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The Likely Source: An Unexplored Weakness in the Net Worth Method of Proof

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The Likely Source: An Unexplored Weakness in the Net Worth Method of Proof*

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The government will often suspect a taxpayer of tax evasion if it discovers that the taxpayer's net worth has increased and that the taxpayer did not report the full amount of the increase as taxable income. If the government can establish a likely source for the increase, a jury will be permitted to infer that the taxpayer derived the increase from currently taxable and unreported income. In this article, the author discusses the origins, development, and varied applications of this "likely source inference." Then, after critically examining the constitutional underpinnings of the inference, the author argues that the inference is unconstitutional as presently applied by most courts. The author concludes by suggesting how the doctrine can be modified to permit its continued use.

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"Trends in tax prosecution have for at least two decades been continuously running against the main currents in criminal procedure. By subtle doctrinal manipulation, the courts confer more and more discretion on invoking officials and reduce the roles of judge and jury. The judge's role is limited by his abdication of responsibility to define the offense and to determine the sufficiency of evidence. The jury's function is restricted by a procedural panoply which prevents a full and fair test of the Government's proofs."¹

"[T]he [likely] source requirement is largely a fiction."²

I. INTRODUCTION

The offense of income tax evasion is defined in section 7201 of the Internal Revenue Code.³ This section provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title" is guilty of a crime against the United States and is subject to a fine and imprisonment if convicted. To obtain a conviction under section 7201, the government must establish that: (1) an additional tax was due and owing; (2) the taxpayer attempted to evade this tax; and (3) the taxpayer acted willfully.⁴

The government has used the net worth method of proof for at least fifty years to establish the elements of the offense of tax evasion.⁵ Although the government initially employed the net worth

1. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 2-3 (1966).

2. Hill, *The Defense of a Criminal Net Worth Tax Case in the Light of Recent Supreme Court Decisions*, 41 CORNELL L.Q. 106, 119 (1955).

3. I.R.C. § 7201 (1976).

4. See, e.g., *Sansone v. United States*, 380 U.S. 343 (1965); *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Schafer*, 580 F.2d 774 (5th Cir.), cert. denied, 439 U.S. 970 (1978).

5. The government also commonly uses two other methods of proof: specific items and bank deposits. In the specific item method, the government attempts to establish specific transactions that were not accurately or completely reflected on the tax return. For example, the receipt of, and the failure to report on a tax return, income from the sale of stock or securities would constitute a specific item. When the government can demonstrate a number of specific items, it contends that taxes were evaded for the year in issue. In the bank deposits method, the government, through analysis of deposits to all of a taxpayer's bank accounts, attempts to establish that these deposits reflected taxable income. To employ this method successfully, the government must establish (1) regular and periodic deposits to one

method to convict racketeers during the 1930's,⁶ by 1950 it had successfully used the method in prosecutions of "legitimate" businessmen.⁷ In the seminal case of *Holland v. United States*,⁸ the Supreme Court of the United States noted that "[t]he net worth method, it seems, has evolved from the final volley to the first shot in the Government's battle for revenue."⁹ This assessment remains accurate today.

The net worth method uses circumstantial evidence to establish that the taxpayer's net worth is greater than the amount suggested by his tax return.¹⁰ Pursuant to this method, government investigators examine the taxpayer's returns, usually for a three-year period, and identify all of the assets acquired by the taxpayer and all of the liabilities he incurred in acquiring those assets. The excess of the assets over the liabilities for each year is the taxpayer's net worth. This figure is adjusted upward by adding to it certain nondeductible expenditures, such as amounts for personal living expenditures, tax payments, and losses on personal assets for each year.¹¹ Monies received from nontaxable sources, such as

or more bank accounts; (2) that the taxpayer was engaged in a business or calling that could have generated these deposits; (3) that the deposits were not generated by nontaxable sources of income; and (4) that the deposits, after adjustment, were in excess of reported income. See generally *Tax Evasion—Methods of Proof*, TAX MGMT. (BNA) No. 330, at A-3 to -11 (1975) [hereinafter cited as TAX MGMT.].

6. See *United States v. Wexler*, 79 F.2d 526 (7th Cir. 1935), cert. denied, 297 U.S. 703 (1936); *Guzik v. United States*, 54 F.2d 618 (7th Cir.), cert. denied, 285 U.S. 545 (1932); *Capone v. United States*, 51 F.2d 609 (7th Cir.), cert. denied, 284 U.S. 669 (1931). Ralph "Bottles" Capone was the older brother of Al Capone. Jack Guzik was the number three man in Al Capone's Chicago organization. Irving Wexler was Arthur Flegenheimer's arch rival in New York. Mr. Wexler and Mr. Flegenheimer were more popularly known as Waxie Gordon and Dutch Schultz respectively. See generally E. IREY & W. SLOCUM, *THE TAX DODGERS: THE INSIDE STORY OF THE T-MEN'S WAR WITH AMERICA'S POLITICAL AND UNDERWORLD HOODLUMS* (1948).

7. See, e.g., *Brodella v. United States*, 184 F.2d 823 (6th Cir. 1950).

8. 348 U.S. 121 (1954).

9. *Id.* at 126-27.

10. The term "net worth" actually is a misnomer. Most individuals, upon hearing the term, think immediately of the financial statement that is prepared in the course of obtaining a bank loan. Bank financial statements, however, reflect the fair market value of the taxpayer's assets. It is the cost of all the assets, not their fair market value, that is employed in computing the net worth in a criminal tax case. See TAX MGMT., *supra* note 5, at A-12; Hill, *supra* note 2, at 108; Note, *Net Worth and Other Indirect Methods Used in Federal Income Tax Criminal Fraud Prosecution*, 28 TEMPLE L.Q. 426 (1955); see also 2 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 35.08 (3d ed. 1977).

11. The treatment of losses in the net worth method is not easy to conceptualize. Because all assets are included in net worth, if an asset is sold at a loss during the years at issue, and if the loss is nondeductible in nature, the amount of the loss is treated as a nondeductible expenditure. The difference between the amount of money received and the cost basis of the asset, as with other nondeductible expenditures, is added back; this in-

gifts, inheritances, loans, tax free interest, and capital gains, are then subtracted from the taxpayer's net worth.¹² The investigators compare the resulting adjusted net worth figure with the taxpayer's reported taxable income for the year. If the adjusted net worth is greater than the reported income, the government claims that the difference represents unreported taxable income for the year or years at issue.¹³

An example will aid in understanding the method. Assume that at the beginning of calendar year 1980, a taxpayer has \$100,000 of nonliquid assets and no liabilities. In its investigation, the government determines that during 1980, the taxpayer spent \$200,000 for a home, \$50,000 for a boat, and \$10,000 for a car, and that the taxpayer owned all of these assets on December 31, 1980. The government further finds that during 1980, the taxpayer spent \$20,000 on clothes, food, and other nondeductible personal expenditures. Finally, the government finds that the taxpayer obtained a \$40,000 loan to purchase the boat. Based on these assets, liabilities, and expenditures, and assuming that the taxpayer still holds the original \$100,000 of nonliquid assets, the government would compute the taxpayer's net worth increase for 1980 as \$240,000: \$280,000 in assets acquired and nondeductible expenditures made during the year, less the new liability of \$40,000. If the taxpayer reported only \$90,000 of income on his tax return, the government would claim that the \$150,000 difference between the taxpayer's net worth increase (\$240,000) and reported income (\$90,000) represents unreported taxable income.

The appearance of a net worth "bulge" in a comparison of the taxpayer's net worth increase and reported taxable income, however, is not by itself sufficient evidence to establish that the difference was derived from *currently* taxable income. The government also is required either to negate all nontaxable sources of income for the year or years in question, or to establish a likely source for the unreported increase in the taxpayer's net worth.¹⁴ In the exam-

creases the net worth in the year the loss occurred. See *Tax Mgmt.*, *supra* note 5, at A-17.

12. Deductible items not claimed on the tax return have no effect on net worth. Any deductible item not claimed requires payment of that item by the taxpayer in the year at issue. Any deductible item not claimed, therefore, is both an expenditure and a deduction in the net worth computation. Because the item results in both an addition to and a reduction from net worth, additional deductions have no effect on the net worth computation. *Id.* at A-17 to -18.

13. See Duke, *supra* note 1; Comment, *Proving Tax Evasion by the Net Worth Method*, 34 *Tex. L. Rev.* 606 (1956); *supra* note 10.

14. See, e.g., *United States v. Massei*, 355 U.S. 595 (1958) (*per curiam*); *Holland v.*

ple above, the government cannot convict the taxpayer for failing to report the \$150,000 net worth "bulge" unless it either negates all possible nontaxable sources of the income or establishes that some legal or illegal enterprise engaged in by the taxpayer was the likely source. If the government establishes a likely source for the net worth increase, the jury then is permitted to infer that the taxpayer derived the increase from unreported and currently taxable income.¹⁵ Because it is easier to prove the affirmative than the negative, the government usually elects to establish a likely source for the claimed net worth increase in criminal tax prosecutions.¹⁶

Neither the Internal Revenue Code nor the Treasury Regulations refers to the likely source inference. Although the Supreme Court of the United States sanctioned the likely source inference in *Holland v. United States*,¹⁷ commentators have criticized the inference,¹⁸ and two federal courts of appeals recently reversed convictions because the government failed to present sufficient evidence to establish the existence of a likely source.¹⁹

Despite the criticism, no commentator or court has reexamined the constitutional underpinnings of the likely source inference in the past twenty-five years. This article traces the development of the likely source inference, and the proof deemed sufficient to establish it, from the pre-*Holland* period to the present. The article also suggests certain modifications essential to permit the continued use of the inference in tax evasion prosecutions in which the government relies on the net worth method of proof.

II. HISTORY OF THE LIKELY SOURCE INFERENCE

A. *The Early Years*

Even before *Holland*, federal courts of appeals had reviewed a number of tax evasion convictions in which the government introduced likely source proof. In *Gleckman v. United States*, the United States Court of Appeals for the Eighth Circuit affirmed a tax evasion conviction for the years 1929 and 1930 based on "circumstantial evidence that [the taxpayer had] a business outside of that described in his return and that at least some of his deposits

United States, 348 U.S. 121 (1955).

15. See 2 E. DEVITT & C. BLACKMAR, *supra* note 10, § 35.08 and cases cited therein.

16. TAX MGMT., *supra* note 5, at A-25 to -27.

17. 348 U.S. 121, 138 (1954).

