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Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by *Allen*

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Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by *Allen*

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I. INTRODUCTION

A presumption is a rule of law that requires that the existence of a fact, the presumed fact, be taken as established when certain other facts, the basic facts, are established.¹ Upon proof of the basic facts giving rise to the presumption, the presumed fact must be taken as established unless and until it is rebutted.² The basic fact of a presumption may be established in an action by judicial notice, by the pleadings, by stipulation of the parties, by evidence that requires a directed verdict, or by the finding of the trier on sufficient evidence.³

A presumption should be distinguished from an inference, which is a conclusion drawn through logic and reasoning after having considered the facts presented.⁴ An inference does not compel the factfinder to come to the conclusion as a matter of law.⁵ Instead, the factfinder has the discretion to draw a conclusion because of the compelling nature of the particular factual circumstances.⁶ Unlike an inference, a presumption expresses a legally recognized relationship

1. If the elements of the crime charged are *A*, *B* and *C*, from the prosecution's proof of *A* and *B* (the basic facts), *C* (the ultimate fact) is inferred. C. McCORMICK, HANDBOOK ON EVIDENCE § 346, at 988 (3d ed. 1984).

2. County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979).

3. J. WEINSTEIN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 27 (5th ed. 1976).

4. C. McCORMICK, *supra* note 1, § 343, at 968.

5. Bray v. United States, 306 F.2d 743, 747 (D.C. Cir. 1962).

6. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 301.7, at 108 (2d ed. 1986).

between facts.⁷ A presumption is an inference that the law directs the trier of fact to find if a given set of facts is established.⁸

In civil cases, the party bringing the action normally has the burden of pleading,⁹ the burden of production of a particular matter,¹⁰ and the burden of persuading the trier of fact of its existence.¹¹ This Comment is mainly concerned with the burdens of production and persuasion.

The burden of producing evidence in a civil case is "satisfied by evidence which, when viewed in the aspect most favorable to the burdened party, is sufficient to enable the trier of fact reasonably to find the issue for him."¹² A *prima facie* case is established when the burden of production is satisfied for each element of the plaintiff's cause of action. The court must dismiss the case as a matter of law if the plaintiff fails to meet this burden of producing evidence.¹³

Once the plaintiff establishes a *prima facie* case, the trier of fact may, but is not required to, find in his favor.¹⁴ The defendant is entitled but not required to produce contrary evidence.¹⁵ A defendant who produces no contrary evidence as to an element of the claim, however, may find the court ruling against him as a matter of law if a reasonable jury would find that the plaintiff had satisfied his burden of persuasion as to that element.¹⁶ Although the burden of production may shift from one party to the other, the burden of persuasion may not.¹⁷ "In the usual civil case, satisfaction of the burden of persuasion requires that the trier of fact find that the existence of the proposition

7. *Id.*, § 301.6, at 105.

8. *Bray*, 306 F.2d at 747.

9. *M. GRAHAM*, *supra* note 6, § 301.3, at 96.

10. *Id.*

11. *Id.*

12. *C. MCCORMICK*, *supra* note 1, § 338, at 954-55.

13. *United States v. Taylor*, 464 F.2d 240, 242 (2d Cir. 1972) (Before submitting case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor.).

14. *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1963) (The establishment of a *prima facie* case permits, but does not require, a finding in favor of the party making out such a case.). This decision depends upon the strength of the evidence produced by the burdened party. *M. GRAHAM*, *supra* note 6, § 301.4, at 97. The defendant is not required to produce contrary evidence. *Id.* § 301.4, at 97-98. When, however, enough evidence is produced that would require a reasonable jury to find that the plaintiff has satisfied his burden of persuasion, it is necessary for the defendant to produce contrary evidence in order to avoid a directed verdict. *Id.* § 301.4, at 98.

15. *M. GRAHAM*, *supra* note 6, § 301.4, at 98.

16. *Id.*

17. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *C. MCCORMICK*, *supra* note 1, § 336, at 947.

to be proved is more probably true than not true."¹⁸

Federal Rule of Evidence 301 states that in all civil proceedings, presumptions shift the burden of producing evidence upon the party against whom the presumption is directed.¹⁹ This Rule, however, does not shift the burden of persuasion upon the party against whom it is directed. When the basic fact that gives rise to the presumption is established, the burden of producing evidence shifts to the opponent, who must then produce sufficient evidence to rebut the presumed fact.²⁰ If the opponent fails to produce sufficient evidence, the court will either instruct the jury to find in favor of the presumed fact or it will direct a verdict on the issue.²¹ If sufficient evidence is introduced, the presumption is rebutted and then has no further use in the trial.²² This rule adopts the Thayer "bursting-bubble" theory,²³ as opposed to the Morgan theory of presumptions.²⁴ According to Thayer's theory, a presumption shifts only the burden of producing enough evidence to rebut the presumed fact. Once that evidence is produced the presumption is overcome or disappears. Any inference, though, that exists between the basic and presumed fact, remains.²⁵ Under the Morgan approach to presumptions, when the proponent establishes the basic fact, the court instructs the jury that it must find the presumed fact unless and until the opponent persuades the jury that the nonexistence of the presumed fact is more probably true than not.²⁶ In other words, the Morgan approach shifts both the burden of production and the burden of persuasion to the opposing party.

In criminal cases, an indictment must set forth all elements of the crime. The prosecution must prove each element of the crime

18. M. GRAHAM, *supra* note 6, § 301.5, at 99-100.

19. Rule 301 provides that:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

20. M. GRAHAM, *supra* note 6, § 301.1, at 94.

21. *Id.*

22. *Id.*

23. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976) (applying Thayer's theory).

24. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933).

25. *Legille v. Dann*, 544 F.2d 1, 9 (D.C. Cir. 1976) (Facts giving rise to the presumption would still have evidentiary force.); C. MCCORMICK, *supra* note 1, § 344, at 975 (criticizing the "bursting bubble" theory as according presumptions too "slight and evanescent" an effect).

26. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937).

charged beyond a reasonable doubt.²⁷ Usually, the defendant's only burden is to produce sufficient evidence of certain defenses that he wishes to raise in the case.²⁸ The defendant's burden of producing evidence in such cases is slight, and is described in the Model Penal Code as evidence sufficient to raise a reasonable doubt.²⁹ Courts, however, have imposed a greater burden of proof on the defendant to establish an affirmative defense.³⁰ When sufficient evidence has been introduced in support of an affirmative defense, the issue is introduced into the case and the government must then prove the contrary beyond a reasonable doubt.³¹

In criminal cases, a presumption usually acts as a rule permitting the inference of one fact from proof of another.³² As an example, assume a crime contains three elements, *A*, *B* and *C*. A rule of law provides that fact *C* may be inferred from proof of *A* and *B*.³³ Under these circumstances, the court will instruct the jury that it may, but is not required to, infer the existence of the presumed fact from proof of the basic facts.³⁴ Such a presumption, however, is not really a presumption at all.³⁵ Rather, it is an inference because it is permissive and not mandatory.³⁶ The purpose of such permissive presumptions is to point out to the jury a natural inference that it might otherwise be unlikely to note.³⁷

The Supreme Court created the distinction between permissive

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

28. See FED. R. CIV. P. 8(c).

29. MODEL PENAL CODE AND COMMENTARIES § 1.12 comment 3 (1985).

30. See *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Morrison v. California*, 291 U.S. 82, 88-90 (1934).

31. M. GRAHAM, *supra* note 6, § 303.2, at 129-30.

32. C. MCCORMICK, *supra* note 1, § 346, at 988.

33. *Id.*

34. The instruction is permissive because in criminal cases there can be no compelled finding of the presumed fact. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

35. See *supra* notes 4-8 and accompanying text.

36. The words presumption and inference are often used interchangeably in cases and literature when, in fact, their meanings differ. An inference is a logical conclusion flowing from a set of facts from which a jury may make a conclusion and which may become a presumption if the law requires the jury to draw the conclusion absent a rebuttal. See Graham, *Presumptions: More Than You Ever Wanted to Know and Yet Were Too Disinterested to Ask*, 17 CRIM. L. BULL. 431 (1981) (discussing the differences between inferences and presumptions); *supra* notes 4-8 and accompanying text. Compare *Tot v. United States*, 319 U.S. 463, 464 (1943) (Possession of a firearm by a person is presumptive evidence that such a firearm was shipped in interstate commerce.) with *Barnes v. United States*, 412 U.S. 837, 838-39 (1973) (Possession of recently stolen property infers that the person in possession knew the property had been stolen.).

37. *County Court of Ulster County v. Allen*, 442 U.S. 140, 168-69 (1979) (Powell, J., dissenting) ("Like certain other jury instructions, [presumptions] provide guidance for jurors' thinking in considering the evidence laid before them.").

and mandatory presumptions in *County Court of Ulster County v. Allen*.³⁸ State prisoners in *Allen* had sought a writ of habeas corpus, contending that they had been denied due process through the application of New York's statutory presumption that the presence of a firearm in an automobile is evidence of illegal possession of a dangerous weapon by all occupants.³⁹ The Court upheld the constitutionality of the presumption because it was permissive and therefore did not undermine the factfinder's responsibility at trial.⁴⁰ Permissive presumptions, the Court said, did not shift any burden of proof, although mandatory presumptions shifted at least the burden of producing evidence to the defendant.⁴¹ The permissive presumption is better termed an inference because the factfinder is not compelled to find the presumed fact.⁴² Mandatory presumptions, on the other hand, do compel the factfinder to find in favor of the presumed fact. Thus, mandatory presumptions pose constitutional problems when used in criminal cases because they have the effect of lessening the prosecution's burden of proof.⁴³ The use of mandatory presumptions may therefore violate a criminal defendant's due process rights because conviction is possible absent proof beyond a reasonable doubt of every element constituting the crime charged.⁴⁴

This Comment begins with the history of the use of presumptions in criminal cases, followed by a discussion of the constitutionality of presumptions in light of the requirement that proof beyond a reasonable doubt is necessary for a conviction. Next, the two types of presumptions are discussed: permissive and mandatory. Presumptions are then analyzed in conjunction with the federal system's allocation of burdens of proof. Finally, this Comment examines North Carolina's approach as an example of one state's attempt to deal with mandatory presumptions.

It is the purpose of this Comment to demonstrate that mandatory presumptions that shift the burden of persuasion in criminal cases are unconstitutional, and in reality, do not exist. It also is shown that mandatory presumptions that shift only the burden of production serve no useful purpose. In sum, it is proposed that in

38. *Id.*

39. *Id.* at 143-46.

40. *Id.* at 157.

41. *Id.* at 157-60.

42. See *supra* notes 4-8 and accompanying text.

43. *Allen*, 442 U.S. at 157.

44. *In re Winship*, 397 U.S. 358, 364 (1970); see also *Sandstrom v. Montana*, 442 U.S. 509, 517 (1979) (The presumption 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.).

light of the federal system's allocation of the burden of proof, and the effect of mandatory presumptions on state courts, mandatory criminal presumptions have created unnecessary confusion in the courts. Furthermore, mandatory presumptions, as far as they have been used in the past, have served no useful function and therefore should be eliminated.

II. THE HISTORY OF PRESUMPTIONS IN CRIMINAL CASES

In *Tot v. United States*,⁴⁵ the Supreme Court of the United States first began to require that a presumption be relevant to a particular set of facts.⁴⁶ The defendant in *Tot* was found to be in possession of a loaded gun and was convicted under the Federal Firearms Act,⁴⁷ which makes it unlawful for a previously convicted felon to receive any firearm shipped in interstate commerce. Under the version of the Act then in force, possession of a firearm by a convicted felon was presumptive evidence that the gun had been shipped in interstate commerce.⁴⁸

The Supreme Court held that this presumption violated the defendant's due process rights because there was "no rational connection between the fact proved and the ultimate fact presumed."⁴⁹ The Court explained that "where the inference created [by the presumption] is so strained as not to have a reasonable relation to the circumstances of life as we know them,"⁵⁰ the presumption violates due process. The Supreme Court applied this rational-connection test to the facts of *Tot* and invalidated the presumption contained in the Federal Firearms Act, because the defendant could have acquired the gun intrastate or prior to adoption of the statute.⁵¹

Two cases decided subsequent to *Tot* cast additional light on the use of the rational-connection test in protecting due process rights. In *United States v. Gainey*,⁵² the defendant's presence at the site of a still was sufficient to convict him of carrying on an illegal distilling business. Applying the rational-connection test, the Court found that Gainey's unexplained presence at a still very likely indicated some

45. 319 U.S. 463 (1943).

46. *Id.* at 467.

47. 18 U.S.C. § 921 (1982).

48. The statute at the time stated: "Possession of a firearm or ammunition by any such person shall be presumptive evidence that such a firearm . . . was shipped or transported or received . . . by such person in violation of this Act." *Tot*, 319 U.S. at 467.

49. *Id.*

50. *Id.* at 468.

