the defendant, and this marked the last decision the Court would issue on this subject before *Allen*, *Sandstrom*, and *Francis.*[414]

How would the *Allen*, *Sandstrom*, and *Francis* formulation fare today in the face of a constitutional challenge? The next part of this Article analyzes that question.

II. PRESUMPTIONS VIOLATE DUE PROCESS, THE RIGHT TO A JURY TRIAL, AND THE PROHIBITION AGAINST SELF-INCRIMINATION

A. Apprendi, Blakely, *and* Booker

Between 2000 and 2005, the Court decided three blockbuster Sixth Amendment cases: *Apprendi v. New Jersey;*[415] *Blakely v. Washington;*[416] and *United States v. Booker*.[417] In *Apprendi*, the defendant raised a due process challenge to a New Jersey statute that

[410] *Tot*, 319 U.S. at 467-68.
[411] *Leary*, 395 U.S. at 36.
[412] *Barnes*, 412 U.S. at 843.
[413] *Mullaney*, 421 U.S. at 703.
[414] *Patterson*, 432 U.S. at 210.
[415] *Apprendi*, 503 U.S. 466.
[416] *Blakely*, 542 U.S. 296,
[417] *Booker*, 543 U.S. 220.

authorized his trial judge to enhance his sentence based on the judge's finding by a preponderance of the evidence that he "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity."[418] The Court framed the question presented as one involving the defendant's Sixth Amendment right to have the jury make the findings necessary to trigger the sentence enhancement and make those findings beyond a reasonable doubt.[419]

The Court said its answer to the question presented "was foreshadowed" in *Jones v. United States*, which held that under the Fifth Amendment Due Process Clause and the "notice and jury trial guarantees of the Sixth Amendment, any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and [proved] beyond a reasonable doubt."[420] *Apprendi* adopted the reasoning in *Jones*, including the statements in *Jones*'s concurring opinions that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."[421] The statute in *Apprendi* required a finding that the defendant was motivated by a proscribed bias, and making such a finding is a classic function of a jury, not a judge.[422] Because the statute invaded the jury's function in determining a defendant's intent, the Court invalidated the law and reversed the defendant's conviction.[423] Almost four years after deciding *Apprendi*, the Court faced a similar issue in *Blakely v. Washington*.[424]

In 1981, the legislature of the State of Washington enacted the Sentencing Reform Act of 1981, which mandated that a trial court impose a sentence within a standard range for an offense unless the court found "substantial and compelling reasons" to deviate from the

[418] *Apprendi*, 503 U.S. at 468-69.
[419] *Apprendi*, 503 U.S. at 475-76. The Court said the New Jersey statute did not involve "the State's power to manipulate the prosecutor's burden of proof by, for example, relying on a presumption rather than evidence to establish an element of an offense, or by placing the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi*, 503 U.S. at 475 (citing *Sandstrom*, 442 U.S. 510; *Patterson*, 432 U.S. at 210; *Mullaney*, 421 U.S. 684).
[420] *Apprendi*, 503 U.S. at 476 (citing Jones v. United States, 526 U.S. 227 (1999)).
[421] *Apprendi*, 503 U.S. at 490 (citing *Jones*, 526 U.S. at 252-53 (opinion of Stevens, J. & opinion of Scalia, J.).
[422] *Apprendi*, 503 U.S. at 492-97.
[423] *Apprendi*, 503 U.S. at 492-97.
[424] *Blakely*, 542 U.S. 296 (2004).

standard range.[425] Ralph Howard Blakely, Jr. pleaded guilty to abducting his estranged wife, which subjected him to a sentencing range of forty-nine to fifty-three months under the Act.[426] After the trial judge heard Mr. Blakely's wife describe the details of the abduction, he made a finding that Mr. Blakely acted with "deliberate cruelty," which authorized the court to enhance the maximum sentence by thirty-seven months.[427] The trial judge then sentenced Mr. Blakely to ninety months in prison.[428] Mr. Blakely appealed his sentence to the Supreme Court, arguing that the trial court making the findings necessary to justify a sentence enhancement violated his Sixth Amendment right have a jury make those findings beyond a reasonable doubt.[429]

The Court began by stating that the rule announced in *Apprendi*—that any fact other than a prior conviction that increases a sentence beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt—reflected two "longstanding tenets of common law criminal jurisprudence: (1) the 'truth of every accusation' against a defendant 'should afterwards by confirmed by the unanimous suffrage of twelve of his equals and neighbours (sic)'"; and (2) "'an accusation [that] lacks any particular fact [that] the law makes essential to the punishment … is no accusation within the requirements of the common law, and it is no accusation in reason.'"[430] The Court defined "the statutory maximum" as "the maximum sentence a judge could impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[431]