18. See Duke, *supra* note 1; Hill, *supra* note 2, at 119.

19. *United States v. Grasso*, 629 F.2d 805 (2d Cir. 1980); *United States v. Bethea*, 537 F.2d 1187 (4th Cir. 1976).

were derived from it.”²⁰ At trial the government established that in 1928, a pre-prosecution year, the defendant had learned that income derived from illegal liquor transactions was taxable, and had therefore filed income tax returns for the years 1925 through 1927. The government also showed that in 1929 the defendant had listed his occupation on property statements as “merchant,” which, according to the court, was a term “broad enough to include one engaged in illegal liquor transactions,”²¹ and that in both 1929 and 1930, the defendant had received income in excess of the amount reported on his return.²² Although the government did not present direct evidence that the taxpayer had actually engaged in illegal liquor transactions in either 1929 or 1930, the jury convicted the defendant on the basis of the circumstantial evidence. The Eighth Circuit affirmed, holding that the circumstantial evidence was sufficient to create the inference that the likely source was the illegal buying and selling of liquor.²³

Fourteen years later, in *Schuermann v. United States*,²⁴ the Eighth Circuit had an opportunity to examine likely source proof more critically. In *Schuermann* a jury convicted the defendant of tax evasion for the years 1942 to 1945. The government established that the defendant had operated a numbers business during the war years. During those years, the taxpayer’s expenditures and investments exceeded his reported income. The government did not prove, however, that a likely source existed for the net worth increase. Nonetheless, the Eighth Circuit affirmed the conviction. On the government’s alleged failure to prove a likely source, the court merely stated:

One can believe that his [the defendant’s] business, like many other enterprises, legal and illegal, was a beneficiary of the prosperity of the war years, and that his expenditures kept pace with his income. If the skill of the tax evader in concealing income is not to become an “invincible barrier to proof” . . . the federal

20. 80 F.2d 394, 399 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936).

21. *Id.* The court even indicated that the government’s burden of investigation is less in a case involving illegal taxpayer activity than in one involving legal taxpayer activity: “[I]t would not be possible for any complete account of [the taxpayer’s] business to be made up for the government by any kind of skilled accountancy. More especially, where the business transacted may be of an illegal nature.” *Id.* at 401.

22. *Id.* at 397-400. In *Gleckman* the government used the bank deposits method to establish the tax deficiency. The government nonetheless attempted to establish that the bank deposits were derived from taxable income. See generally *Duke*, *supra* note 1, at 13-15; Note, *supra* note 10, at 433-36.

23. 80 F.2d at 399-402.

24. 174 F.2d 397 (8th Cir.), *cert. denied*, 338 U.S. 831 (1949).

appellate courts will have to rely heavily upon the sound judgment of the trial courts in appraising the sufficiency of the evidence to warrant submission of a tax evasion case to a jury, and upon the fairness and common sense of juries in determining guilt or innocence when such cases are submitted to them.²⁵

Although the Eighth Circuit in *Gleckman* and *Schuermann* sanctioned the use of minimal evidence to establish a likely source for allegedly illicit, unreported income, in similar cases the government presented a substantial amount of likely source evidence. In *United States v. Chapman*,²⁶ for example, the government's likely source evidence included the testimony of seven meat peddlers, each of whom stated that during one of the war years, they had paid either the taxpayer, the president of a meat-packing company, or his salesmen overceiling prices, in cash, for meat. The taxpayer's salesmen, in turn, testified that they forwarded the cash payments to the taxpayer. In addition, the government established that the taxpayer did not report income from any cash sales in the year in question. The United States Court of Appeals for the Seventh Circuit properly affirmed the conviction, holding that the specific items of unreported income, the overceiling cash payments, established a likely source for the claimed net worth increase.²⁷

At least one circuit court reversed a net worth conviction during this time period because the government failed to establish a likely source for the unreported income. In *Ford v. United States*,²⁸ the former chief of the Galveston, Texas police force was convicted of tax evasion for the years 1945 to 1947. At trial the government attempted to demonstrate that bribes and payoffs were the likely source of the claimed net worth increase. The defendant admitted that gambling and prostitution existed in Galveston, but denied that he had ever accepted a bribe. A government witness, the operator of a Galveston house of prostitution, testified that in 1943, a pre-prosecution year, "she left \$100 in cash

25. *Id.* at 399 (quoting *United States v. Johnson*, 319 U.S. 503, 518 (1943)). The evidence also did not establish that the net worth computation included all of the defendant's assets. The court relied on the defendant's tax returns to negate the possibility that the source of the increase was prior asset accumulation. *Id.*

26. 168 F.2d 997 (7th Cir.), *cert. denied*, 335 U.S. 853 (1948).

27. *Id.* at 1003; *see also* *United States v. Skidmore*, 123 F.2d 604 (7th Cir. 1941), *cert. denied*, 315 U.S. 800 (1942). In *Skidmore*, government witnesses testified that they paid the defendant "protection" money which was not reported by the taxpayer. Proof of specific items of unreported income again sufficiently established a likely source for the claimed net worth increase. *Id.* at 608, 610.

28. 210 F.2d 313 (5th Cir. 1954).

'at the defendant's office,' that starting the latter part of 1945 and continuing through May of 1947 she made regular payoffs 'to the police department' of \$100 per month."²⁹

Even though the government's witness could not directly connect the defendant to any of these payments, the trial court admitted the witness's testimony into evidence and the jury convicted the taxpayer. On appeal the Fifth Circuit suggested that the general testimony which established "opportunities" for the defendant to accept payoffs was admissible and would have been *sufficient* to sustain the conviction. The court held, however, that because the government failed to present any evidence that connected the defendant to the payments from the government's witness, the witness's testimony was prejudicial and a new trial was required.³⁰

Towards the end of the pre-*Holland* era, the United States courts of appeals reviewed several convictions of taxpayers in which the government had alleged that a legitimate business enterprise was the likely source of the claimed net worth increase. In *Jelaza v. United States*³¹ and *Brodella v. United States*,³² the taxpayers each owned legal businesses: Jelaza owned a small retail establishment, and Brodella owned several retail liquor stores. The government established in each case that the reported gross profit from the respective businesses was significantly less than that of similar businesses in the community.³³ Moreover, in *Brodella* the business's books did not reflect purchases of approximately \$15,000 worth of goods, and the taxpayer's books and personal return did not show any profits from the sale of these goods.³⁴ Both circuit courts affirmed the taxpayers' convictions. In *Brodella*, the Sixth Circuit found that the comparative statistics and specific items of unreported income established the liquor stores as the likely source of the claimed net worth increase.³⁵ In *Jelaza*, the Fourth Circuit noted that "[a] stronger case against the taxpayer would undoubtedly have been made had the Government proved the precise source of income . . . ,"³⁶ but it nonetheless found the evi-

29. *Id.* at 317.

30. *Id.* at 318. "[A] conclusion [that the taxpayer received the payoffs] cannot be permitted to be based upon mere conjecture or suspicion." *Id.* at 317.

31. 179 F.2d 202 (4th Cir. 1950).

32. 184 F.2d 823 (6th Cir. 1950).

33. *Id.* at 826; 179 F.2d at 204.

34. 184 F.2d at 826.

35. *Id.*

36. 179 F.2d at 204.

dence sufficient to sustain the conviction.³⁷

By the spring of 1954, it was apparent that the amount of likely source proof deemed sufficient to sustain convictions in criminal tax prosecutions varied widely among the circuits.³⁸ The circuits also differentiated cases in which the claimed net worth increase allegedly stemmed from illegal activities of the taxpayer, from cases in which the increase stemmed from legal activities.³⁹ At that time, the courts still had not received any guidance from the Supreme Court of the United States. Although the Court had permitted the government to use circumstantial evidence to obtain a tax evasion conviction in *United States v. Johnson*,⁴⁰ it did not analyze the net worth method or its variations.

To resolve these differences and give direction to the circuit courts, the Supreme Court on June 7, 1954 granted certiorari in five net worth tax evasion cases, and vacated its prior denial of certiorari in three other such cases.⁴¹ One of these cases, *Holland v. United States*,⁴² became the Court's lead opinion and the controlling precedent in this area of the law.

B. Holland v. United States

Justice Clark, a former Attorney General of the United States, wrote the opinion for a unanimous Court in *Holland*. The court first noted that the number of petitions seeking Supreme Court

37. *Id.* at 204-05.

38. For a summary of other pre-*Holland* likely source net worth tax evasion cases, see Hill, *supra* note 2, and Note, *supra* note 10.

39. See *supra* notes 24-30 and accompanying text.

40. 319 U.S. 503 (1943). In *Johnson* the government used taxpayer expenditures to corroborate the fact that the taxpayer owned the gambling establishments in issue and should have reported income from these businesses.

41. *Sullivan v. United States*, 212 F.2d 125 (10th Cir.), *cert. granted*, 347 U.S. 1010, *aff'd*, 348 U.S. 170 (1954); *Smith v. United States*, 210 F.2d 496 (1st Cir.), *cert. granted*, 347 U.S. 1010, *aff'd*, 348 U.S. 142 (1954); *Holland v. United States*, 209 F.2d 516 (10th Cir.), *cert. granted*, 347 U.S. 1008, *aff'd*, 348 U.S. 121 (1954); *Friedberg v. United States*, 207 F.2d 777 (6th Cir. 1953), *cert. granted*, 347 U.S. 1006, *aff'd*, 348 U.S. 142 (1954); *Calderon v. United States*, 207 F.2d 377 (9th Cir. 1953), *cert. granted*, 347 U.S. 1008, *rev'd*, 348 U.S. 160 (1954); *McFee v. United States*, 206 F.2d 872 (9th Cir. 1953), *cert. denied*, 347 U.S. 927, *denial of cert. vacated*, 347 U.S. 1007 (1954), *cert. granted*, 348 U.S. 905 (1955), *vacating* 206 F.2d 872 (9th Cir. 1954), *aff'd*, 221 F.2d 807 (9th Cir.), *cert. denied*, 350 U.S. 825 (1955); *Banks v. United States*, 204 F.2d 666 (8th Cir.), *cert. denied*, 346 U.S. 857 (1953), *denial of cert. vacated*, 347 U.S. 1007 (1954), *cert. granted*, 348 U.S. 905 (1955), *vacating* 204 F.2d 666 (8th Cir. 1953), *aff'd*, 223 F.2d 884 (8th Cir.), *cert. denied*, 350 U.S. 986 (1955); *Goldbaum v. United States*, 204 F.2d 74 (9th Cir.), *cert. denied*, 346 U.S. 831 (1953), *denial of cert. vacated*, 347 U.S. 1007 (1954), *cert. granted*, 348 U.S. 905 (1955), *vacating* 204 F.2d 74 (9th Cir. 1953), *aff'd*, 222 F.2d 360 (9th Cir.), *cert. dismissed*, 350 U.S. 801 (1955).