51. *Id.*

52. 380 U.S. 63 (1965).

involvement with distillation.⁵³ In *United States v. Romano*,⁵⁴ on the other hand, the Court used the same test but found that Romano's presence at an illegal still was not sufficient to support the inference, created by the presumption, that the defendant was in possession of the still.⁵⁵ Because a person might be present at the still site without being guilty of possession, the connection between presence and possession was too tenuous in the Court's view to support a sufficient rational connection.⁵⁶ The *Romano* Court relied on *Tot* to assess the required degree of rational connection. The Court concluded that there is

no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.⁵⁷

Thus, the presumption in *Romano* was not sufficient because the defendant's presence at the still lacked sufficient probability to support the inference that he was engaged in a function connected with possession.⁵⁸

The Court employed a stricter test in *Leary v. United States*⁵⁹ and *Turner v. United States*.⁶⁰ *Leary* involved a federal criminal statute under which possession of marijuana gives rise to the presumption that the defendant knew it had been illegally imported.⁶¹ In judging whether the presumption was constitutional, the Court stated that it must be "more likely than not" that one possessing marijuana also knew that it had been illegally imported.⁶² The Court, after consider-

53. *Id.* at 66-67.

54. 382 U.S. 136 (1965).

55. *Id.* at 141.

56. The different results in the two cases are a consequence of the breadth of the statute involved. The statute in *Gainey* created a broad presumption that covered every conceivable act associated with distillation. By the statute in *Romano*, however, presence at the still site created only the presumption of ownership of the still. Presence tells nothing of the defendant's function at the still site and thus no natural inference arises. For a discussion of *Gainey* and *Romano*, see C. McCORMICK, *supra* note 1, § 347, at 992-93.

57. *Romano*, 382 U.S. at 139 (citing *Tot*, 319 U.S. at 467-68).

58. *Romano*, 382 U.S. at 143.

59. 395 U.S. 6 (1969).

60. 396 U.S. 398 (1970).

61. The defendant was prosecuted under 21 U.S.C. § 176a (1956) (repealed 1970).

62. See *Leary*, 395 U.S. at 36 ("The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that 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 proved fact on which it is made to depend.").

ing the history of the statute, data on drug importation contained in the statute's legislative record, and articles and books on marijuana published since the statute's enactment, held the statute invalid.⁶³

Turner concerned heroin and cocaine, but the presumption in the case was identical to that in *Leary*.⁶⁴ The Court again reviewed the legislative history and the data on drug importation.⁶⁵ It upheld the statute as applied to heroin but struck it down as applied to cocaine.⁶⁶ Anyone in possession of heroin should know it had been illegally imported, the Court said, because it is not produced domestically nor imported for any legitimate use.⁶⁷ Cocaine, however, was produced domestically for legitimate medical purposes and thus it could not be said that it was more likely than not that one who possessed cocaine also knew that it had been illegally imported.⁶⁸

III. THE REASONABLE DOUBT TEST

The Court has never decided whether the reasonable doubt test should apply to presumptions that help establish an element of the crime charged. Both the *Leary* and *Turner* Courts evaded the issue.⁶⁹ In *In re Winship*,⁷⁰ the Court went so far as to state that proof beyond a reasonable doubt in a criminal case is a constitutional requirement because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁷¹ Although no case has answered the question of whether the reasonable doubt test should also apply to presumptions, logic suggests that any device

63. The Court found that a significant portion of the marijuana consumed in the United States is grown domestically, and therefore could not conclude that a majority of those who possessed marijuana are cognizant that it was illegally imported. *Leary*, 395 U.S. at 52, 53.

The Court refused to address the issue of whether a presumption that establishes an element of a crime should pass an even higher standard, such as the reasonable doubt test. *Id.* at 36 n.64.

64. *Turner*, 396 U.S. at 403.

65. *Id.* at 418 n.36.

66. *Id.* at 419, 420.

67. *Id.* at 416.

68. *Id.* at 418.

69. The Court stated in *Leary* that there was no need to consider whether a criminal presumption must also satisfy the criminal reasonable doubt standard because the statute does not even meet the more-likely-than-not standard. 395 U.S. at 36 n.64. The *Turner* Court also made reference to the reasonable doubt standard: "Whether judged by the more-likely-than-not standard of *Leary*, or by the more exacting reasonable doubt standard normally applicable in criminal cases [the statute] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug." 396 U.S. at 416.

70. 397 U.S. 358 (1970).

71. *Id.* at 364; see Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979) (discussing the burden of proof in criminal cases).

used as the sole evidence to prove an element of a crime must meet the reasonable doubt test. Whether an element of a crime is proved through the use of a presumption or through other evidence, the same standard of constitutionality should apply because both approaches assist the prosecution in establishing its *prima facie* case. Similarly, a presumption that is not the sole proof of an element of a crime but constitutes some evidence of the element should, together with other independent evidence offered by the prosecution, prove the element beyond a reasonable doubt. To hold otherwise would be to infringe upon the defendant's right to due process.

In *Mullaney v. Wilbur*,⁷² the Supreme Court held that the burden of proof rests upon the prosecution to prove every element of the crime charged beyond a reasonable doubt.⁷³ The case concerned the validity of a Maine statute that required a defendant charged with murder to prove that he acted "in the heat of passion, on sudden provocation" in order to reduce a charge of homicide to that of manslaughter.⁷⁴ If the defendant did not meet this requirement, then malice was to be conclusively presumed.⁷⁵ The defendant in *Wilbur* claimed that the statute denied him due process because he was required to disprove an element of the crime charged.⁷⁶ The Court followed the rationale of *Winship*, and held that the use of a presumption that placed the burden of disproving an element of the crime on the defendant violated the defendant's due process rights.⁷⁷ The presumption relieved the prosecution of its burden of proving every element of the crime beyond a reasonable doubt and therefore violated due process.⁷⁸ *Winship's* holding, therefore, applied to cases in which the issue involved the degree of criminal culpability as well as guilt or innocence. *Winship's* holding applied to *Wilbur* even though the burden of proof that was shifted to the defendant, if satisfied, would not have established innocence but only guilt of a lesser crime.

The *Wilbur* decision severely limits the use in criminal cases of presumptions that shift the burden of persuasion. Nonetheless, states may achieve virtually the same result by using the technique approved by the Court in *Patterson v. New York*.⁷⁹ The New York statute in *Patterson* required a conviction of murder upon proof beyond a rea-

72. 421 U.S. 684 (1975).

73. *Id.* at 704.

74. *Id.* at 703 (quoting ME. REV. STAT. ANN. tit. 17, § 2651 (1964)).

75. *Id.* at 687.

76. *Id.*

77. *Id.* at 701.

