Rebuttable Criminal And Civil Presumptions: California's Statutory Dichotomy

> One of the favorite and much indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men's differences, a presumption is often indulged, where the fact presumed cannot have existed.[1]

I. INTRODUCTION

On January 1, 1967, the California Evidence Code[2] became effective.[3] Although in most areas the Code serves merely to codify and clarify pre-existing California law,[4] it makes substantial and innovative changes in the law of presumptions.

This Comment examines the theory, operation, and effect of presumptions under the California Evidence Code and compares them with relevant sections of the Federal Rules of Evidence. The constitutionality of the current presumption doctrines as they operate in civil and criminal cases is examined. Although California's treatment of presumptions in civil cases raises few objections, the effect that a criminal presumption has under California law is both confusing and constitutionally suspect on due process grounds. This Comment proposes a modification of existing law that would guarantee the criminal defendant's constitutional rights without depriving law enforcement agencies of the procedural advantages provided by presumptions.

II. PRESUMPTIONS IN GENERAL

In general, a presumption[5] is a legal operation by which a proven

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[1] Conger v. Weaver, 6 Cal. 548, 556, 65 Am. Dec. 528 (1856).
[2] Enacted as Chapter 299 of Statutes of 1965.
[3] CAL. EVID. CODE § 12 (West 1968).
[4] 7 CAL. LAW REV. COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES 34 (1965).
[5] CAL. EVID. CODE § 600(a) (West 1968) defines a presumption as:
> [A]n assumption of fact that the law requires to be made from an-

fact is used to establish the truth of another fact, not proven.[6] Call the proven or basic fact, *BF*, and the nonproven or presumed fact, *PF*.[7] Assume, for example, that *X* has the burden of proving that *Y* is the legal owner of a certain automobile. If *X* has direct evidence that *Y* is the owner, for example by Department of Motor Vehicle records, *X* may have satisfied his burden. If, however, *X* has no direct evidence of ownership, he may attempt to satisfy his burden of proof by establishing some other fact which is closely related to ownership. Assume that *X* can prove that *Y* is in possession of the automobile. In this example, *Y*'s possession of the automobile is *BF* and *Y*'s ownership of the automobile is *PF*. If the relationship between *BF* and *PF* is sufficiently strong, proof of *BF* may be sufficient for *X* to make out a prima facie case regarding the existence of *PF* and thereby withstand a motion for directed verdict or even shift the burden of proving the nonexistence of *PF* to *Y*. The courts may characterize the relation between any two *BF* and *PF* in several ways:

(1) If the trier of fact determines that *PF* may reasonably be deduced from *BF* by the operation of ordinary rules of reasoning, then it is sometimes said that *PF* is "presumed" from the existence of *BF*. If this reasoning process is permissive, that is if the trier of fact may find that *PF* does not exist even if *BF* is established and no evidence of the nonexistence of *PF* has been introduced,[8] then the proper term for the relationship between *BF* and *PF* is an "inference."[9]

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other fact or group of facts found or otherwise established in the action.

[6] MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (1962).

[7] The "presumptions" of sanity, innocence and due care have been reclassified under the Evidence Code. Since they do not depend on the establishment of a basic fact for their operation, they are not properly considered presumptions. They are in actuality legislative allocations of the burden of proof on those issues. CAL. EVID. CODE §§ 520-22 (West 1968).

[8] *See* Blank v. Coffin, 20 Cal. 2d 457, 461, 126 P.2d 868, 870 (1942). *See also* text accompanying notes 37-38 *infra*.

[9] An inference must be distinguished from a presumption. *See* Engstrom v. Auburn Auto. Sales Corp. 11 Cal. 2d 64, 69-71, 77 P.2d 1059, 1062-63 (1938). A presumption is an assumption of fact which the law requires to be made. CAL. EVID. CODE § 600(a) (West 1968). An inference is "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." CAL. EVID. CODE § 600(b) (West 1968). It may properly be based on circumstantial evidence, *see* People v. Williams, 5 Cal. 3d 211, 215, 485 P.2d 1146, 1148, 95 Cal. Rptr. 530, 532 (1971), facts otherwise established in an action, CAL. EVID. CODE § 600(b) (West 1968), or even from other inferences, provided the first inference is properly drawn from sufficient evidence and the second inference is not too remote or speculative. *See* People v. Warner, 270 Cal. App. 2d 900, 908, 76 Cal. Rptr. 160, 165 (4th Dist. 1969). *But see* Annot., 5 A.L.R. 3d 100 (1966). Whether a particular inference may be drawn from the evidence is a question of law, but whether the inference shall be drawn in any given case is a question of fact for the jury. *See* Blank v. Coffin, 20 Cal. 2d 457, 461, 126 P.2d 868, 870 (1942). An inference is always based on a rational connection between the basic