42. 348 U.S. 121 (1954).

review of net worth cases had multiplied in recent years, and that the Court had finally concluded that "the [net worth] method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire theory."⁴³

The Court then proceeded to catalogue various weaknesses of the net worth method, including: (1) the assumption that the increase in net worth was derived from taxable income rather than from nontaxable sources, such as accumulated cash, gifts, or loans; (2) the possible inability of the taxpayer to recount accurately his financial history; (3) the government's ability to selectively introduce some, but not all, of the statements made by a taxpayer to government agents; and (4) the difficulty in allocating a net worth increase to any specific taxable year.⁴⁴ The Court stated that:

While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. . . . Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute.⁴⁵

To protect the taxpayer from the dangers inherent in the method, the Court held that no net worth conviction can be sustained unless the government establishes a definite beginning net worth, traces leads provided by the taxpayer as to nontaxable sources of income, and proves a likely source for the claimed net worth increase.⁴⁶ By defining the elements of the method, the Court created evidentiary safeguards that increased the government's burden of proof in net worth cases from what courts had demanded previously.

Of the three safeguards created, the Court found that likely source proof was the most critical to the government's case. The Court noted that

requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.

. . . .

43. *Id.* at 124-25.

44. *Id.* at 127-29.

45. *Id.* at 129 (citations omitted).

46. *Id.* at 137-39.

. . . Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.⁴⁷

Once the government establishes a likely source, the Court added, it does not have to negate nontaxable sources, because the likely source proof carries with it the requisite source negations.⁴⁸

The Court also noted that because "circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation," jury instructions in a net worth case should be especially clear and should include "a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."⁴⁹

With these evidentiary safeguards clearly outlined, the Court reviewed the evidence presented at trial. The government maintained that profits from the operation of a legitimate hotel business constituted the likely source for the claimed net worth increase. The evidence established that business at the hotel increased during the year in issue, 1948, but reported profits fell to approximately one quarter of those disclosed by previous management in an earlier year.

The Court found that the government had demonstrated that the hotel was capable of producing much more income than the taxpayer had reported. The Court noted that the entire net worth increase could have come from unreported hotel income and "still the hotel's total earnings for the year would have been only 73% of the sum reported by the previous owner for the comparable period in 1945."⁵⁰ Affirming the conviction, the Court held that because the operation of the hotel could have accounted for the entire net worth increase, the jury was permitted to infer that the increase was derived from currently taxable income.⁵¹

The *Holland* Court suggested that likely source proof is mandatory in every case and that the government can meet its burden of proof by presenting evidence sufficient to account for all of the claimed net worth increase. Although the Court subsequently clarified a portion of the *Holland* opinion in *United States*

47. *Id.* at 137-38 (emphasis added).

48. *Id.*

49. *Id.* at 129.

50. *Id.* at 137.

51. *Id.* at 137-38.

v. Massei,⁵² which held that the government could either prove a likely source or negate nontaxable sources, the Court has never held that proof which fails to account for all or at least a substantial portion of a claimed net worth increase is sufficient to convict a taxpayer. Nonetheless, in the years that followed, the circuit courts quickly diluted *Holland*'s likely source evidentiary safeguard.

C. *Post-Holland: 1955*

In March 1955, in *United States v. Adonis*,⁵³ the United States Court of Appeals for the Third Circuit affirmed the conviction of a salaried employee of the State of New Jersey. The court discussed the recent *Holland* decision, and, without supporting citations, stated that "under the doctrine of the *Holland* case, 'proof of a likely source', *without evidence of how much that source yielded*, is sufficient additional evidence to justify the inference the government seeks to create."⁵⁴ With one phrase, the court diluted the *Holland* safeguard, created only a few months earlier. Instead of a requirement that the likely source account for all or at least a quantifiable portion of the claimed net worth increase, after *Adonis*, the identification of any likely source, regardless of the specific amount that the source generated, would be sufficient evidence to support a conviction.

Even under this diluted standard, however, the government's evidence in *Adonis* was insufficient to establish a likely source. Struggling to find a ground upon which to affirm the conviction, the Third Circuit turned to the government's allegation that the taxpayer had intentionally given government agents false statements to explain the claimed net worth increase. The court held that the government had sufficiently proven willful misrepresentation on the part of the taxpayer, and that the jury could therefore infer that the claimed increase was derived from a taxable source.⁵⁵ Because the government can almost always identify some source for a claimed net worth increase, or establish that some statement made by the taxpayer is not totally accurate, *Adonis* sounded an early death knell to the carefully constructed *Holland* safeguard.⁵⁶

52. 355 U.S. 595 (1958) (per curiam).

53. 221 F.2d 717 (3d Cir. 1955).

54. *Id.* at 719 (emphasis added).

55. *Id.* at 719-21.

56. See, e.g., *United States v. Ford*, 237 F.2d 57 (2d Cir. 1956), cert. denied, 335 U.S. 38 (1957); *infra* notes 64-67 and accompanying text.

Other circuit courts in 1955 also failed to preserve the *Holland* likely source safeguard. In *United States v. Costello*,⁵⁷ the likely source was gambling. The government's evidence established that the defendant had interests in slot machines and jukeboxes, and that he had received \$30,000 for keeping bookmakers away from a racetrack for two years.⁵⁸ In April 1955, the United States Court of Appeals for the Second Circuit concluded that because "[g]ambling is an occupation with indeterminate possibilities that might well have brought in more than \$100,000 in a single year—the highest [income] with which [the defendant] was charged in the four 'indictment years,'"⁵⁹ the evidence presented was sufficient to permit the jury to infer that gambling was the likely source of the claimed net worth increase.⁶⁰

In June 1955, in *Scanlon v. United States*,⁶¹ the First Circuit similarly found that testimony "that the defendant was a bookie in order to make a large profit and not 'for just a weeks pay'" was sufficient to permit the jury to infer that this occupation was the likely source of the claimed increase in the defendant's net worth.⁶²

Thus, within six months of the *Holland* decision, the First, Second, and Third Circuit Courts of Appeals had failed to require the government to present proof of a likely source sufficient to account for a quantifiable portion of the claimed increase in net worth.⁶³ In subsequent years, courts generally have been no more demanding of the government's likely source proof. For ease of analysis, the following sampling of more recent cases has been cat-

57. 221 F.2d 668 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956).

58. *Id.* at 671.

59. *Id.* at 672.

60. *Id.* at 671-72.

61. 223 F.2d 382 (1st Cir. 1955).

62. *Id.* at 390.

63. Not all courts immediately diluted the *Holland* requirement. In *Vloutis v. United States*, 219 F.2d 782 (5th Cir. 1955), the defendant had been convicted of tax evasion for the years 1944 and 1945. The government, as in *Holland*, attempted to establish that the likely source for the increase in net worth was the taxpayer's operation of legitimate businesses, in this case the Old Gem and Kit Kat restaurants. The government established that although the gross receipts of the Kit Kat exceeded those of the Old Gem, the Kit Kat reported less profit than the Old Gem. The Fifth Circuit reversed the conviction on a number of grounds. The court noted, *inter alia*, that the Kit Kat was a restaurant whereas the Old Gem was primarily a "saloon." The court also noted that the government failed to introduce any evidence that the businesses had similar inventories, costs, or operating expenses. The court held that it was improper to infer that the increase in net worth came from unreported Kit Kat profits, based upon the fact that one restaurant reported less income than the other. As the court stated: "[t]o allow evidence which can support only a meaningless conclusion, such as the comparison allowed here, clearly prejudices the rights of the defendant." *Id.* at 790.

egorized according to whether the alleged likely source was an illegal or legal activity of the taxpayer.

D. *Post-Holland: The Traditional View*

Circuit courts of appeal have continued to affirm net worth convictions in likely source cases involving illegal activities of the taxpayer, even when the government presents only minimal evidence. For example, in *United States v. Ford*,⁶⁴ a New York police officer was convicted of tax evasion for the years 1947 through 1951.⁶⁵ The government attempted both to negate nontaxable sources and to show as a likely source the receipt of bribes. The evidence established that the officer was a member of the vice squad during a portion of the years in issue; that he had "opportunities" to accept bribes; that gambling was prevalent in the area; that the officer had been informed of sales of policy slips but took no action until other police officers were notified of similar sales; that the prosecution of gambling cases increased after he left the vice squad; and that he was on "friendly terms" with a professional gambler.⁶⁶

While holding that the government had successfully negated all nontaxable sources, the Second Circuit also held that the evidence of the officer's "opportunities" to accept bribes was sufficient to sustain his conviction, even without testimony that the officer had actually received a bribe. The court stated that evidence of "opportunities" was "relevant and material for its tendency to show that the unreported receipts, independently established, derived from a *taxable source*. . . . [The evidence] added strength to the inference that the unreported receipts were taxable."⁶⁷

In *United States v. Frank*,⁶⁸ the government employed both the bank deposits and net worth methods of proof.⁶⁹ The likely source proof consisted of findings that the taxpayer had reported gain from "sporting enterprises" on his tax returns for pre-prosecution years but did not report a similar gain in 1948, the year in issue. The Third Circuit affirmed the conviction, stating that the

64. 237 F.2d 57 (2d Cir. 1956), *cert. denied*, 335 U.S. 38 (1957).

65. See *Ford v. United States*, 210 F.2d 313 (5th Cir. 1954); *supra* notes 28-30 and accompanying text.

66. 237 F.2d at 60.

67. *Id.* at 65 (emphasis in original).

68. 245 F.2d 284 (3d Cir.), *cert. denied*, 355 U.S. 819 (1957).

69. *Id.* at 286-87. For a discussion of the bank deposits method of proof, see *supra* note

term "sporting enterprises" was a "euphemistic term for gambling profits," and that the evidence was sufficient to permit the jury to infer that gambling was the likely source for the claimed increase in the taxpayer's net worth.⁷⁰

In *Armstrong v. United States*,⁷¹ the taxpayer was a bus driver for the Los Angeles Transit Authority. The government alleged that the sale of "pep" pills was the likely source of an increase of approximately \$51,000 in the taxpayer's net worth. The evidence established that on one occasion an officer had seized 650 tablets of benzedrine or amphetamine from the defendant's wife; that on a second occasion another officer purchased thirty dollars worth of pills from the defendant's wife; that on two other occasions bottles of pills were seized in searches of the defendant's home; and that these drugs could not be sold legally in California.⁷² The Ninth Circuit held that the probative value of the testimony outweighed its prejudicial effect and was sufficient to permit the jury to infer that the sale of pills was the likely source for the claimed net worth increase.⁷³

In *Ford*, *Frank*, and *Armstrong*, each court allowed the government to present likely source evidence without requiring the government to prove that the likely source was sufficient to account for a quantifiable portion of the claimed net worth increase. Moreover, each court permitted the government to introduce very damaging evidence of other crimes to establish the illegal source.⁷⁴ It is difficult to believe that any jury would have acquitted the taxpayers once the government presented unexplained or unrefuted evidence of graft, gambling, or possession of illicit drugs.