78. *Id.*

79. 432 U.S. 197 (1977).

sonable doubt of intent to kill.⁸⁰ If the defendant proved, however, as an affirmative defense, that he acted under "extreme emotional disturbance," then the charge of murder could be reduced to manslaughter.⁸¹ The Court upheld the imposition of this burden of persuasion upon the defendant. It distinguished *Patterson* from *Wilbur* on the basis that the defendant in *Patterson* was not asked to disprove any element of the state's case.⁸² There was no shifting of the burden to the defendant requiring him to disprove any fact essential to the offense. According to the *Patterson* Court, if a state is able to construct its laws such that it removes certain elements from the definition of a crime and makes them affirmative defenses, it may legally impose persuasion burdens on the defendant that otherwise would have violated principles of due process.⁸³

Although a state may initially allocate the burdens of production and persuasion to the defendant through the use of affirmative defenses, there are limitations on the state's power of allocation.⁸⁴ In *Speiser v. Randall*,⁸⁵ a California statute required veterans to file an oath as a prerequisite to qualification for a tax exemption.⁸⁶ The oath stated that the subscriber did not advocate the overthrow of the federal or state government by force, violence, or other unlawful means.⁸⁷ The Supreme Court of the United States held that enforcement of the California provision through procedures that place the burdens of proof and persuasion on the taxpayers denied them freedom of speech without the procedural safeguards required by the due process clause of the fourteenth amendment.⁸⁸ Justice Brennan, writing for the majority, reasoned that the state may not allocate the burden of proof if "in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked

80. *Id.* at 200; N.Y. PENAL LAW § 125.27 (McKinney 1975).

81. *Patterson*, 432 U.S. at 200.

82. *Id.* at 205-06.

83. *But see* *Speiser v. Randall*, 357 U.S. 513 (1958) (Requiring a defendant to disprove an element of the crime charged, rather than requiring the prosecution to prove the element, does not violate due process as long as the defendant is not subjected to hardship or oppression.).

84. *See* *Morrison v. California*, 291 U.S. 82, 88-89 (1934) (The burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant only after the state has "proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.").

85. 357 U.S. 513 (1958).

86. CAL. REV. & TAX. CODE § 32 (Deering 1953).

87. *Speiser*, 357 U.S. at 515.

88. *Id.* at 529.

as fundamental.”⁸⁹ Although *Speiser* permits, within these limits, the allocation of the burden of proof to the defendant before trial, the Supreme Court has also held that the burden of persuasion may not be shifted during trial by means of a presumption.⁹⁰

IV. THE DIVISION OF CRIMINAL PRESUMPTIONS: PERMISSIVE AND MANDATORY

In *County Court of Ulster County v. Allen*,⁹¹ the defendant was convicted under a New York statute that provided that the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons in the vehicle.⁹² The defendant claimed the statute violated his due process rights under the fourteenth amendment, arguing that the evidence, apart from the presumption, was insufficient to sustain his conviction.⁹³ In an opinion written by Justice Stevens, the Court distinguished between permissive and mandatory presumptions, and declared that the ultimate test of the validity of a criminal presumption is that it “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.”⁹⁴ The Court defined permissive presumptions as follows:⁹⁵

The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute *prima facie* evidence of the elemental fact. When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. . . . [T]his permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof.⁹⁶

89. *Id.* at 523 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (State courts are free to regulate their own procedure unless it violates the fourteenth amendment.).

90. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

91. 442 U.S. 140 (1979).

92. N.Y. PENAL LAW § 265.15(3) (McKinney 1967).

93. *Allen*, 442 U.S. at 142-43.

94. *Id.* at 156; see *Winship*, 397 U.S. at 364 (The prosecution must prove every element of a crime beyond a reasonable doubt.); see also *Mullaney v. Wilbur*, 421 U.S. at 702 n.31 (The ultimate burden of proof remains on the prosecution, but sometimes the burden is aided by the use of a presumption.).

95. *Allen*, 442 U.S. at 157. There is no prior law or decision mentioning these two types of presumptions. Thus, the distinction appears to be based on Justice Stevens’ own perception of the evidentiary device.

96. *Id.* (Proof beyond a reasonable doubt is affected only if “there is no rational way the trier could make the connection permitted by the inference.”). The risk of the rational factfinder making an erroneous factual determination is thus only present in this situation.

Permissive presumptions thus do not violate the due process clause of the fourteenth amendment when used in criminal trials, because there is no shifting of the burden of proof to the defendant, and the jury *may*, not *must*, apply the presumption. To pass scrutiny under a due process analysis, however, a permissive presumption must still evidence a sufficient rational connection between the proved and presumed facts. Such a presumption is better termed an inference because it is not required by law but the factfinder may resort to it at the factfinder's discretion.⁹⁷

A mandatory presumption, on the other hand, is a more troublesome device. The *Allen* Court stated that a mandatory presumption may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.⁹⁸

In the case of a mandatory presumption, therefore, the factfinder must find the presumed fact regardless of whether there is other evidence presented by the prosecution to support a conviction. The validity of a presumption is thus determined by "the presumption's accuracy in the run of cases."⁹⁹ Without discussing the criteria used to distinguish a permissive from a mandatory presumption,¹⁰⁰ the Court held that the presumption contained in the New York statute in *Allen* was permissive.¹⁰¹ It further held that the statute was constitutional because the presumption met the test described in *Leary*.¹⁰²

In a footnote, the *Allen* Court divided mandatory presumptions into two parts: "Presumptions that only shift the burden of production to the defendant, returning the ultimate burden of persuasion to the prosecution if the defendant meets his burden of production; and presumptions that entirely shift the burden of proof to the defendant."¹⁰³

97. M. GRAHAM, *supra* note 6, § 301.7, at 108.

98. *Allen*, 442 U.S. at 157.

99. *Id.* at 159.

100. *Id.* at 157 (The Court did not provide the criteria that a judge should apply to differentiate a mandatory presumption from a permissive presumption and to instruct the jury accordingly.).

101. *Id.* at 160.

102. Under the *Leary* test, there must be a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter must "more likely than not" flow from the former. 395 U.S. at 34-36. Thus, the Court held unconstitutional the presumption in *Leary* that authorized the jury to infer from the defendant's possession of marijuana that the marijuana was illegally imported because marijuana is grown in the United States. *Id.*

103. *Allen*, 442 U.S. at 157 n.16.