Under this rule, if a judge enhances a sentence after making findings in addition to those made by the jury, he violates the defendant's Sixth Amendment right to have a jury find all facts that the law "makes essential to punishment."[432] Because Mr. Blakely's judge

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[425] *State v. Blakely*, 111 Wash. App. 851, 868, 47 P.3d 149, 157 (2002).
[426] *Blakely*, 542 U.S. at 298-300.
[427] *Blakely*, 524 U.S. at 298-300. Mr. Blakely tied up Ms. Blakely with duct tape, forced her at knifepoint into a wooden box located in the bed of his pickup truck, and drove from Grant County, Washington to a friend's house in Montana. *Blakely*, 524 U.S. 298-300.
[428] *Blakely*, 524 U.S. at 300.
[429] *Blakely*, 524 U.S. at 301.
[430] *Blakely*, 524 U.S. at 301-02 (citing and quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769); 1 J. Bishop, *Criminal Procedure* § 87 at 55 (2d ed. 1872)).
[431] *Blakely*, 524 U.S. at 303 (citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi*, 530 U.S. 466, 483 (2000)); Harris v. United States, 536 U.S. 545, 563 (2002) (plurality opinion)).
[432] *Blakely*, 542 U.S. at 303-304 (citing 1 J. Bishop, Criminal Procedure § 87 at 55 (2d ed. 1872)).

enhanced his sentence by thirty-seven months based on a finding not made by a jury and not admitted to by Mr. Blakely, the Court invalidated Mr. Blakely's sentence.[433]

Justice O'Connor dissented in *Apprendi* and *Blakely*, and in both cases she lamented and predicted that the Federal Sentencing Guidelines, promulgated by the United States Sentencing Commission in 1984, had to be unconstitutional because they too authorized judges to increase sentences based on their own findings rather than a jury's.[434] She turned out to be quite the soothsayer because six months later, the Court invalided the Federal Sentencing Guidelines in *United States v. Booker*.[435]

Booker combined two cases, both of which involved a United States district judge using the discretion authorized by the Federal Sentencing Guidelines to increase a sentence above what it would have been based on a jury's findings alone.[436] The Court held that the Federal Guidelines violated the Sixth Amendment because they authorized an increase in a defendant's sentence based on judicial findings of fact by a preponderance of the evidence rather than jury findings beyond a reasonable doubt.[437] Recognizing that its ruling would invalidate more than two decades' worth of legislative sentencing reforms, the Court said "in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly."[438]

Apprendi, *Blakely*, and *Booker* are all premised on the notion that a jury has a historic and exclusive role in criminal trials; to determine whether the government has proved each element of an

[433] *Blakely*, 542 U.S. at 305.
[434] *Blakely*, 542 U.S. at 323-26 (O'Connor & Breyer, JJ., dissenting); *Apprendi*, 530 U.S. at 549-52 (O'Connor, Kennedy, Breyer, JJ. & Rehnquist, C.J., dissenting). The Office of Solicitor General of the United States filed an *amicus curiae* brief urging the Court to uphold the Washington guidelines because there were no "constitutionally significant" differences between the Federal Sentencing Guidelines and the Washington guidelines. *Blakely*, 542 U.S. at 305 n.9. The Court responded to the argument by saying, "The Federal Guidelines are not before us, and we express no opinion on them." *Blakely*, 542 U.S. at 305 n.9.
[435] *Booker*, 543 U.S. 220.
[436] *Booker*, 543 U.S. at 227-29, 244.
[437] *Booker*, 543 U.S. at 231-33, 236-39.
[438] *Booker*, 543 U.S. at 244 (citing *Blakely*, 542 U.S. at 313).

offense beyond a reasonable doubt.[439] It is the jury and the jury alone that has the authority to determine any fact necessary to convict a defendant and any fact necessary to increase his punishment above a statutory maximum.[440] The Sixth Amendment does not permit a legislature to encroach on this prerogative.[441] I will now turn to demonstrating how statutory presumptions in criminal cases do just what the Sixth Amendment and Fourteenth Amendments forbid.