70. *Id.* at 287. There was also testimony that the taxpayer had a "possibility" of income from a pinball business. The trial judge thought such evidence was weak and the Third Circuit agreed. *Id.*

71. 327 F.2d 189 (9th Cir. 1964).

72. *Id.* at 192.

73. *Id.* at 194. The court also followed the "indeterminate possibilities" case, *United States v. Costello*, 221 F.2d 668 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956). See also *supra* notes 57-60 and accompanying text. In *United States v. Mackey*, 345 F.2d 499 (7th Cir.), *cert. denied*, 401 U.S. 667 (1965), the Seventh Circuit, following *Costello*, held that the taxpayer's admission that he ran a policy wheel operation presented sufficient "indeterminate possibilities" for income that the likely source was sufficiently established. 345 F.2d at 507.

74. Rule 404(b) of the Federal Rules of Evidence regulates the admissibility of evidence of other crimes in criminal cases. FED. R. EVID. 404(b). Several courts have begun to analyze carefully the types of evidence of the defendant's other crimes admissible in a subsequent criminal case. See, e.g., *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). These cases may signal an increased scrutiny of such evidence in criminal trials. See also *infra* text accompanying note 212.

The use of minimal likely source evidence in cases involving illegal taxpayer activity continues. In 1980, in *United States v. Hamilton*,⁷⁵ the Ninth Circuit affirmed the conviction of the slot machine manager of a hotel and casino in Las Vegas, Nevada. The government asserted that the likely source of a \$64,664 increase in the taxpayer's net worth was a slot machine "skim."⁷⁶ The evidence established that the taxpayer had an "unusual system of dealing with slot machine revenues," and did not permit other employees to count or wrap the coins; that the hotel had filed an insurance claim to recover losses caused by "employee dishonesty"; and that, according to a statistical expert, the odds that the hotel's slot machines would perform as poorly as reported were greater than two billion to one.⁷⁷

The government did not present evidence that the taxpayer had participated in or received any money from the "skimming" of casino receipts, or that such receipts could have accounted for the claimed net worth increase. Nonetheless, the Ninth Circuit found the evidence sufficient to permit the jury to infer that the casino receipts were the source of the increase in net worth.⁷⁸

Circuit courts also have affirmed "legitimate business" net worth convictions when the government presented significantly less likely source evidence than it did in *Holland*. For example, in *Whitfield v. United States*,⁷⁹ the government attempted to show that the likely source of the claimed net worth increase was the operation of a motel. The Ninth Circuit upheld the conviction on evidence which established only that the taxpayer and her deceased husband operated a fourteen-unit motel, that eight units were added to the motel in 1951 or 1952, and that a swimming pool and cocktail lounge were added in 1958 and 1959.⁸⁰

In *United States v. Hom Ming Dong*,⁸¹ the government attempted to prove that the taxpayer's grocery store was the likely source of the net worth increase. The government established that the store was open seven days a week for long hours, that the taxpayer did not maintain inventory records for cash purchases, and that the grocery spent no money for advertising.⁸² Even though de-

75. 620 F.2d 712 (9th Cir. 1980).

76. *Id.* at 713.

77. *Id.* at 715.

78. *Id.*

79. 383 F.2d 142 (9th Cir. 1967).

80. *Id.* at 144.

81. 436 F.2d 1237 (9th Cir. 1971).

82. *United States v. Hom Ming Dong*, 293 F. Supp. 1249, 1257 (D. Ariz. 1968), *aff'd*,

fense witnesses testified that the store could not have generated the \$140,000 of allegedly unreported income, the district court noted that "a high mark-up is inherent to neighborhood grocery stores . . . , particularly those selling liquors," and held that the proof was sufficient to establish the grocery as the likely source.⁸³ On appeal, the Circuit Court affirmed the conviction of the taxpayer for the years 1959 through 1964.⁸⁴

Taxpayers in more recent "legal" likely source cases have fared no better. For example, in *United States v. Costanzo*,⁸⁵ the government attempted to negate nontaxable sources and to establish that the likely source was the defendant's bakery business, Costanzo's Bread, Inc. The evidence established that the bakery reported nearly \$500,000 in gross sales per year.⁸⁶ The Second Circuit found that the government had negated nontaxable sources, and that the bakery "was a successful business with many sizable accounts, and was large enough to generate substantial amounts of unreported cash receipts."⁸⁷ Without any proof of the profits of similar bakeries or any proof that the bakery was not accurately reporting sales, the Second Circuit found this evidence sufficient to establish the bakery as the likely source and affirmed the conviction.⁸⁸

In *Whitfield*, *Hom Ming Dong*, and *Costanzo*, the courts, in "legal" likely source cases, failed to require the government to present likely source evidence sufficient to account for a quantifiable portion of the claimed net worth increase. Indeed, it appears that as the *Adonis* decision⁸⁹ forewarned, the mere identification of a likely source is now sufficient evidence to support a conviction for tax evasion.

Likely source proof, of course, has not been deficient in all cases. For example, in *United States v. Nunan*,⁹⁰ an attorney was convicted of tax evasion for the years 1946 through 1950. The government established that the defendant had failed to report in-

436 F.2d 1237 (9th Cir. 1971).

83. *Id.*

84. 436 F.2d at 1242-43.

85. 581 F.2d 28 (2d Cir. 1978), *cert. denied*, 439 U.S. 1067 (1979).

86. *Id.* at 33.

87. *Id.*

88. *Id.* at 33 nn.4 & 5; *see also* *United States v. Abatino*, No. 81-1454X (9th Cir. Apr. 22, 1982).

89. 221 F.2d 717 (3d Cir. 1955); *see supra* notes 53-56 and accompanying text.

90. 236 F.2d 576, 583-85 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); *see also* *United States v. Goichman*, 547 F.2d 778 (3d Cir. 1976) (failure of an attorney to report settlement fees).

come not only from certain transactions related to his law practice, but also from interest payments, capital gains, and dividends received. In *United States v. Sclafani*,⁹¹ the government established that \$50,000 of corporate loans payable to the defendant's business were repaid to the defendant personally, that the defendant received \$149,000 from the corporation in cash and by check, and that the defendant used \$35,000 of corporate funds to purchase securities.⁹² In both of these cases, the government's likely source proof included *specific items* of unreported income that accounted for a substantial portion of the increase in the taxpayer's net worth.⁹³

Taxpayer admissions also may establish a likely source. For example, in *United States v. Tunnell*,⁹⁴ a motel owner was convicted of tax evasion for the years 1965 through 1967. During the investigation, the taxpayer informed a government agent that he had employed between two and four girls at the motel during the years in issue, and that he made as much as \$12,000 per year from their prostitution activities.⁹⁵ This admission, which permitted the government to account for a substantial portion of the claimed net worth increase, was sufficient proof to sustain the conviction.⁹⁶

Finally, strong circumstantial evidence may be used to establish a likely source. In *United States v. Rifkin*,⁹⁷ the taxpayer was convicted on charges of corporate and personal tax evasion. The likely source was the taxpayer's pharmacy. Employees of the pharmacy testified that they had received cash from the defendant while he was standing behind the counter in the pharmacy, and that they were instructed to exchange this cash for teller's or cashier's checks payable to designated stockbrokers. The government also established that the checks were, in fact, used to purchase \$65,000 worth of stock during the years in issue, and that these monies accounted for approximately sixteen percent of the pharmacy's gross receipts. The Second Circuit properly found that this evidence established a likely source for the claimed net worth

91. 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959).

92. *Id.* at 413.

93. *Sclafani*, 265 F.2d at 413; *Nunan*, 236 F.2d at 586.

94. 481 F.2d 149 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

95. *Id.* at 151.

96. *Id.* Apparently, no issue concerning the need to corroborate the admission was raised at trial. See *United States v. Calderon*, 348 U.S. 160 (1954), a companion case to *Holland*.

97. 451 F.2d 1149 (2d Cir. 1971).

increase.⁹⁸

Even though proof in some of the cases outlined above was sufficient to establish the likely source, and although some lower courts during the 1950's reversed convictions for insufficient likely source proof,⁹⁹ the vast majority of the federal district and circuit courts have failed to analyze critically likely source proof and to follow the evidentiary safeguard erected by the Supreme Court in *Holland*. As one commentator noted: "The [likely source] requirement has become in many courts a duty merely to show that the defendant is engaged in a profit-directed activity of some kind."¹⁰⁰

E. *Return to the Holland Standard*

As noted earlier,¹⁰¹ two different circuit courts recently reversed convictions because of the government's failure to establish a likely source for the claimed increase in the taxpayer's net worth. In *United States v. Bethea*,¹⁰² the defendant contended that the net worth increase established by the government came from an inheritance from his deceased brother. The government did not offer evidence to refute this claim, but instead "relie[d] solely upon a natural disinclination to believe that large sums of money are ever cached away."¹⁰³ The United States Court of Appeals for the Fourth Circuit held that because the government could not negate nontaxable sources of income, it had to establish a likely source for the claimed increase.¹⁰⁴

The likely source evidence presented by the government established that the defendant was a carpenter. The government also suggested during cross-examination of the defendant that he had received illicit income from narcotics sales.¹⁰⁵ Although the lower court found that the government sufficiently established the defendant's carpentry trade as the likely source, the Fourth Circuit dis-

98. *Id.* at 1152-53.

99. See e.g., *United States v. Kleinman*, 167 F.2d 870 (E.D.N.Y. 1958) (government failed to establish graft as the likely source when defendant was employed as an Internal Revenue agent); *United States v. Uccellini*, 159 F. Supp. 491 (W.D. Pa. 1957) (government's proof negated assertion that net worth increase was derived from the defendant's business); *United States v. Donovan*, 142 F. Supp. 703 (E.D. Va. 1956) (government's proof negated assertion that defendant's business was the source for increase in net worth); *United States v. O'Malley*, 131 F. Supp. 409 (E.D. Pa. 1955) (failure to establish any likely source).

100. Duke, *supra* note 1, at 28.

101. See *supra* text accompanying note 19.

102. 537 F.2d 1187 (4th Cir. 1976).

103. *Id.* at 1190.

104. *Id.* at 1190-91.