Both types of mandatory presumptions pose problems. Those that shift the entire burden of proof (production and persuasion) to the defendant relieve the prosecution of the ultimate burden of proving its case against the defendant beyond a reasonable doubt and therefore violate the due process clause of the fourteenth amendment. Mandatory presumptions that shift only the burden of production leave the court in the impossible position of having to direct a verdict against a defendant who fails to meet the imposed burden of production. Furthermore, *Allen* created an additional problem by failing to state any basis for distinguishing between the two types of mandatory presumptions other than the cryptic statement that jury instructions would be controlling.¹⁰⁴

Subsequent cases have dealt with presumptions but none have stated the criteria by which courts are to determine which presumptions are permissive and which are mandatory. Nonetheless, they have held unconstitutional mandatory presumptions that shift the burden of persuasion to the defendant. In *Sandstrom v. Montana*,¹⁰⁵ the defendant had been charged with deliberate homicide, an element of which was intent.¹⁰⁶ The trial court instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."¹⁰⁷ Because a reasonable juror could have interpreted the instruction as requiring an irrebuttable presumption or as shifting the burden of persuasion, the Supreme Court held that the instruction violated the fourteenth amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt.¹⁰⁸ Therefore, jury instructions relieving the state of the burden of proof enunciated in *Winship* are unconstitutional.¹⁰⁹

*Francis v. Franklin*¹¹⁰ again made clear that shifting the burden of persuasion of an element of the crime charged is impermissible.¹¹¹ Franklin was charged with malice murder and claimed lack of intent as his sole defense.¹¹² The jury was instructed that "[t]he acts of a

104. *Id.* The Court also stated that distinguishing between the two types of presumptions may require recourse to the particular statute and to previous cases decided under the statute. This suggestion, too, fails to explain what specific criteria are involved in distinguishing between the two types of presumptions.

105. 442 U.S. 510 (1979).

106. *Id.* at 513.

107. *Id.* at 517.

108. *Id.* at 513 (The jury was neither told that the presumption could be rebutted by some specific type of evidence nor told that it could be rebutted at all.).

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

110. 471 U.S. 307 (1985).

111. *Id.* at 314.

112. *Id.* at 311.

person of sound mind and discretion are presumed to be the product of the person's will."¹¹³ Even though the jury was told that the presumption could be rebutted, this instruction was not enough to guarantee due process, because "[t]he very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion."¹¹⁴ The *Franklin* Court had the opportunity to decide the constitutionality of presumptions that shift the burden of production but did not do so.¹¹⁵ It held that the jury instructions in the case could be interpreted as shifting the burden of persuasion to the defendant, in violation of the defendant's due process rights, and therefore, it did not need to address the question whether a shifting of the lesser burden of production would also have violated the defendant's due process rights.¹¹⁶ Thus, the constitutionality of mandatory criminal presumptions that shift the burden of production is an open question.

V. THE BURDEN OF PROOF WITHIN THE FEDERAL SYSTEM

A. *Proof Beyond a Reasonable Doubt*

The Model Penal Code specifies that the prosecution must prove every element¹¹⁷ of a crime beyond a reasonable doubt.¹¹⁸ A defendant is presumed innocent absent proof beyond a reasonable doubt.¹¹⁹ Presumptions pose problems in both of these areas. First, they may assist the prosecution in proving its case by allowing an element of the crime to be proven solely by the presumption without regard to the reasonable doubt standard. *Leary* established that due process is sat-

113. *Id.*

114. *Id.* at 316-17.

115. *Id.* at 314 n.3 ("We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question.").

116. *Id.* at 325.

117. Section 1.13(9) of the Model Penal Code defines the term "element":

- (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
 - (a) is included in the description of the forbidden conduct in the definition of the offense; or
 - (b) establishes the required kind of culpability; or
 - (c) negatives an excuse or justification for such conduct; or
 - (d) negatives a defense under the statute of limitations; or
 - (e) establishes jurisdiction or venue.

MODEL PENAL CODE § 1.13(9) (Proposed Official Draft 1962).

118. MODEL PENAL CODE AND COMMENTARIES § 1.12 comment 8 (1985).

119. *See, e.g., Carr v. State*, 192 Miss. 152, 156, 4 So. 2d 887, 888 (1941) (The "presumption of innocence" is not technically a presumption—an inference drawn from a fact in evidence—it is actually an "assumption" until facts proven by the prosecution indicate the contrary.).

ified by the lesser standard that the presumed fact is "more likely than not" to follow from the basic facts.¹²⁰ A presumption, therefore, that met the *Leary* test but not the reasonable doubt test would allow the prosecution to prove its case without proving every element of the crime beyond a reasonable doubt. Second, if the prosecution may prove an element of a crime by a presumption, then the presumption of innocence is overcome by proof that has not been established beyond a reasonable doubt.

B. *Affirmative Defenses*

Affirmative defenses, fixed by statute or case law, allocate either a burden of persuasion or of production to the defendant before trial.¹²¹ Once evidence has been produced by the defendant to support the affirmative defense,¹²² the prosecution has the usual burden of disproving the defense beyond a reasonable doubt. Some common affirmative defenses include self-defense,¹²³ duress,¹²⁴ and entrapment.¹²⁵ According to *Patterson v. New York*,¹²⁶ affirmative defenses are not violative of the due process clause as long as they do not simply negate an element of a crime.¹²⁷ The constitutionality of an affirmative defense would therefore vary from state to state depending on the state's definition of the elements of the offense. The difficulty with this approach is that a state may shift the burden of proof to the defendant by removing an element from the definition of a crime.¹²⁸ There are, nonetheless, constitutional limitations on the freedom of states to allocate the burden of proof between the prosecution and the

120. *Leary*, 395 U.S. at 46.

121. C. MCCORMICK, *supra* note 1, § 346 at 987.

122. It is not clear what amount of evidence is required to support an affirmative defense so that the burden shifts back to the prosecution to disprove it. The Model Penal Code suggests that it is sufficient that the defendant show enough evidence to justify a reasonable doubt upon the issue. See MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962). McCormick argues that a defendant is usually required to prove an affirmative defense by a preponderance of the evidence. C. MCCORMICK, *supra* note 1, § 346 at 988 n.5.

123. *Brown v. State*, 48 Del. 427, 433, 105 A.2d 646, 650 (1954).

124. *Johnson v. United States*, 291 F.2d 150, 155 (8th Cir.), *cert. denied*, 368 U.S. 880 (1961).

125. *United States v. Bailey*, 505 F.2d 417, 420 n.7 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).

126. *Patterson*, 432 U.S. 197 (1977).

127. *Id.* at 206-07.

128. For example, instead of requiring the prosecution to prove *A*, *B*, *C*, and *D*, the state could require the prosecution to prove only *A*, *B*, and *C*, with the additional requirement that only when the defendant raised the issue of the absence of *D* would the prosecution have to prove *D* beyond a reasonable doubt.

defendant, as illustrated by *Speiser v. Randall*.¹²⁹ The *Speiser* Court stated:

[T]he burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.¹³⁰

The Model Penal Code states that a defense is affirmative if such a defense is designated as affirmative by a code or statute, or if it involves a matter plainly within the defendant's knowledge that will excuse or justify his action.¹³¹ Thus, shifting the burden of proof onto the defendant passes constitutional muster if the shift is made before trial on an independent defense that offers justification for the crime instead of simply negating an element of the crime. Presumptions, on the other hand, which shift the burden of production or persuasion during trial may be unconstitutional.¹³² Therefore, if states wish to impose upon the defendant the burden of exculpating himself by proving an element that is not an element of the prosecution's case, the means of achieving this objective is by establishing the ground of exculpation as an affirmative defense.