Thus, from the fact that the accused ran upon seeing a policeman, the trier of fact might reasonably infer the accused's consciousness of guilt.[10]

(2) It may be that *BF* is the legal equivalent of *PF*. In this situation, whenever the trier of fact finds that *BF* has been established, the existence of *PF* is conclusively presumed.[11] For example, if it is established that a husband, who is not impotent or sterile, is cohabitating with his wife at the time of the conception of her issue, it is conclusively presumed that he is the father of the child.[12] No showing made by the husband, however persuasive, will overcome the presumption.[13] In this respect, conclusive presumptions are not really rules of evidence, but expressions of substantive law.[14]

(3) The most common characterization of the relationship between *BF* and *PF*, however, is to say that if *BF* is established in an action, the existence of *PF* must be assumed until a specified showing is made by the opponent (the one against whom the presumption operates) to refute *PF*. Here a presumption is a procedural device which establishes the existence of *PF* in the absence of sufficient evidence to prove *PF* directly.[15] When a presumption has this effect, it

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fact and the inferred fact, while a presumption may or may not be, depending on its purpose. *See* text accompanying note 62 *infra*. *See also* note 103 *infra*.

[10] *See* People v. Wong, 35 Cal. App. 3d 812, 831, 111 Cal. Rptr. 314, 328 (1st Dist. 1973); CAL. PENAL CODE § 1127c (West 1972); B. WITKIN, CALIFORNIA EVIDENCE § 511 (2d ed. 1966) [hereinafter cited as WITKIN].

[11] Conclusive presumptions are beyond the scope of this Comment. Unlike rebuttable presumptions, which may be dispelled upon a requisite showing of evidence, conclusive presumptions, once their basic facts are established, cannot be dispelled by any evidentiary showing, including the impossibility of the presumed fact. CAL. EVID. CODE § 620 (West 1968). *See also* note 13, *supra*.

The Evidence Code codifies four conclusive presumptions: § 621, parent child relationship; § 622, facts recited in a written instrument (estoppel by contract); § 623, estoppel by own statement or conduct (estoppel in pais); and § 624, estoppel of tenant to deny landlord (West 1968 and Supp. 1976).

Conclusive presumptions may also be created in other codes, *see* WITKIN, *supra* note 10, § 297 (statutory listing), or by judicial decision. *See, e.g.*, Fletcher v. Los Angeles T. & S. Bank, 182 Cal. 177, 184, 187 P. 425, 428 (1920) (a woman is capable of bearing children, the "fertile octogenarian rule").

[12] CAL. EVID. CODE § 621 (West Supp. 1976).

[13] Even blood tests which prove that it is medically impossible for the husband to be the biological father "may not be used to controvert the conclusive presumption of paternity." Kusior v. Silver, 54 Cal. 2d 603, 620, 354 P.2d 657, 668, 7 Cal. Rptr. 129, 140 (1960). *See also* Wareham v. Wareham, 195 Cal. App. 2d 64, 67, 15 Cal. Rptr. 465, 467 (2d Dist. 1961).

[14] *See* Jackson v. Jackson, 67 Cal. 2d 245, 247, 430 P.2d 289, 290, 60 Cal. Rptr. 649, 650 (1967); Kusior v. Silver, 54 Cal. 2d 603, 619, 354 P.2d 657, 668, 7 Cal. Rptr. 129, 140 (1960); CAL. EVID. CODE § 620, Law Revision Comm'n Comment (West 1968); 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1353 (Chadbourn rev. 1972). For this reason, the Federal Rules of Evidence, 28 U.S.C. FED. R. EVID. 101 *et seq.* (1976), do not deal specifically with conclusive presumptions.

[15] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 38 (4th ed 1971) [hereinafter cited as PROSSER].

is properly referred to as a "rebuttable presumption." The presumption of ownership from possession, seen above, is an example of a rebuttable presumption.[16]

III. REBUTTABLE PRESUMPTIONS

Courts and legislatures have created rebuttable presumptions for a variety of policy reasons. Examples include: redressing an imbalance resulting from one party's superior access to evidence, avoiding a procedural impasse if the requisite proof is often unavailable, or aiding a favored outcome and handicapping a disfavored one.[17] The most common reason for the creation of a presumption, however, is probability.[18] In many instances, the likelihood of the presumed fact being true is so great, that in the absence of controverting evidence, the court should assume the existence of such fact. In this respect, many presumptions are little more than expressions of crystallized judicial experience.