105. *Id.* at 1191.

agreed.¹⁰⁶ The court noted that except for one self-serving statement of the defendant,¹⁰⁷ there was no evidence to establish that the carpentry income accounted for the claimed increase in net worth: "Most importantly, there is nothing in the record to indicate that *Bethea's carpentry income went up at all during the years 1971 and 1972 when his net worth sharply increased.*"¹⁰⁸

In addition, the court was highly critical of the government's attempts to interject narcotics as the likely source during the cross-examination of the defendant: "There are two problems with this suggested source of income. First, not one shred of evidence was introduced at trial to show that Bethea had any dealings in narcotics Second, the timing of any narcotics activity was not shown or even suggested."¹⁰⁹ Because the government did not present evidence of "substantial earned income," the Fourth Circuit reversed the conviction.¹¹⁰

In *United States v. Grasso*,¹¹¹ a case with a long and storied history,¹¹² the defendant was found guilty in a nonjury trial of one count of income tax evasion. The Second Circuit, in a per curiam opinion, noted that the defendant had reported income on his tax return from a restaurant, a band, a bonding business, and investments, but that the government had not made any effort to determine if the taxpayer understated income from any of these sources. The court stated:

The suggestion that his reported sources of income were the likely sources of his more than \$60,000 in unreported income without verification is inconsistent with the requirements of *Massei* and *Holland* that the government in a net worth case must verify the available facts and leads either to show a likely source or negate alternative sources.¹¹³

Because the government failed either to negate nontaxable sources or to show a likely source sufficient to account for the claimed increase in net worth, the court reversed the conviction. The court concluded that "a conviction based on sources suggested but not

106. *Id.*

107. *Id.* The defendant had apparently inflated his income on a credit application.

108. *Id.* (emphasis added).

109. *Id.*

110. *Id.* at 1191-92.

111. 629 F.2d 805 (2d Cir. 1980).

112. See *United States v. Grasso*, 413 F. Supp. 166 (D. Conn. 1976) (after mistrial declared, charges dismissed on grounds of double jeopardy), *aff'd*, 552 F.2d 46 (2d Cir. 1977), *vacated and remanded*, 438 U.S. 901 (1978).

113. 629 F.2d at 808.

verified by the government (although apparently verifiable) and which are not even plausible much less proved hardly establishes guilt beyond a reasonable doubt."¹¹⁴

In *Bethea* and *Grasso*, the Fourth and Second Circuits held that likely source proof that fails to account for the increase in net worth is insufficient to sustain a conviction. Although these cases may signal increased judicial scrutiny and a return to the *Holland* standard of likely source proof, neither case reexamined *Holland* or the constitutional underpinnings of its evidentiary safeguards. No court in the past twenty-five years has undertaken such an analysis. Since the Supreme Court in the past quarter century has carefully reviewed the standards governing the use of presumptions and inferences in other criminal settings, a reexamination of the likely source inference is appropriate.

III. PERMISSIVE INFERENCES

A. A Brief History

An inference is a statement that permits a factfinder to infer one fact from the proof of another. As a species of the more generalized presumption, it is an evidentiary device that links two facts or sets of facts defined as the predicate fact and the presumed fact.¹¹⁵ A mandatory inference or presumption requires a jury to infer the existence of the second fact from proof of the first.¹¹⁶ A permissive inference, as the term suggests, allows but does not require a jury to infer the existence of a second fact from proof of the first.¹¹⁷

Inferences and presumptions are widely used in the criminal

114. *Id.*

115. Nesson, *Reasonable Doubt and Permissible Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979). See also C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 306 (1954); J. THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* (1895); 9 J. WIGMORE, *EVIDENCE* § 2490 (3d ed. 1940) for their discussions and different definitions of inferences and presumptions.

116. See *Tot v. United States*, 319 U.S. 463 (1943); Nesson, *supra* note 115, at 1201 nn.34 & 36.

117. The commentators have extensively discussed inferences and presumptions in the criminal law. See, e.g., Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Law: A Theoretical Overview*, 79 YALE L.J. 165 (1969); Christie & Pye, *Presumptions and Assumptions in the Criminal Law*, 1970 DUKE L.J. 917 (1970); Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977); Comment, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970). For purposes of this discussion, the terms inference and presumption will be used interchangeably.

justice system. Although most inferences evolve from either federal or state legislative enactments, some are judicially created.¹¹⁸ Professor McCormick has noted that this type of evidentiary device is sanctioned for a number of reasons. These reasons include the recognition that there is often a high probability that the presumed fact follows from the predicate fact, procedural convenience, fairness in allocating the burden of initial production to those with superior access to the proof, and social and economic policy reasons.¹¹⁹ Since procedural convenience and fairness in allocating evidentiary burdens have limited applicability when the government must prove guilt beyond a reasonable doubt, the Supreme Court of the United States has carefully reviewed statutorily and judicially created inferences.

The Supreme Court has applied three different, yet interrelated, lines of constitutional analysis in its review of inferences. Traditionally, inferences have been scrutinized under a "rational relation" due process test and under the fifth amendment self-incrimination clause.¹²⁰ Recently, however, the Supreme Court has begun to view inferences as part of a larger group of burden-shifting devices, subject to scrutiny under *In re Winship*¹²¹ and its progeny. Since the Supreme Court has discussed the rational relation and fifth amendment analyses together (hereinafter "traditional analysis"), this article will review first these lines of analysis.

Tot v. United States,¹²² is the major pre-*Holland* Supreme Court decision based on the rational relation analysis. In *Tot* the defendant was convicted under a federal law that made it unlawful for a felon to receive a firearm that had been transported or shipped in interstate commerce.¹²³ The statute also provided that mere possession of the weapon would be presumptive evidence that the weapon had been shipped, transported, or received in violation of the law. The government relied on this presumption in its case against *Tot*.¹²⁴

118. See state statutes cited in Nesson, *supra* note 115, at 1187-88. Interestingly, Professor McCormick feels that the presumption of innocence, if based on probability, is "absurd," since it is not more probable than not that the accused in most cases is innocent. C. McCORMICK, *supra* note 115, § 309.

119. C. McCORMICK, *supra* note 115, § 309; see also Comment, *Statutory Criminal Presumptions, Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 157 (1970).

120. See U.S. CONST. amend. V; cf. *Ferry v. Ramsey*, 277 U.S. 88 (1928).

121. 397 U.S. 358 (1970). For a discussion of *Winship*, see *infra* notes 164-66 and accompanying text.

122. 319 U.S. 463 (1943).

123. Federal Firearms Act, § 2(f), 15 U.S.C. § 902(f) (1939) (repealed 1968).

124. 319 U.S. at 464-65.

The government argued that the presumption was valid because the defendant easily could have produced evidence showing he did not receive the firearm in violation of the law, and because Congress could have created a statute punishing mere possession of the firearm.¹²⁵ The Court rejected the government's claim, stating: "Under our decisions, a statutory presumption cannot be sustained if there be 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."¹²⁶ The Court reversed the conviction, holding that because no rational relation existed between possession of a firearm and its transport in interstate commerce, the presumption violated the due process clause of the fifth amendment to the Constitution.¹²⁷

The Supreme Court reviewed both legislatively and judicially created presumptions under this standard in a number of post-*Holland* cases during the 1960's and 1970's, including *United States v. Gainey*,¹²⁸ *United States v. Romano*,¹²⁹ *United States v. Leary*,¹³⁰ *Turner v. United States*,¹³¹ and *Barnes v. United States*.¹³² In *Gainey* the jury was permitted to infer that the defendant carried on the business of a distiller from the defendant's presence around a still, and in *Romano*, the jury was permitted to infer possession, custody, or control from the defendant's presence around a still.¹³³ Using the *Tot* analysis in both cases, the Supreme Court found a rational connection between presence and carrying on the business of a distiller, but held that no rational connection existed between presence and possession or custody of an illegal still.¹³⁴ In *Gainey*, therefore, the Court approved the statutory inference and affirmed the conviction, and in *Romano*, the Court invalidated the statutory inference and reversed the conviction.

In *Leary* and *Turner*, decided in 1969 and 1970 respectively, the Court reviewed the validity of statutory presumptions that permitted a jury to infer importation and knowledge of importa-

125. *Id.* at 467, 469-70.

126. *Id.* at 467-68 (citations omitted).

127. *Id.* at 467-69, 472.

128. 380 U.S. 63 (1965).

129. 382 U.S. 136 (1965).

130. 395 U.S. 6 (1969).

131. 396 U.S. 398 (1970).

132. 412 U.S. 837 (1973).

133. *Romano*, 382 U.S. at 137-38; *Gainey*, 380 U.S. at 69-70.

134. *Romano*, 382 U.S. at 141-42; *Gainey*, 380 U.S. at 67-68.

tion from the possession of various controlled substances. In *Leary* the Court reviewed its earlier decisions and summarized them as follows:

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.¹³⁵

The Court in *Leary* found no rational relation between the possession of marijuana and knowledge that the substance had been imported. Testimony at Leary's trial established the fact that marijuana will grow anywhere in the United States, and that some actually is grown here.¹³⁶ Relying on both this fact and the *Tot* rationale, the Court stated that "to determine the constitutionality of the 'knowledge' inference, one must have direct or circumstantial data regarding the beliefs of marihuana users generally about the source of the drug they consume."¹³⁷ Because such information was not available, there was no rational relation between possession of marijuana and knowledge that it had been imported. The presumption, therefore, was held invalid.

In *Turner* the Court concluded that a rational relation existed between possession of heroin and knowledge of its importation, but that no such rational relation existed with respect to cocaine.¹³⁸ Following a lengthy discussion, the Court stated that the "overwhelming evidence" is that virtually all heroin consumed in the United States is illegally imported.¹³⁹ Given this fact, there was little doubt that Turner knew that the heroin he possessed was imported.¹⁴⁰ A jury could therefore infer that a defendant who possessed heroin knew that it was smuggled into this country. Conversely, there was no evidence that large amounts of cocaine are either imported or smuggled into this country. The Court cited a government report and noted that "much more cocaine is lawfully produced in this country than is smuggled into this country."¹⁴¹ The Court concluded that because the Court itself could

135. 395 U.S. at 36.

136. *Id.* at 39-43.

137. *Id.* at 37-38.

138. 396 U.S. at 408-16, 418-19.

139. *Id.* at 415-16.

140. *Id.* at 416.