Presumptions are useful evidentiary devices when the legislative purpose for creating the presumption is to cause something less than a shift in the burden of proof.¹³³ In cases in which proof of certain basic facts is strong evidence of the ultimate fact so that it is deemed appropriate to emphasize the strength of the connection, establishing a presumption is appropriate. The permissive presumption addresses this situation because proof of the basic facts is sufficient to submit the issue to the jury and the jury is permitted, but not required, to find the presumed fact.¹³⁴ Thus, the permissive presumption is really an infer-

129. 357 U.S. 513 (1958). For a discussion of *Speiser*, see *supra* notes 84-90 and accompanying text.

130. *Id.* at 524 (quoting *Morrison v. California*, 291 U.S. 82, 88-89 (1934)).

131. MODEL PENAL CODE § 1.12(3) (Proposed Official Draft 1962).

132. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (stating that presumptions that shift the burden of persuasion are unconstitutional).

133. MODEL PENAL CODE AND COMMENTARIES § 1.12 comment 7 (1985).

134. *Id.*; see Ashford & Rissinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969) (discussing the purpose of presumptions and how they operate); Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979) (providing a discussion and analysis of presumptions).

ence that guides the jury in making a decision they might otherwise have been less likely to make.

Mandatory presumptions that shift the burden of production serve a different purpose.¹³⁵ They were first discussed by the Court in *Allen*,¹³⁶ and again fourteen days later in *Sandstrom*,¹³⁷ but their constitutionality was left undecided in *Franklin*.¹³⁸ In theory, the burden of production shifts to the defendant upon presentation of the basic facts giving rise to the presumption, and the defendant must then produce some evidence to rebut the presumption.¹³⁹ If the defendant produces such evidence, then the burden of persuasion beyond a reasonable doubt returns to the prosecution. Because the defendant's burden of production is minimal, the purpose of the shift is to weed out justifications and excuses for the crime that the prosecution does not need to overcome with evidence, and to single out those justifications and excuses that the prosecution does need to address in presenting its case. *Sandstrom* explains what should, but cannot, happen if the defendant fails to provide an "excuse or justification"¹⁴⁰ for the crime with which he is charged:

[T]he effect of a failure to meet the production burden is significantly different for the defendant and prosecution. When the prosecution fails to meet it, a directed verdict in favor of the defense results. Such a consequence is not possible upon a defendant's failure, however, as verdicts may not be directed against defendants in criminal cases.¹⁴¹

Therefore, presumptions or any other devices that shift the burden of production to the defendant cannot be utilized in criminal trials.¹⁴² This conclusion is supported by Standard 303 of the Uniform Rules of Evidence.¹⁴³ Standard 303 establishes the standard for a court to sub-

135. Unlike permissive presumptions, the burden of proof is shifted to the defendant and thus their effect is more than simply suggesting to the jury that greater emphasis ought to be placed on the proven facts giving rise to a presumption.

136. *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979).

137. *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979).

138. *Francis v. Franklin*, 471 U.S. 307, 314 n.3 (1985).

139. What constitutes "some" evidence is not clear. The Court suggested in *Allen* that some production burdens may be satisfied by any evidence. 442 U.S. at 157 n.16.

140. MODEL PENAL CODE § 1.12(3)(c) (Proposed Official Draft 1962).

141. *Sandstrom*, 442 U.S. at 517 n.5.

142. *United States v. Martin Linen Supply*, 430 U.S. 564, 572 (1977).

143. Standard 303(b) of the Uniform Rules of Evidence addresses the submission of a presumption to the jury. It states that:

The court is not authorized to direct the jury to find a presumed fact against the accused. If a presumed fact establishes guilt or is an element of the offense or negatives a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the

mit a presumption to the jury and the type of jury instruction required.¹⁴⁴ According to Standard 303, the judge is never authorized to direct the jury to find a presumed fact against the accused if that fact reaches an element of the crime.¹⁴⁵

Affirmative defenses serve the same purpose as presumptions that shift the burden of production, but without placing the court in the position of having to direct a verdict against a criminal defendant. In most instances, defenses that the defendant may raise are not true affirmative defenses that place both the burden of persuasion and production on the defendant.¹⁴⁶ According to the Model Penal Code, only evidence sufficient to raise a reasonable doubt is necessary to support an affirmative defense.¹⁴⁷ Once the defendant produces this evidence, a new element is introduced that the prosecution must disprove beyond a reasonable doubt.

If the burden of proof in criminal cases was structured as to prohibit the production shifting presumption but to allow affirmative defenses, clarity would be gained and confusion reduced. Only defenses that the defendant raised in the case would have to be disproved by the prosecution and the court would never have to confront the problem of what it should do if the defendant fails to meet his burden of production.

In addition to presumptions that shift the burden of production,

presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

UNIF. R. EVID. 303(b) (1953).

Standard 303(c) addresses the instructions that are to be given to the jury regarding a presumption:

Whenever the existence of a presumed fact against the accused is submitted to the jury, the court shall instruct the jury that it may regard the basic facts as sufficient evidence of the presumed fact but is not required to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the court shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

UNIF. R. EVID. 303(c) (1953).

144. Congress deleted this rule from the proposed Federal Rules of Evidence because it was more appropriate for inclusion in the amendments to the Federal Rules of Criminal Procedure. MODEL PENAL CODE AND COMMENTARIES § 1.12 comment 2 n.9 (1985).

145. UNIF. R. EVID. 303(b) (1953), reproduced *supra* note 141.

146. See, e.g., *Kadis v. United States*, 373 F.2d 370, 374 (1st Cir. 1967) (describing evidence needed to prove an affirmative defense as some evidence but more than a mere scintilla); *Notaro v. United States*, 363 F.2d 169, 174 (9th Cir. 1966) (describing the burden of producing evidence in order to raise an affirmative defense as evidence that "fairly" raises the issue); *Howard v. United States*, 232 F.2d 274, 276 (5th Cir. 1956) (describing evidence to support an affirmative defense as slight evidence).