B. Presumptions Lower the Prosecution's Burden of Proof

In 1970, the Supreme Court "constitutionalized" the requirement that the government prove each element of a criminal offense beyond a reasonable doubt.[442] What it did, however, was not revolutionary; it merely made explicit what had been implicit since 1798.[443] The constitutional basis for this principle is the Due Process Clauses of the Fifth and Fourteenth Amendments.[444] The presumption formulation developed in *Allen*, *Sandstrom*, and *Francis* does not comport with this principle.

In *Allen*, the convicted defendants argued that the validity of a presumption in a criminal case should be "judged by a 'reasonable doubt' test rather than the 'more likely than not' standard."[445] The Supreme Court rejected their argument on the ground that a permissive presumption should not be subjected to a greater degree of judicial scrutiny than a mandatory presumption.[446] The Court ratified this rule in *Francis v. Franklin*.[447]

Allen and *Francis* conflict with *Apprendi*, *Blakely*, and *Booker*, particularly when the presumption applies to an element of an offense. The latter three cases are quite clear in their command that the elements of an offense have to be presented to a jury and proved beyond a reasonable doubt.[448] *Allen* and *Francis* exempted permissive presumptions from this requirement on the thin reed that a jury is not

[439] *Booker*, 543 U.S. at 230; *Blakely*, 542 U.S. at 301-304; *Apprendi*, 530 U.S. at 476-78.
[440] *Ice*, 555 U.S. at 163.
[441] *Ice*, 555 U.S. at 168 (citing *Apprendi*, 530 U.S. at 497).
[442] *In re Winship*, 397 U.S. at 364.
[443] *Apprendi*, 530 U.S. at 478; *Winship*, 397 U.S. at 361.
[444] *Jones*, 526 U.S. at 242-52.
[445] *Allen*, 442 U.S. at 166-67.
[446] *Allen*, 442 U.S. at 166-67.
[447] *Francis*, 471 U.S. at 313-15.
[448] *Booker*, 543 U.S. at 230; *Blakely*, 542 U.S. at 301-04; *Apprendi*, 530 U.S. at 476-78.

required to accept the presumed fact if the government proves the predicate fact.[449] This is constitutionally problematic nevertheless because although a jury is not *required* to find the presumed fact, it *can* find the presumed fact and once it does, it can use that finding to convict a defendant. Because *Allen* and *Francis* authorize a jury to find an element of an offense under a lesser standard than beyond a reasonable doubt, those cases conflict with *Apprendi*, *Blakely*, and *Booker*.

Mandatory presumptions fare no better even though they have to satisfy the beyond a reasonable doubt standard.[450] Conclusive mandatory presumptions are unconstitutional because they shift the burden of persuasion to the defendant.[451] The party bearing the burden of persuasion on an issue bears the ultimate burden of proof on that issue, and placing that burden on a defendant is impermissible.[452] Take the drug possession statute described in the Introduction of this Article. That law would impute the intent to distribute to any person found with one gram of marijuana. Under a conclusive mandatory presumption, once the government proves possession, the jury would be required to find intent, and hence convict the defendant. Six decades ago, the Supreme Court said that if a defendant's intent or state of mind is an element of a criminal offense, that issue "cannot be taken from the trier of fact through reliance on a legal presumption."[453] Conclusive mandatory presumptions are unconstitutional because they shift the burden of persuasion on an element of an offense to a defendant, which relieves the government from having to prove that element.

Legislatures attempted to cure the defects in conclusive mandatory presumptions by enacting rebuttable mandatory presumptions.[454] By making the presumption rebuttable, these statutes ostensibly shift only the burden production to the defendant rather than the burden of persuasion.[455] These types of presumptions require a jury to find a presumed fact if the government proves a predicate fact and the defendant does not rebut the presumed fact.[456] Making the

[449] *Francis*, 471 U.S. at 313-15; *Allen*, 442 U.S. at 157-60.
[450] *Francis*, 471 U.S. at 314; *Sandstrom*, 442 U.S. at 520-24; *Allen*, 442 U.S. at 157-60.
[451] *Francis*, 471 U.S. at 313-314; *Sandstrom*, 442 U.S. at 514-15, 517-19; *Allen*, 442 U.S. at 157-60.
[452] *Francis*, 471 U.S. at 314; *Sandstrom*, 442 U.S. at 521-24; *Allen*, 442 U.S. at 166-67.
[453] *Morissette*, 342 U.S. at 273-76.
[454] *Francis*, 471 U.S. at 314 n.2; *Allen*, 442 U.S. at 157 n.16.
[455] *Francis*, 471 U.S. at 314 n.2; *Allen*, 442 U.S. at 157 n.16.
[456] *Francis*, 417 U.S. at 314 n.2; *Sandstrom*, 442 U.S. at 517-18.