141. *Id.* at 418.

not be sure that the cocaine Turner possessed was imported, a jury could not infer that Turner must have known that it was imported.¹⁴² The Court thus affirmed Turner's heroin conviction but reversed his cocaine conviction.¹⁴³

In 1973, in *Barnes v. United States*,¹⁴⁴ the Court reviewed for the first time a judicially created presumption. There, the jury was permitted to infer from the defendant's unexplained possession of recently stolen mail that the defendant knew that the mail was stolen.¹⁴⁵ The Court noted that at issue in *Barnes* was a "traditional common-law inference deeply rooted in our law," but that even "[c]ommon-law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience."¹⁴⁶ In *Barnes* the government's evidence established that the defendant possessed treasury checks payable to individuals he did not know, and that he had no plausible explanation for this possession.¹⁴⁷ Based on these facts, the Court held that the inference was constitutionally valid.¹⁴⁸

In both *Turner* and *Barnes*, the defendants argued that the presumptions at issue placed impermissible pressures upon them to testify in violation of the fifth amendment self-incrimination clause. The Supreme Court quickly dismissed this contention in both cases,¹⁴⁹ relying on *Yee Hem v. United States*.¹⁵⁰ In *Yee Hem* the defendant argued that a presumption of importation from possession of opium violated the fifth amendment.¹⁵¹ In an analysis later used in *Turner* and *Barnes*, the Court rejected this argument and affirmed the conviction, stating:

If the accused happens to be the only repository of the facts necessary to negate the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an expla-

142. *Id.* at 419.

143. *Id.* at 424.

144. 412 U.S. 837 (1973).

145. *Id.* at 838.

146. *Id.* at 843, 844-45.

147. *Id.* at 845.

148. *Id.* at 845-46.

149. *Barnes*, 412 U.S. at 846-47; *Turner*, 396 U.S. at 403-04.

150. 268 U.S. 178 (1925).

151. *Id.* at 179-81.

nation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.¹⁵²

The Court in *Turner* and *Barnes* relied on the rational relation test and rejected the fifth amendment claims in affirming the defendants' convictions. The Court also discussed but failed to decide whether the burden shifting effect of a presumption in a criminal case requires the government to prove the predicate fact beyond a reasonable doubt.

The Court finally resolved this issue in *County Court v. Allen*,¹⁵³ the most recent traditional analysis case. There, the Second Circuit Court of Appeals had affirmed the district court's order granting the defendants' writ of habeas corpus, and held that a New York statute¹⁵⁴ was unconstitutional on its face because it permitted the jury to infer from the presence of a firearm in a motor vehicle that the weapon was illegally possessed by all occupants of the vehicle.¹⁵⁵ The evidence established that two handguns were found in an automobile occupied by three adult males and a sixteen year-old female. All four were convicted under the statute.¹⁵⁶

In *Allen* the Court created a distinction between a mandatory presumption, which "tells the trier that he or they *must* find the elemental fact upon proof of the basic fact,"¹⁵⁷ and a permissive inference, "which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one."¹⁵⁸ The Court held that mandatory presumptions must be established by facts sufficient to support the inference of guilt beyond a reasonable doubt. For permissive inferences, however, the Court held that the evidence need only establish that it is more probable than not that the presumed fact will follow from the predicate.¹⁵⁹ The Court also stated that permissive inferences must not be tested on their face, but only as applied to the facts of a

152. *Id.* at 185.

153. 442 U.S. 140 (1979).

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

155. *Allen v. County Court*, 568 F.2d 998, 1011-12 (2d Cir. 1977).

156. 442 U.S. at 144.

157. 442 U.S. at 157 (emphasis in original).

158. *Id.*

159. The Court outlined this test in the *Leary* case. See *supra* text accompanying note 135.

specific case.¹⁶⁰

Because the New York statute was permissive in nature, the Court ruled that the Second Circuit had incorrectly found it unconstitutional on its face.¹⁶¹ As applied to the facts of the case, the statutory inference of possession satisfied the more probable than not test¹⁶² because the passengers in the car were not hitchhikers, and the guns in question were large and in plain view, although partially concealed by a pocketbook.¹⁶³

Traditional analysis of presumptions thus requires that both judicially and legislatively created inferences be carefully scrutinized under the due process clause of the Constitution. The Court has held, *inter alia*, that the validity of an inference must be examined in light of the facts presented in the case, that mandatory inferences must meet a "beyond a reasonable doubt" standard, and that permissive inferences must satisfy a "more probable than not" test before they may be upheld constitutionally.

In rejecting fifth amendment claims and in creating a distinction between mandatory and permissive inferences, traditional presumption analysis briefly explores, but fails to focus upon, the burden of proof in a criminal case. Another group of Supreme Court cases, however, has carefully examined the effect of burden shifting devices, such as the likely source inference, in light of the requirement of proof beyond a reasonable doubt. Since an inference in a criminal case increases the weight of the government's evidence against the defendant, it affects the government's burden of proof and alters the requirement of proof beyond a reasonable doubt. The Supreme Court's analysis of the concept of burden of proof began in 1970 in *In re Winship*.¹⁶⁴ In *Winship* a New York statute¹⁶⁵ permitted an adjudication of delinquency based on a mere preponderance of the evidence. The Supreme Court held that proof beyond a reasonable doubt was essential for any criminal conviction, including that of a juvenile, and stated: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

160. 442 U.S. at 165-67.

161. *Id.* at 160-63.

162. *Id.* at 163-67.

163. *Id.*

164. 397 U.S. 358 (1970).

165. N.Y. FAM. CT. ACT § 744(b) (McKinney 1967).

with which he is charged."¹⁶⁶

The Court first applied the *Winship* rationale to invalidate a burden shifting device, a statutory affirmative defense, in *Mullaney v. Wilbur*.¹⁶⁷ In *Mullaney* the defendant was convicted of murder under a Maine statute.¹⁶⁸ Pursuant to the statute, the court instructed the jury that if the defendant could prove by a preponderance of the evidence that he killed in the heat of passion, the charges would be reduced from murder to manslaughter.¹⁶⁹ The defendant claimed that the law impermissibly shifted to him the burden of proof in violation of due process. The Supreme Court agreed and reversed the conviction.¹⁷⁰ The Court held that lack of provocation was an essential element of the offense of homicide, which under *Winship* the state must prove, and that the state could not shift the burden of proving this element to the defendant.¹⁷¹

The Supreme Court established in *Mullaney* that an evidentiary device which reallocates the burden of proof to the defendant and relieves the state of proving an essential element of the offense violates due process. Recently, the Supreme Court examined the burden shifting effect of a presumption, the evidentiary device used in connection with the proof of a likely source in tax evasion cases.

In *Sandstrom v. Montana*,¹⁷² the Court reviewed a murder conviction in which the intent of the defendant to commit the crime was the only disputed element. The trial court had "instruct[ed] the jury that '[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.'"¹⁷³ On appeal the state contended that the instruction created a permissive inference that was valid under *Tot* and *Allen*.¹⁷⁴ The Court rejected this contention, stating: "It is clear that a reasonable juror could easily have viewed such an instruction as mandatory."¹⁷⁵

The state also argued that even if mandatory, the presumption

166. 397 U.S. at 364.

167. 421 U.S. 684 (1975).

168. ME. REV. STAT. ANN. tit. 17, §§ 2551, 2651 (1964).

169. 421 U.S. at 685.

170. *Id.* at 703-04.

171. *Id.* But see *Patterson v. New York*, 432 U.S. 197 (1976) (placing burden on defendant to prove that he acted under extreme emotional distress would not violate due process).

172. 442 U.S. 510 (1979).

173. *Id.* at 513.

174. *Id.* at 514.

175. *Id.* at 515.

was valid because it did not conclusively establish intent, but rather could be rebutted.¹⁷⁶ The Court also rejected this argument, stating that the instruction could be viewed either "as an irrebuttable direction by the court to find intent once convinced of the facts," or "as a direction to find intent upon proof of the defendant's voluntary actions . . . , unless *the defendant* proved the contrary by some quantum of proof."¹⁷⁷ The Court found that the former interpretation would violate the defendant's constitutional rights as set forth in *In re Winship*, because the jury could reasonably have concluded that the trial court had instructed it to conclude from "proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action),"¹⁷⁸ that intent existed. This, the Court stated, permitted the state to avoid its constitutional duty to prove every element of the crime beyond a reasonable doubt.¹⁷⁹

The Supreme Court concluded that the state's rebuttable presumption argument violated the principles of *Mullaney*.¹⁸⁰ The Court reasoned that because the jury could have interpreted the instruction as requiring affirmative proof of lack of intent, the state again had been relieved of the requirement of proving intent beyond a reasonable doubt, in violation of due process.¹⁸¹

The Supreme Court thus has reviewed presumptions under a rational relation test, the fifth amendment, and a burden of proof analysis. The Court's recent attempts to clarify the use of inferences and presumptions in *Allen* and *Sandstrom* have created confusion in the courts and among the commentators.¹⁸² Some commentators have suggested that no evidentiary device is now constitutionally permissible, while others have suggested the unification of the diverse threads of Supreme Court analysis into a three-prong test, focusing on whether the device relates to or affects a constitutionally "essential element" of the offense.¹⁸³

176. *Id.*

177. *Id.* at 517 (emphasis in original).

178. *Id.* at 523.

179. *Id.*

180. *Id.* at 524.

181. *Id.*

182. See, e.g., *United States v. Fowler*, 605 F.2d 181 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *Hammontree v. Phelps*, 605 F.2d 1371 (5th Cir. 1979).

183. See Allen, *Structuring Jury Decision-Making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980); Jeffries & Stephan, *supra* note 117; Nesson, *Rationality, Presumptions and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574 (1981); Underwood, *supra* note 117; see

It is beyond the scope of this article, however, to discuss the reconciliations proposed by the commentators in connection with the likely source inference. Even under present Supreme Court analysis, the likely source inference as presently formulated is invalid.

B. *Weaknesses in the Likely Source Inference*

The likely source inference is highly unusual in its purpose and scope in comparison to the evidentiary devices used in nontax criminal cases. It is a judicially created inference of recent origin. Inferences and presumptions, by permitting the jury to infer the existence of the presumed fact from proof of the predicate, have served to reduce the prosecution's burden of proof in criminal cases. The likely source inference, however, should work in the opposite manner. The inference was judicially sanctioned by the Supreme Court in *Holland* as part of a package of evidentiary safeguards designed to protect the taxpayer. Although the inference permits a jury to infer the presumed fact (taxable income) from the predicate fact (a likely source for the claimed net worth increase), prior to *Holland*, no judicial requirement of likely source proof existed.¹⁸⁴

The likely source inference was designed to increase, not reduce, the government's burden of proof. Since the inference mandates the presentation of more, rather than less, evidence by the government, it may properly be labeled a "reverse inference" and is an anomaly in the criminal law.