147. MODEL PENAL CODE AND COMMENTARIES § 1.13 comment 3 (1985).

the *Allen* Court discussed mandatory presumptions that shift the burden of persuasion.¹⁴⁸ This part of the *Allen* decision, however, appears to have been incorrect in light of *Mullaney v. Wilbur*.¹⁴⁹ Under *Wilbur*, it is a violation of the due process clause of the fourteenth amendment to place the burden of persuasion on the defendant to disprove an element of a crime.¹⁵⁰ Because a presumption shifting the burden of persuasion does exactly what was held to be impermissible in *Wilbur*, such presumptions cannot be constitutional. Indeed, *Patterson v. New York*,¹⁵¹ *Sandstrom v. Montana*¹⁵² and *Francis v. Franklin*¹⁵³ all reaffirmed *Wilbur* and held that the burden of persuasion may not be shifted to the defendant. In addition, a mandatory presumption that shifts the burden of persuasion suffers from the same infirmities as a mandatory presumption that shifts the burden of production. Neither type of presumption is really mandatory, because the defendant's failure to satisfy the burden of production or persuasion never results in a directed verdict against him.¹⁵⁴ To call such presumptions mandatory, therefore, results in considerable confusion.

Furthermore, the rationale behind mandatory presumptions is difficult to justify. In theory, according to *Allen*, the validity of mandatory presumptions should be analyzed through common knowledge without regard to other evidence in the record.¹⁵⁵ Because no extraneous information is needed to judge a mandatory presumption, this approach suggests that mandatory presumptions should be very obvious so that every rational juror will find the existence of the presumed fact upon proof of the basic facts. An example is the presumption that a 1987 Cadillac is worth at least fifty dollars. Every rational juror will agree to such a statement so that the only effect of the presumption is the reiteration of the obvious. Therefore, the probative value of instructing the jury that they must find the presumed fact is minimal because any rational juror will find the presumed fact regardless of the presumption. Furthermore, accepting presumptions shifting the burden of persuasion in situations in which the presumption is extremely strong and obvious, does nothing to assist with drawing the line between permissible and impermissible presump-

148. *Allen*, 442 U.S. at 157.

149. 421 U.S. 684 (1975). See *supra* notes 72-78 and accompanying text.

150. *Id.* at 704.

151. *Patterson*, 432 U.S. at 214.

152. *Sandstrom*, 442 U.S. at 524.

153. *Franklin*, 471 U.S. at 317-18.

154. *Sandstrom*, 442 U.S. at 516 n.5.

155. *Allen*, 442 U.S. at 157 n.16.

tions. For example, it is less obvious to say that a 1987 Cadillac is worth \$5000.

Allen created the so-called mandatory presumption. In addition to the constitutional problems discussed above, however, *Allen* never indicated how a judge determines whether a presumption is mandatory or permissive.¹⁵⁶ The origin of Justice Stevens' distinction between permissive and mandatory presumptions remains uncertain. Justice Powell's concurrence in *Allen* commented thus: "The Court suggests as the touchstone for its analysis a distinction between 'mandatory' and 'permissive' presumptions. I have found no recognition in the Court's prior decisions that this distinction is important in analyzing presumptions used in criminal cases."¹⁵⁷

VI. AN ATTEMPT TO DEAL WITH MANDATORY PRESUMPTIONS

Allen caused confusion in the area of presumptions. Instead of having courts merely decide whether the strength of the connection between the basic and presumed facts was strong enough, *Allen* also required that the courts distinguish between permissive and mandatory presumptions. No guidelines were given on how that distinction should be made, and no answers were provided to the due process questions that mandatory presumptions pose. According to *Sandstrom*, that part of the holding in *Allen* that shifts the burden of persuasion is incorrect.¹⁵⁸ Furthermore, *Franklin* recognized presumptions that shift the burden of production but did not decide upon their validity.¹⁵⁹

Two North Carolina cases, *Davis v. Allsbrook*¹⁶⁰ and *Rook v. Rice*,¹⁶¹ demonstrate the confusion that resulted from *Allen*. In *Davis*, the defendant, charged and convicted of first-degree murder, sought a writ of habeas corpus. The defendant challenged the jury instructions, which provided that if the prosecution proved beyond a reasonable doubt that the defendant intentionally killed the victim, or the defendant admitted that the killing was intentional, state law presumed that the defendant acted with malice.¹⁶² The malice element of

156. The Court suggested that jury instructions would address this issue. *Allen*, 442 U.S. at 162. That suggestion, however, only addresses the question of how the jury would interpret the instruction, and not how the judge should decide what type of presumption is involved and what type of instruction to give.

157. *Allen*, 442 U.S. at 170 n.3 (Powell, J., concurring).

158. *Sandstrom*, 442 U.S. at 524.

159. *Franklin*, 471 U.S. at 314 n.3.

160. 778 F.2d 168 (4th Cir. 1985).

161. 783 F.2d 401 (4th Cir. 1986).

162. *Davis*, 778 F.2d at 172.

the prosecution's case thus could, according to the *Davis* court, be proved through the use of a presumption. The defendant contended that the instruction on the presumption unconstitutionally shifted the burden of persuasion to him, on the element of malice, in violation of *Mullaney v. Wilbur*.¹⁶³ The court held that only a burden of production had been shifted to the defendant and that such a shift was constitutionally permissible as long as the presumed fact was rationally connected to a proven fact.¹⁶⁴ The court went on to state that whether the jury might have understood the instruction as imposing a burden of persuasion on the defendant was irrelevant because the defendant had failed to meet any burden of proof whatsoever.¹⁶⁵ The defendant's failure to meet the burden of production, the court said, had taken the element of malice out of the case, thereby reducing the number of elements the government had to prove to establish its case.¹⁶⁶ If the defendant had produced some contrary evidence, then the burden of proof would be shifted back to the prosecution, who would have the burden of proving all the elements of the crime beyond a reasonable doubt. In cases such as *Sandstrom*, the court said, when the defendant meets his burden of production, the question of whether proper jury instructions were given is a critical issue.¹⁶⁷ Where the defendant fails to meet his burden of production, it does not matter whether the jury interpreted the instruction as shifting the burden of production or persuasion, because the question of malice is no longer an issue in the case.¹⁶⁸

In *Rook*, the defendant also was charged and convicted of first-degree murder and subsequently sought a writ of habeas corpus. Like *Davis*, *Rook* allowed the element of malice to be proven by the use of a presumption.¹⁶⁹ *Rook* contended that the jury instructions given at his trial shifted the burden of proof to him in violation of his due process rights.¹⁷⁰ The jury instructions to which *Rook* objected stated that "if the state proves to you beyond a reasonable doubt that the defendant intentionally killed [the victim,] . . . then the law implies, first, that the killing was unlawful, and secondly, that it was done with malice."¹⁷¹ The court held that the jury instruction did not shift the burden of persuasion to the defendant but did shift the burden of

163. *Id.*; see *supra* notes 72-79 and accompanying text.

164. *Id.* at 172.

165. *Id.* at 173.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Rook*, 783 F.2d at 405.