presumption rebuttable does not cure the constitutional defect because the presumption—rebuttable or not—serves as a substitute for actual proof. All the government has to do is prove the predicate fact, and the jury has to accept the presumed fact as "proven" if the defendant does not rebut the presumed fact. When a presumption is used as a proxy for actual proof of an element of an offense, the government is exempted from having to actually prove that element, and that violates due process. Moreover, requiring the defendant to rebut a presumption if proof of a predicate fact is established undermines the defendant's right to rely "solely on the presumption of innocence and the State's burden of proof."[457]

C. Presumptions Usurp the Jury's Fact-finding Role

The Sixth Amendment entitles a defendant have certain facts determined by a jury and a jury alone.[458] Determining the existence of a fact presumes actual proof of that fact will be presented to a jury for it to accept or reject. Examples of such facts include those essential to a finding of guilt, those subjecting a defendant to the death penalty, those allowing a sentence to be enhanced beyond a statutory or guideline range, and those pertaining to a sentence in the upper range of a determinate sentencing system.[459] Allowing facts constituting elements of an offense to be established through the device of presumptions allows legislatures to declare a person guilty or presumptively guilty of an offense.[460] When a statutory presumption allows a jury to be instructed that it may or must find certain facts because the government has proved some other facts or because a defendant did not rebut the facts the jury may or must find, the legislature has encroached on the jury's exclusive domain.[461]

Instructing a jury that it can or may find a given fact on anything less than proof of that actual fact is a trespass on the jury's

[457] *Johnson*, 460 U.S. at 87 n.16.
[458] Oregon v. Ice, 555 U.S. 160, 167 (2009).
[459] *Ice*, 555 U.S. at 167 (citing Cunningham v. California, 549 U.S. 270 (2007); *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. 296, 304-05 (2004); *Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Apprendi*, 530 U.S. at 490).
[460] *Patterson*, 432 U.S. at 210 (citing *Speiser*, 357 U.S. at 523-25; *Tot*, 319 U.S. at 469 (a legislature cannot declare that all the elements of guilt have been satisfied based solely on the fact that a person has been charged and identified); *Morrison*, 291 U.S. 82; *McFarland*, 241 U.S. at 86 (a legislature cannot declare someone guilty or presumptively guilty of an offense)).
[461] *Turner*, 396 U.S. at 425-34 (Black & Douglas, JJ., dissenting); *Leary*, 395 U.S. at 55-56 (Black, J., concurring); *Gainey*, 380 U.S. at 74-88 (Black, J., dissenting).

historic and exclusive role as the finder of fact. A presumption tells the jury to assume the existence or proof of a fact that has not been actually proved. While legislatures can establish what constitutes a crime, the Constitution establishes the "quantum of evidence necessary to convict," and establishes the jury, not legislatures, as the entity responsible for deciding if a defendant should be convicted.[462]

Apprendi, *Blakely*, and *Booker* put a halt on legislatures' twenty year incursion into the jury's territory.[463] The logic of those cases likewise extends to statutory presumptions.[464]

D. Presumptions Infringe on a Defendant's Fifth Amendment Rights

The Supreme Court has been dismissive if not hostile to the argument that presumptions violate a defendant's Fifth Amendment right against compulsory testimony or his right not to have a jury draw an adverse inference from his not testifying.[465] The way the Court sees it, the burden of rebutting a presumption does not require that a defendant actually testify; he may have to put on a defense, but he can do that without giving any testimony himself.[466] This is literally true, but it ignores the reality of how criminal trials actually work, particularly where a defendant's state of mind or intent is an element of an offense.

Imputing a particular state of mind or intent to a defendant based on proof of other facts requires the defendant to prove a negative, i.e., he did not have a particular intent or state of mind at the time of the alleged offense. It is difficult to see how the testimony of other defense witnesses or the introduction of other types of evidence can effectively rebut a presumption that the defendant knew something or intended a certain result. The best the testimony of another witness can do is indicate what that witness might have known or intended had he been similarly situated to the defendant. That, however, says little to nothing about what the actual defendant intended or thought in the situation that led him to be on trial in the first place, and it is the defendant's state of mind, not someone else's hypothetical state of mind, that the prosecution has the burden of proving.