The likely source reverse inference is invalid under both traditional due process analysis and self-incrimination analysis, and also under the more recent burden of proof analysis. The fifth amendment infirmity of the reverse inference first will be reviewed.

The Supreme Court has noted that the fifth amendment's self-incrimination clause

"reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dic-

also Allen, *More on Constitutional Process of Proof Problems in Criminal Cases*, 94 HARV. L. REV. 1795 (1981).

184. Before *Holland*, it was Justice Department "policy" to present such likely source proof. See Hill, *supra* note 2, at 118-19.

tates 'a fair state-individual balance by requiring the government . . . , in its contest with the individual to shoulder the entire load,' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"¹⁸⁵

The Supreme Court examined the self-incrimination clause in a nonpresumption case, *Griffin v. California*.¹⁸⁶ The provision of the California Constitution¹⁸⁷ at issue permitted the court and the prosecutor to comment at trial on the failure of an accused to testify. The prosecutor and the judge had done so in *Griffin* and the petitioner was convicted of murder. The Supreme Court noted that the state claimed that "the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible."¹⁸⁸ The Court held, however, that this inference was improper and stated, "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."¹⁸⁹ Because the use of the inference "cuts down on the privilege by making its assertion costly," the inference violated the self-incrimination clause of the fifth amendment and the Court reversed the conviction.¹⁹⁰

In *Holland* the Supreme Court noted that "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."¹⁹¹ Moreover, the Court acknowledged that once the government establishes a prima facie case, the taxpayer "remains quiet at his peril."¹⁹² These statements by the Court are an explicit recognition that the type of circumstantial proof presented in a net worth case places serious and unyielding pressure on the taxpayer to testify. To protect the taxpayer's constitutional rights, including his right not to testify, the Court enacted evidentiary safeguards, including the likely source reverse

185. *Carter v. Kentucky*, 450 U.S. 288, 299-300 (1981) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (quoting 8 J. WIGMORE, *EVIDENCE* 317 (McNaughton rev. ed. 1961))). In *Carter* the Supreme Court held that a defendant in a criminal case, upon request, is constitutionally entitled to a jury instruction that his silence may not be used against him. This question was expressly reserved in *Griffin v. California*, 380 U.S. 609 (1965). See *infra* notes 186-88 and accompanying text.

186. 380 U.S. 609 (1965).

187. CAL. CONST. art. I, § 13.

188. 380 U.S. at 614.

189. *Id.*

190. *Id.* at 614-15.

191. 348 U.S. at 128.

192. *Id.* at 138-39.

inference.

Cases that permit minimal likely source evidence to reach the jury destroy the safeguard and, in reality, require the taxpayer either to explain the "bare" net worth increase or be convicted. What the courts in *Ford v. United States*,¹⁹³ *United States v. Frank*,¹⁹⁴ and *United States v. Hamilton*¹⁹⁵ really held is that likely source proof, plus the taxpayer's failure to *refute or explain it*, is sufficient to permit a jury to infer that the claimed net worth increase was derived from currently taxable income. The pressure upon the defendant to testify in these cases arises not from the strength of the evidence, but rather from the likely source inference, bolstered by the defendant's silence. The defendant's silence thus functions as additional evidence against him, and the failure to require sufficient likely source proof places the taxpayer in what Justice Black termed a "presumptive squeeze" in violation of the fifth amendment self-incrimination clause.¹⁹⁶ As one commentator has stated:

If one accepts the proposition that the aggregate likelihood presupposed by the permissive inference is not in itself enough to sustain a verdict beyond reasonable doubt, then any attempt to draw additional strength for the permissive inference from the defendant's lack of explanation means necessarily that the defendant's silence is functioning as an added piece of "evidence," "solemnized" by the statute and the jury instruction.¹⁹⁷

In *Turner* and *Barnes*, the Supreme Court stated that the "traditional" inferences that were before the Court did not violate the self-incrimination clause of the fifth amendment.¹⁹⁸ In *Turner*, however, the inference of importation was used solely to establish the jurisdiction of the trial court over the offense, and in *Barnes*, the government's own evidence established the falsity of the defendant's explanation for possession.¹⁹⁹ In neither case was the defen-

193. 237 F.2d 57 (2d Cir. 1956), *cert. denied*, 355 U.S. 38 (1957); *see supra* notes 64-68 and accompanying text.

194. 245 F.2d 284 (3d Cir.), *cert. denied*, 355 U.S. 819 (1957); *see supra* notes 68-70 and accompanying text.

195. 620 F.2d 712 (9th Cir. 1980); *see supra* notes 75-78 and accompanying text.

196. *United States v. Gainey*, 380 U.S. at 87 (Black, J., dissenting); *see supra* text accompanying note 133.

197. Nesson, *supra* note 115, at 1211.

198. *Barnes*, 412 U.S. at 846; *Turner*, 396 U.S. at 417-18.

199. *See supra* notes 128-48 and accompanying text; *cf. United States v. Newman*, 468 F.2d 791 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973). In *Newman* the defendant contended that he could not testify because his claimed cash hoard arose from thefts in pre-

dant's silence affirmatively incorporated into the government's case in chief. Moreover, in neither case was the Court concerned with a method of proof under which, even with evidentiary safeguards, the taxpayer remains silent at his peril, or with an inference designed to increase, not decrease the government's burden of proof. Thus, neither *Turner* nor *Barnes* sanctions the use of likely source proof, which uses the taxpayer's silence to prove a substantive element of the offense of tax evasion. Under *Griffin*, the use of likely source proof under present standards violates the fifth amendment.

Finally, as another commentator noted of the likely source inference over fifteen years ago:

Surely if legislation attempted to establish a mere official accusation of crime as sufficient to require the defendant to prove himself innocent or take his chances with the jury, the courts would strike it down, and on Fifth Amendment grounds. Yet the difference between net worth proof and mere accusation is one of degree only, and not a very large one.²⁰⁰

The likely source inference also violates the due process clause. The Supreme Court constructed the likely source evidentiary safeguard in *Holland* based on a practical recognition that once a likely source is established, the taxpayer will either explain the net worth increase to the satisfaction of the jury or will be convicted. Although jury instructions concerning the use of the likely source inference usually are phrased in permissive terms, the inference should be considered a species of mandatory presumption, for a jury *always* will find that the claimed net worth increase was derived from taxable income if the government presents likely source proof.

Thus, the jury may treat the proof of a likely source as creating an irrebuttable presumption that the increase in net worth was derived from taxable income. Alternatively, the jury may treat the likely source proof as creating a presumption of taxable income unless and until the taxpayer presents evidence negating the government's likely source. Because the government's burden of proof is

prosecution years. The Court held that the defendant's privilege against self-incrimination was not violated by requiring the defendant to decide whether to present a defense based on prior criminal activity. The defendant interposed a defense based on his prior criminal activity, but retreated behind the fifth amendment veil when asked to supply details that would prove the validity of his testimony. In *Newman* the government presented sufficient evidence of a likely source and negated nontaxable sources.

200. Duke, *supra* note 1, at 33 (footnotes omitted).

reduced under either alternative, the use of the likely source presumption violates the due process clause under the *Winship* and *Mullaney* analysis of the Supreme Court in *Sandstrom*.²⁰¹

If the likely source inference is considered as a mandatory presumption, the jury may view likely source proof as irrebuttable. Once the government presents likely source proof, the jury will find that the increase in net worth was derived from taxable income. Under this interpretation, the likely source presumption relieves the government of its burden of proving a deficiency in a tax evasion prosecution, an essential element of the offense, and violates the due process clause under the *Winship* and *Mullaney* analysis of the Supreme Court in *Sandstrom*.

Alternatively, the jury may view the proof of a likely source as a direction to find taxable income from likely source proof unless the defendant presents some evidence to the contrary. I believe that it is this interpretation that the Supreme Court explicitly recognized in *Holland* when it stated that a defendant remained silent in such cases at his peril.²⁰² In *United States v. Ford*,²⁰³ for example, in the absence of explanation at trial, the jury found that the source of the unreported income was the "opportunities" for graft described by the government. Indeed, in all net worth cases, unless the income is satisfactorily explained by the defendant, the jury will infer the existence of taxable income from likely source proof. Again, the government has used the inference to establish a tax deficiency, an essential element of the tax evasion offense. The burden shifting effect of the likely source presumption, although phrased in permissive terms, also violates due process under the *Mullaney* analysis in *Sandstrom*. Whether viewed as a device that forces the taxpayer to testify or as a burden reallocation device, the likely source rule cannot withstand constitutional scrutiny.

Finally, it is possible that the likely source rule may be considered merely a permissive inference because the standard jury instruction is phrased in permissive terms. Under *Tot* and its progeny,²⁰⁴ this inference would be constitutionally valid if it is more probable than not that the presumed fact of taxable income fol-

201. For a discussion of the *Sandstrom* case, see *supra* notes 172-83 and accompanying text.

202. Indeed, the *Holland* Court recognized that the government "must still prove every element of the offense beyond a reasonable doubt." 348 U.S. at 138.

203. 237 F.2d 57 (2d Cir. 1956), *cert. denied*, 355 U.S. 38 (1957); see *supra* notes 64-68 and accompanying text.

204. See *supra* notes 122-43 and accompanying text.

lows from proof of the predicate fact, the likely source. Even under this analysis, current likely source proof still violates due process.

Currently, the government may either negate nontaxable sources of income or prove a likely source for the claimed net worth increase. Proof of an increase in net worth with no additional evidence that negates nontaxable sources should not satisfy the more probable than not test. Any taxpayer may have received loans, gifts, or inheritances during the years in issue. Proof that a taxpayer operated a grocery store, as in *United States v. Hom Ming Dong*,²⁰⁵ or a bakery, as in *United States v. Costanzo*,²⁰⁶ without proof that no loans or gifts existed, cannot alone satisfy due process.

Although in *Holland* the likely source proof was so strong that it carried with it its own nontaxable source negation, this is the exception and not the rule. Logically and constitutionally, without such nontaxable source negation, no jury should be allowed to draw any inference that the net worth increase was derived from currently taxable income. Probably in recognition of this concept, the government in most, if not all, net worth cases attempts to negate nontaxable sources as part of its case in chief.

Nevertheless, even with nontaxable source negation, the amount of evidence that the government currently introduces still fails to satisfy due process. The mere "opportunities" for graft established by the government in *United States v. Ford*,²⁰⁷ for example, do not make it more probable than not that graft was the source for the claimed net worth increase. The fact that the taxpayer is a gambler, as in *United States v. Costello*,²⁰⁸ does not make it more probable than not that gambling activities were the source of a claimed net worth increase in excess of \$100,000. The fact that an individual operates a hotel, as in *Whitfield v. United States*,²⁰⁹ does not make it more probable than not that the hotel is the source of the net worth increase.