170. *Id.*

171. *Id.*

production.¹⁷² Relying on *Davis*, the court said that, "a state may legitimately shift a burden of production on an element of the crime to the defendant."¹⁷³

The *Davis* and *Rook* courts' treatment of presumptions creates several problems for North Carolina courts. First, under *Davis* and *Rook*, they must decide how to instruct the jury on a presumption when no contrary evidence is produced by the defendant. In such instances, the court must decide whether the jury should be instructed that the defendant failed to meet his burden of proof and that the element must therefore be removed from the case. If such an instruction is given, the jury may place undue weight on the defendant's failure to produce evidence. On the other hand, the jury may treat the defendant's failure to produce evidence as conclusively establishing the presumption of malice.

Second, *Davis* and *Rook* indicate that the element of malice should be entirely removed from the case if the defendant fails to meet his burden of production. This is equivalent to making the presumption of malice conclusive because the prosecution is relieved of the burden of proving an element of the crime. Therefore, the *Davis* and *Rook* trial courts should have instructed the juries that they were required to find that there was malice. Instead, the *Davis* trial court simply said: "If the state proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed [the victim] . . . with a deadly weapon, . . . the law implies first that the killing was unlawful, and second, that it was done with malice."¹⁷⁴ The word "implies" makes the instruction permissive, not conclusive, as to the element of malice. Even if the instruction were to be conclusive, it would nonetheless be unconstitutional because it would allow the prosecution to establish an element of its case without, as constitutionally required, proving it beyond a reasonable doubt.¹⁷⁵ At best, the *Davis* and *Rook* trial courts were instructing their juries as to an inference that they might make. Although they stated that they were removing the element of malice from the case, the *Davis* and *Rook* trial courts were only confusing their juries.

Third, North Carolina's treatment of presumptions does not help the prosecution. As stated in Justice Powell's concurrence in *Allen*, the purpose of presumptions is to assist the government.¹⁷⁶ Instead,

172. *Id.*

173. *Id.* (quoting *Davis*, 778 F.2d at 172).

174. *Davis*, 778 F.2d at 172; *Rook*, 783 F.2d at 405.

175. *Winship*, 397 U.S. at 364 (holding that every element of the crime charged must be proven beyond a reasonable doubt).

176. *Allen*, 442 U.S. at 168 (Powell, J., concurring).

the prosecution's case is undermined because the instructions given to the jury introduce a new issue into the case, whether the killing was done with malice,¹⁷⁷ that otherwise would not have been there. If the defendant does not meet the burden of production as to malice, then the North Carolina courts hold that the issue of malice is removed from the case. The value of a presumption in this situation is that it eliminates an issue from the case. There is no value to a system, however, whose only purpose is to assist the government in eliminating an element of an offense that was unnecessary at the outset. Instead, like other jurisdictions, North Carolina courts could have placed the initial burden on the defendant to produce some evidence of an affirmative defense that would show justification for the killing.

In *State v. Simpson*,¹⁷⁸ the court stated that "[t]he state is not required to prove malice and unlawfulness unless there is some evidence of their nonexistence"¹⁷⁹ Therefore, only when the defendant produces evidence of a justification for the crime should a burden be imposed on the state to prove malice. This objective is most efficiently and effectively handled through the use of affirmative defenses. Only when the defendant has evidence to support a defense is the defense introduced into the case. If no evidence is introduced to support a defense, that defense is not an issue in the case.

The effect of the presumption of malice in *Davis* and *Rook* imposed upon the defendant the burden of going forward with or producing some evidence of a lawful reason for the killing, such as self-defense and killing in the heat of passion upon sudden provocation.¹⁸⁰ These issues can better be introduced into the case through the use of affirmative defenses. Self-defense is mentioned in the Model Penal Code as a typical affirmative defense.¹⁸¹ Killing in the heat of passion on sudden provocation has also been used as an affirmative defense in some jurisdictions.¹⁸² *Wilbur* recognizes that "many states do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion" before requiring the prosecution to negate this element by proving the absence of passion beyond a rea-

177. Malice has been defined by the North Carolina courts as "not only hatred, ill will, or spite, but that condition of mind which prompts one to take the life of another intentionally, without just cause, excuse or justification." *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922).

178. 303 N.C. 439, 279 S.E.2d 542 (1981).

179. *Id.* at 451, 279 S.E.2d at 550.

180. *Id.*, 279 S.E.2d at 550 (explaining the effect of the presumption of malice).

181. MODEL PENAL CODE AND COMMENTARIES § 1.12 comment 3 (1985).

182. *People v. Seaberry*, 63 Ill. App. 3d 718, 721, 380 N.E.2d 511, 514 (1978) (burden on the defendant charged with manslaughter to introduce some evidence that he acted under the influence of "sudden and intense passion" resulting from serious provocation).

sonable doubt.¹⁸³ Placing the burden of producing evidence as to these issues upon the defendant in the first instance is the better system. Using affirmative defenses instead of presumptions would eliminate any prejudice to the defendant caused by his failure to rebut the state's presumption. Jury confusion would also be eliminated because no burden is shifted to the defendant. The only burden on the defendant is that allocated to him when he introduces a new element, an affirmative defense, into the case.

VII. CONCLUSION

The theoretical distinction between permissive and mandatory presumptions, created by *Allen*, has resulted in much confusion and serves no practical purpose. Given the fact that *Sandstrom*, *Franklin* and *Patterson* held that the burden of persuasion may not be shifted to the defendant on an element of a crime, that part of *Allen* that referred to presumptions shifting the burden of persuasion should be recognized as being incorrect. In addition, there has never been a case of an actual mandatory shifting of the burden of persuasion.

Furthermore, because courts cannot direct a verdict against the defendant in a criminal case, that part of *Allen*, which was left open in *Franklin*, allowing the burden of production to be shifted to the defendant, is also probably unconstitutional, although courts have not yet ruled on the issue. Understandably, courts are fearful of instructing juries that they must find a presumed fact. This situation is demonstrated by the Fourth Circuit and its reluctance to give mandatory instructions to the jury to find the presumed fact.¹⁸⁴ Although the *Davis* court upheld production shifting presumptions, it did not go so far as to give mandatory instructions to the jury,¹⁸⁵ suggesting that the court sensed that such an instruction was wrong and jeopardized the constitutional rights of the accused. Because mandatory presumptions confuse the jury and jeopardize the rights of the accused without serving any purpose that cannot be accomplished through other evidentiary devices, such as affirmative defenses, they should be eliminated and *Allen* overruled in that respect.

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183. *Wilbur*, 421 U.S. at 701 n.28.

184. See *supra* notes 173-75 and accompanying text.

185. *Id.*