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[462] *Turner*, 396 U.S. at 431-32.
[463] *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 304-05; *Apprendi*, 530 U.S. at 490.
[464] Allen & Hastert, *supra* note 16, at 207; Gottfried & Baroni, *supra* note 16, at 715-16, 736-40.
[465] *Barnes*, 412 U.S. at 846-47; *Turner*, 396 U.S. at 417-18; *Yee Hem*, 268 U.S. at 181.
[466] *Barnes*, 412 U.S. at 846-47; *Turner*, 396 U.S. at 417-18; *Yee Hem*, 268 U.S. at 181.

Even if, however, one is not persuaded by the argument that other witnesses or evidence can effectively rebut the presumption of intent or knowledge, there is the constitutional right to rest on the presumption of innocence and the accompanying right to have the government prove each element beyond a reasonable doubt.[467] Telling a jury that it must or can accept a presumed fact if the defendant does not rebut that fact requires the defendant to "put on a case." There is serious tension between requiring a defendant to rebut a presumption and his right to rely solely on the government satisfying its burden of proof in order to obtain a conviction. A statutory device that requires a defendant to put on any evidence to rebut an element of an offense, on the pain of suffering a conviction if he does not, is a device that trammels the right against compulsory testimony and the accompanying right to not have a jury draw an adverse inference if the defendant does not testify.[468]

Finally, there is the well-chronicled reason statutory presumptions were enacted in the first place: to make it easier for prosecutors to obtain convictions in cases where proving a defendant's state of mind is an element of an offense.[469] No one can quarrel with the proposition that it is difficult in the extreme to prove someone's state of mind if that person cannot be subjected to direct or cross-examination. Intent and state of mind crimes pose quite the dilemma for prosecutors because they require proof of something only the defendant actually knows, and prosecutors cannot compel the defendant to disclose what he knows. It is understandable that some consider this to be an undue burden on the government. But as Justice Douglas said in his dissent in *Barnes v. United States*, "the Bill of Rights was designed to make the job of the prosecutor difficult."[470]

If there is a choice to be made between presumptions that allow for swifter and easier prosecutions, or a robust respect for the Fifth Amendment prohibition against compulsory testimony and the accompanying right to not have a jury draw an adverse inference from a defendant not testifying, the Fifth Amendment should win every time. Statutory criminal presumptions that require a defendant to rebut any

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[467] *Johnson*, 460 U.S. at 87 n.16.

[468] *Turner*, 396 U.S. at 425-34 (Black & Douglas, JJ., dissenting); *Leary*, 395 U.S. at 55-56 (Black, J., concurring); *Romano*, 382 U.S. at 144 (Black, J., concurring); *Gainey*, 380 U.S. at 74-88 (Black, J., dissenting); *Harris*, 359 U.S. at 24 (Black & Douglas, JJ., dissenting); *Tot*, 319 U.S. at 472 (Black & Douglas, JJ., concurring).

[469] *Gainey*, 380 U.S. at 83 (Black, J., dissenting); *Casey*, 276 U.S. at 420 (McReynolds, J., dissenting); Chamberlain, supra note 5, at 287; Note, supra note 5, at 489.

[470] *Barnes*, 412 U.S. at 852 (Douglas, J., dissenting).

element of any offense conflict with these Fifth Amendment guarantees.

CONCLUSION

Criminal conduct and the devastation it causes "call for the most vigorous laws … as well as the most powerful efforts to put [those] vigorous laws into effect."[471] The zeal for "law and order," however, too often leads to shortcuts like statutory presumptions that trammel the constitutional protections that attach to even the most unpopular and reviled among the citizenry. The Sixth Amendment jury trial right exists as "a bulwark between the State and the accused."[472] Likewise, the Fourteenth Amendment requirement that the government prove each element of an offense to a jury beyond a reasonable doubt is necessary to give substantive meaning to the presumption of innocence.[473] All of this makes the process of charging, trying, and convicting a person more difficult, time-consuming, expensive, and frustrating. None of the foregoing, however, is a constitutionally permissible reason for diminishing a defendant's jury trial right, reducing the government's burden of proof, or shifting the burden of proof the defendant. After all, before depriving a person of his life or liberty, "the State should suffer the modest inconvenience of submitting its accusation to the 'unanimous suffrage of twelve of his equals and neighbours (sic),' rather than a lone employee of the State."[474]

[471] *Turner*, 396 U.S. at 426-27 (Black & Douglas, JJ., dissenting).
[472] *Ice*, 550 U.S. at 167-68 (citing *Apprendi*, 530 U.S. at 477).
[473] *In re Winship*, 397 U.S. at 363.
[474] *Blakely*, 524 U.S. at 301-02 (citing and quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).