Each of these cases could withstand constitutional scrutiny, however, if there was proof that the source could account for all or at least a substantial portion of the claimed net worth increase.

205. 436 F.2d 1237 (9th Cir. 1971); see *supra* notes 81-84 and accompanying text.

206. 581 F.2d 28 (2d Cir. 1978), *cert. denied*, 439 U.S. 1067 (1979); see *supra* notes 85-88 and accompanying text.

207. 237 F.2d 57 (2d Cir. 1956), *cert. denied*, 335 U.S. 38 (1957); see *supra* notes 64-68 and accompanying text.

208. 221 F.2d 668 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956); see *supra* notes 57-60 and accompanying text.

209. 383 F.2d 142 (9th Cir. 1967); see *supra* notes 79-80 and accompanying text.

For example, in *Ford*, if the government had shown specific instances of graft, or if in *Costello* the government had produced testimony of individuals who had gambled with and lost to the defendant, the government could have established graft and gambling as the respective likely sources. Similarly, if in *Whitfield*, the government had presented comparative statistics showing that the hotel reported significantly less income than other hotels in the community, this evidence could have sufficed to prove a likely source for the claimed net worth increase.

Although the government is not required to prove either the specific source of the increase in the taxpayer's net worth or the specific amount of taxes due, unless the likely source proof can account for all or a substantial portion of the claimed net worth increase, the likely source inference, even if considered permissive, is not constitutionally valid.

This author believes that the self-incrimination and due process weaknesses in the likely source inference were the unstated constitutional underpinnings for the reversals of the convictions in *United States v. Bethea*²¹⁰ and *United States v. Grasso*.²¹¹ Indeed, each court required proof of a likely source sufficient to account for the entire net worth increase. The continued use of the inference in net worth prosecutions requires several similar cautionary measures by the courts.

IV. A FAITHFUL RETURN TO *Holland*

To satisfy both the fifth amendment self-incrimination clause and the due process clause in net worth criminal tax prosecutions, the government must be required in every case to negate nontaxable sources of income. Once nontaxable sources of income are negated, the government may, at its option, introduce proof as to a likely source. The courts must, however, carefully examine likely source evidence. The following are four suggested standards by which the court should evaluate likely source proof.

First, illegal likely source proof must be scrutinized under rule 404(b) of the Federal Rules of Evidence. In most cases, the prejudicial nature of evidence of an illegal likely source clearly will outweigh its probative value. The government should, in such cases, offer to stipulate that a likely source of *unstated origin* exists in

210. 537 F.2d 1187 (4th Cir. 1976); see *supra* note 19 and accompanying text.

211. 629 F.2d 805 (2d Cir. 1980); see *supra* note 19 and accompanying text.

the case.²¹² The court should require a stipulation in the absence of a government offer.

Second, a court should not admit likely source proof into evidence unless the government can establish that the likely source can account for all or a substantial portion of the claimed net worth increase. This likely source proof may be based on comparative statistics, as in *Brodella v. United States*,²¹³ *Jelaza v. United States*,²¹⁴ and *Holland v. United States*,²¹⁵ strong circumstantial evidence as in *United States v. Rifkin*,²¹⁶ admissions as in *United States v. Tunnell*,²¹⁷ or specific items of omission as in *United States v. Nunan*²¹⁸ and *United States v. Sclafani*.²¹⁹ If the government is able both to negate nontaxable sources and to establish a likely source that accounts for all or a substantial portion of the claimed net worth increase, then the government may constitutionally use the likely source doctrine to demonstrate that the increase in net worth was derived from currently taxable income.

Third, the satisfaction of constitutional objections cannot end judicial scrutiny of likely source evidence. Both the Supreme Court and commentators have noted that a constitutional "tension" exists when courts apply a "more probable than not," rational relation test in a criminal proceeding in which proof beyond a reasonable doubt is required.²²⁰ Although the Supreme Court has not resolved this tension satisfactorily under its various modes of analysis, the Court noted this tension in *United States v. Gainey*.²²¹ Holding that the inference at issue was valid, the Court specifically noted that the use of the inference did not infringe on the power of the trial judge to determine whether sufficient facts had been presented to establish proof beyond a reasonable doubt. The Court noted that "[o]ur Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial, including the right to have a case withheld from the jury

212. See FED. R. EVID. 404(b); *supra* note 74.

213. 184 F.2d 823 (6th Cir. 1950); see *supra* text accompanying notes 32-35.

214. 179 F.2d 202 (4th Cir. 1950); see *supra* notes 31-37 and accompanying text.

215. 348 U.S. 121 (1954); see *supra* notes 43-52 and accompanying text.

216. 451 F.2d 1149 (2d Cir. 1971); see *supra* notes 97-98 and accompanying text.

217. 481 F.2d 149 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); see *supra* notes 94-96 and accompanying text.

218. 236 F.2d 576 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); see *supra* text accompanying note 90.

219. 265 F.2d 408 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959); see *supra* notes 91-92 and accompanying text.

220. See, e.g., Comment, *supra* note 117, at 349-50.

221. 380 U.S. 63 (1965); see *supra* notes 128 & 133 and accompanying text.

when the evidence is insufficient as a matter of law to support a conviction."²²²

Rule 29 of the Federal Rules of Criminal Procedure is entitled "Motion for Judgment of Acquittal," and provides in part:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.²²³

A court must grant this motion unless the relevant evidence, viewed in a light most favorable to the government, is sufficient to support a conclusion of guilt beyond a reasonable doubt.²²⁴

As previously noted,²²⁵ to obtain a conviction under section 7201 of the Internal Revenue Code,²²⁶ the government must establish that the taxpayer knowingly and willfully attempted to evade a substantial portion of the tax due and owing. To prove this deficiency, the government's evidence must establish beyond a reasonable doubt that there is not only a bare net worth increase, but that there is also a likely source of the increase. Regardless of whether the fifth amendment and due process objections are satisfied, judges must carefully scrutinize likely source evidence and should direct verdicts against the government when appropriate under the imperative of rule 29(a). It is the individual district court trial judge who, in the last analysis, must stand between the taxpayer and the government in a net worth case.

Finally, to protect the taxpayer whenever the government presents proof of a likely source, the courts must, as *Holland* requires, carefully instruct the jury as to the use of permissive inferences both for and against the taxpayer.²²⁷

Several commentators have suggested that judicial comment on the predicate facts introduced at trial and the conclusions that

222. 380 U.S. at 68.

223. FED. R. CRIM. P. 29(a).

224. For cases applying rule 29, see *United States v. Varkonyi*, 611 F.2d 84 (5th Cir.), cert. denied, 446 U.S. 945 (1980); *United States v. Price*, 623 F.2d 587 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); see also *United States v. Skalicky*, 615 F.2d 1117 (5th Cir.), cert. denied, 449 U.S. 832 (1980) (judgment of acquittal granted for one count of three count indictment).

225. See *supra* text accompanying note 4.

226. I.R.C. § 7201 (1976).

227. In *United States v. Hall*, 650 F.2d 994 (9th Cir. 1981), the Ninth Circuit recently reversed as plain error a lower court's failure to instruct on the inferences that arise in the net worth method of proof.

may be drawn from those facts provides more rational guidance to the jury than the present summary by "abstraction" of a formal jury instruction.²²⁸ This suggestion may well minimize the adverse jury impact of a traditional presumption. In the unique context of the likely source inference, however, which safeguard was established to increase rather than reduce the government's burden of proof, a judicial instruction remains essential.

A respected manual on jury instructions contains the following instruction concerning the likely source inference:

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in the manner just stated has increased during the taxable year, then the jury may draw the inference and find that the defendant had receipts of either money or property during that year; and if the evidence in the case also establishes beyond a reasonable doubt that the defendant had one or more possible sources of taxable income and that the receipts did not come from nontaxable income, then the jury may draw the further inference and find that such receipts constituted taxable income to the defendant.²²⁹

This instruction should be modified to encompass the "abstraction" of the inference and its permissive use in the context of a net worth case. The instruction also must include admonitions to the jury that they must determine whether the inference is justified in the particular case and that they must be convinced based upon all the evidence that the defendant is guilty beyond a reasonable doubt. I recommend that the jury instruction be modified as follows:

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in the manner just stated has increased during the taxable year, then the jury may infer that the defendant has receipts of either money or property during that year.

The receipts of money or property during the year is not sufficient, however, to establish that such receipts came from currently taxable income of the defendant. To establish that such receipts came from currently taxable income, the government is required to establish beyond a reasonable doubt that the defendant had one or more sources of taxable income sufficient to account for all or a substantial portion of the claimed increase in net worth and to establish beyond a reasonable doubt that

228. See Allen, *supra* note 183; Nesson, *supra* note 115, at 1222-23.

229. 2 E. DEVITT & C. BLACKMAR, *supra* note 10, § 35.08.

such receipts did not come from any nontaxable source. Nontaxable sources include loans, gifts, inheritances, tax free interest, and any other monies not currently taxable to the defendant.

If you find from all the evidence in the case that the government has failed to establish beyond a reasonable doubt either one or more likely sources of taxable income sufficient to account for all or a substantial portion of the claimed net worth increase or to negate the existence of nontaxable sources of income, then you must acquit the defendant of all charges alleged in the indictment. Moreover, even if you find beyond a reasonable doubt that the defendant had one or more sources of taxable income which account for all or a substantial portion of the claimed increase in net worth, and that no nontaxable sources of income existed, then you are permitted but need not infer that such receipts by the defendant constituted taxable income for the years in question. You must decide whether, in the context of this case, such a conclusion is justified or warranted.

However, you are never required to draw either inference and it is the exclusive province of the jury to determine whether the facts, and the circumstances as shown by the evidence in this case, warrant a finding that any inference should or should not be drawn.

The negation of nontaxable sources, the requirement that the proof of the likely source account for all or a substantial portion of the net worth increase, careful analysis of the sufficiency of likely source proof, and the new jury instruction presented above, should ensure that the safeguard erected in *Holland* will, in fact, protect the taxpayer rather than aid the government in a net worth case.

V. CONCLUSION

The government has employed the net worth method for over fifty years. Recently, however, commentators and several circuit courts have criticized both the likely source inference used in the net worth method and the proof deemed sufficient to establish it. To use the likely source inference in a constitutional manner, the government must negate all nontaxable sources of income, and establish that the likely source is sufficient to account for all or a substantial portion of the claimed net worth increase. A revised jury instruction explaining the use of the likely source inference also should be implemented.