For example, most things a person possesses he probably owns. Rather than require proof of ownership in every case where ownership could be an issue, but most likely will not be, the courts merely presume ownership from the established fact of possession.[19] This promotes judicial economy and facilitates the disposition of the case.[20] If the opponent chooses to put the presumed fact of ownership in issue, he must make some showing specified by law.

All courts agree that a rebuttable presumption has the effect of shifting to the opponent the burden of satisfying a specified condition if he wishes to rebut the presumption. There is, however, disagreement about the condition which must be satisfied to overcome the presumption.[21] The majority view, adopted by the Federal Rules of Evidence,[22] is that a rebuttable presumption affects only the bur-

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[16] CAL. EVID. CODE § 637 (West 1968).

[17] *See* Speck v. Sarver, 20 Cal. 2d 585, 591-92, 128 P.2d 16, 19-20 (1942) (Traynor, J., dissenting); E. CLEARY *et al.*, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 343, at 806-07 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]; MORGAN, BASIC PROBLEMS OF EVIDENCE, 32-34 (1962); Morgan, *Instructing the Jury Upon Presumptions and Burdens of Proof*, 47 HARV. L. REV. 59, 77 (1933) [hereinafter cited as Morgan].

[18] *See* CAL. EVID. CODE § 603, Law Rev. Comm'n Comment (West 1968); MCCORMICK (2d ed.), *supra* note 17, § 343, at 807.

[19] *See* People v. Oldham, 111 Cal. 648, 652, 44 P. 312, 313 (1896).

[20] Few presumptions are based solely on one underlying ground; most have been created for a combination of reasons. The presumption of ownership from possession, for example, also tends to favor the stability of estates. *See* MCCORMICK (2d ed.), *supra* note 17, § 343, at 807.

[21] *See* MORGAN, BASIC PROBLEMS OF EVIDENCE 32 (1962); MCCORMICK (2d ed.), *supra* note 17, § 342, at 803.

[22] FED. R. EVID. 301.

den of producing evidence, and therefore the presumption disappears upon the introduction of evidence sufficient as a matter of law to sustain a finding of the nonexistence of the presumed fact.[23] The minority view[24] is that rebuttable presumptions affect the burden of proof and endure until the trier of fact is persuaded of the nonexistence of the presumed fact.[25]

California's answer to this debate was to create a system incorporating features of both doctrines.[26] The Law Revision Commission, acknowledging that rebuttable presumptions may be created for a variety of reasons and that no single theory or rationale can deal adequately with all of them,[27] created a bifurcated system in which rebuttable presumptions are classified according to their function and the showing required to overcome them.

Twenty-four rebuttable presumptions are specifically designated in the Evidence Code as affecting either the burden of producing evidence or the burden of proof.[28] There are, in addition, many pre-

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[23]This school is usually named after Thayer, its first advocate. THAYER, PRELIMINARY TREATISE ON EVIDENCE 337 (1898). *See generally* MODEL CODE OF EVIDENCE rule 704 (1942); J. Chadbourn and Degnan, *A Study Relating to the Uniform Rules of Evidence — Burden of Producing Evidence, Burden of Proof, and Presumptions*, 6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 1047, 1053 (1964) [hereinafter cited as CHADBOURN, LAW REVISION STUDY]; 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2491 (3d ed. 1940) [hereinafter cited as WIGMORE (3d ed.)].

[24]The Thayer theory of presumptions has been vigorously criticized as giving presumptions an effect that is too "slight and evanescent." Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 912 (1937). It has been characterized as the "bursting bubble" theory, MCCORMICK (2d ed.), *supra* note 17, § 345, at 821, and as rendering presumptions, "the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." Mockowich v. Kansas City, St. J. & C.B.R. Co., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906), quoted in MCCORMICK (2d ed.), *supra* note 17, § 345 at 821 and WIGMORE (3d ed.), *supra* note 23, § 2491.

[25]This school is usually named after Morgan, its chief advocate. *See* Morgan, *supra* note 17. *See generally* CHADBOURN, LAW REVISION STUDY, *supra* note 23, at 1055; Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

[26]Prior to the adoption of the Evidence Code, California, and a few other states held the minority view that a rebuttable presumption was evidence to be weighed by the trier of fact with or against other evidence. People v. Stevenson, 58 Cal. 2d 794, 796, 376 P.2d 297, 298, 26 Cal. Rptr. 297, 298 (1962); Smellie v. Southern Pacific Co., 212 Cal. 540, 549, 299 P. 529, 532 (1931). The verdict or finding could rest upon the presumption even if all of the other evidence contradicted it. *See* People v. Stevenson, 58 Cal. 2d at 796, 376 P.2d at 298, 26 Cal. Rptr. at 298. In spite of intense criticism, *see, e.g.*, Scott v. Burke, 39 Cal. 2d 388, 402-06, 247 P.2d 313, 321-24 (1952) (Traynor, J., dissenting), the rule survived until the adoption of the Evidence Code, in which it was specifically repudiated. CAL. EVID. CODE § 600(a) (West 1968).

[27]CAL. EVID. CODE § 601, Law Rev. Comm'n Comment (West 1968).

[28]*See* notes 33, 55 *infra*.

sumptions found in other codes[29] or the common law.[30] These are left for the courts to classify according to criteria established in the Evidence Code.[31] Since it is more difficult to dispel a presumption which affects the burden of proof than one which affects the burden of producing evidence, the classification a presumption receives may, in some situations, determine the outcome of the litigation.

A. PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE[32]

1. THE CALIFORNIA EVIDENCE CODE

Presumptions affecting the burden of producing evidence[33] are defined by the Evidence Code as presumptions "established to imple-

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[29] *See, e.g.*, CAL. BUS. & PROF. CODE §§ 14411 *et seq.* (exclusive right to use fictitious name), §§ 17071, 17071.5 (sales to injure competitors) (West Ann. 1964 & Supp. 1976); CAL. CIV. CODE § 869a (purported trust without named beneficiary), § 1105 (fee simple title), § 1150 (gift causa mortis), § 1431 (joint and several contracts), § 1614 (consideration for written contracts), §§ 1943, 1944 (term of tenancy), § 2235 (advantage obtained by beneficiary), § 5110 (community and separate property) (West 1970 & Supp. 1976); CAL. COMM. CODE § 3307(1)(b) (establishing signatures on an instrument) (West Ann. 1964); CAL. FIN. CODE § 852 (joint tenancy in bank account) (West Ann. 1968); CAL. HEALTH AND SAF. CODE § 10557 (judicial determination of birth date) (West Ann. 1975); CAL. INS. CODE § 11580.4 (uninsured motorist) (West Ann. Supp. 1976); CAL. LAB. CODE § 3708 (negligence of uninsured employer) (West 1971); CAL. PENAL CODE § 250 (malice in libel proceeding), § 259 (malice in slander utterance), § 270 (proof of abandonment of child), § 484(b) (intent to commit theft from failure to return rented property), § 496(2) (receiving stolen property by second hand dealers) (West 1972 & Supp. 1976); CAL. REV. & T. CODE § 1610 (taxable value of property), § 6276 (taxable value of motorvehicles) (West Ann. Supp. 1976); CAL. VEH. CODE §§ 14601(a), 14601.1(a) (driving when privilege is suspended or revoked), § 23126 (driving under the influence), § 41102 (illegal parking by owner) (West 1971 & Supp. 1976).

[30] *See, e.g.*, Alarid v. Vanier, 50 Cal. 2d 617, 621, 327 P.2d 897, 898 (1958) (negligence per se); Gagnon Co. v. Nevada Desert Inn, Inc., 45 Cal. 2d 448, 460, 289 P.2d 466, 474 (1955) (attorney's authority); Blank v. Coffin, 20 Cal. 2d 457, 460, 126 P.2d 868, 870 (1942) (driving with permission); Davis v. Jacoby, 1 Cal. 2d 370, 379, 34 P.2d 1026, 1030 (1934) (bilateral contract rather than unilateral contract); Butler v. Butler, 188 Cal. App. 2d 228, 233, 10 Cal. Rptr. 382, 385 (1st Dist. 1961) (delivery from recordation or possession); Estate of Browne, 159 Cal. App. 2d 99, 101, 323 P.2d 837, 829 (2d Dist. 1958) (due execution of will); People v. One 1952 Chevrolet, 128 Cal. App. 2d 414, 417, 275 P.2d 509, 511 (1st Dist. 1954) (knowledge of illegal use of car); Halbert v. Berlinger, 127 Cal. App. 2d 6, 17-18, 273 P.2d 274, 281 (3d Dist. 1954) (scope of employment and agency); Estate of LeSure, 21 Cal. App. 2d 73, 80, 68 P.2d 313, 317 (4th Dist. 1937) (revocation of lost will).

[31] CAL. EVID. CODE §§ 603, 605 (West 1968 & Supp. 1976).

[32] Although this section is discussed in the context of civil proceedings, many of the procedures are equally applicable in criminal cases. For a discussion of the differences, *see* text accompanying notes 85-87 *infra*.

[33] The California Evidence Code originally designated 15 presumptions affecting the burden of producing evidence: § 631 (money delivered was due); § 632 (thing delivered was owned); § 633 (obligation delivered was paid); § 634 (person in possession of order on himself has paid or delivered thing ordered);

ment no public policy other than to facilitate the determination of the particular action in which the presumption is applied."[34] If *BF* is found to exist, then the trier of fact is required "to assume the existence of [*PF*] unless and until evidence is introduced which would support a finding of its nonexistence."[35] Once evidence sufficient to support a finding of the nonexistence of *PF* has been introduced, the presumption vanishes and the action proceeds as if the presumption never existed.[36]

A presumption does not become operative until the basic facts on which it is based are established. A basic fact may be established by: (1) judicial notice, (2) the pleadings, (3) stipulation of the parties, (4) evidence which requires a directed verdict, (5) the finding by the trier of fact of sufficient evidence,[37] or (6) order of the court as a remedy for one party's failure to obey an order for discovery.[38]

With a presumption, it is possible for *BF* alone to be disputed, or for *BF* to be established and *PF* disputed, or for both *BF* and *PF* to be disputed. If, for example, *Y* can show that he properly mailed a letter to *X*, then *X* is presumed to have received the letter in the ordinary course of mail.[39] *BF* is the proper mailing of the letter by *Y* and *PF* is *X*'s receipt of the letter. *X*'s response to the introduction of evidence of *BF* will determine the effect of the presumption:

(1) *X* may introduce either no evidence, or evidence which the

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§ 635 (obligation possessed by creditor not paid); § 636 (payment of earlier rent or installments from receipt for later rent or installments); § 637 (ownership of things possessed; § 638 (ownership of property by person who exercises acts of ownership); § 639 (judgment determines rights of parties); § 640 (writing truly dated); § 641 (letter properly mailed was received); § 642 (conveyance by person under duty to convey); § 643 (authenticity of ancient document); § 644 (books purporting to be published by public authority actually so published); § 645 (book purporting to contain reports of cases contains correct reports). (West 1968). In 1970, § 646 was added designating res ipsa loquitur as a presumption affecting the burden of producing evidence. (West Supp. 1976).

There is by no means universal agreement that res ipsa loquitur qualifies as a presumption. *See* Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 217-18 (1949). California is one of a minority of jurisdictions to give it this effect. In the majority of states, it is little more than a permissible inference which the jury may, but does not have to accept. It is an inference which makes a sufficient case to get to the jury and no more. *See, e.g.*, Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W. 2d 782, 785 (1953); MCCORMICK (2d ed.), *supra* note 17, § 342, at 804-05; Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 217 (1949); PROSSER, *supra* note 15, § 40.

[34] CAL. EVID. CODE § 603 (West 1968).

[35] CAL. EVID. CODE § 604 (West 1968). *See also* MCCORMICK (2d ed.), *supra* note 17, § 338, at 789-90.

[36] CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment (West 1968); *see* People v. Hemmer, 19 Cal. App. 3d 1052, 1061, 97 Cal. Rptr. 516, 522 (4th Dist. 1971).

[37] CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment (West 1968); MORGAN, BASIC PROBLEMS OF EVIDENCE 34 (1962).

[38] CAL. CODE CIV. P. § 2034(b)(2)(i) (West Supp. 1976).

[39] CAL. EVID. CODE § 641 (West 1968).

court determines is insufficient to controvert either the proper mailing or the receipt of the letter. If the judge finds that it has been established as a matter of law that the letter was mailed, then the jury is instructed that the letter was received. If it has not been established as a matter of law that the letter was mailed, then the jury is instructed that if it finds that the letter was mailed, it must also find that the letter was received.[40]

(2) *X* may introduce evidence which the court determines is sufficient to put the mailing, *BF*, at issue, and either introduce no evidence or insufficient evidence to controvert the receipt of the letter. In this situation, the judge will send the matter to the jury with instructions that if it finds that the letter was mailed, it must also find that it was received. Conversely, if *Y*, the proponent, fails to convince the trier of fact of the existence of *BF* by a preponderance of the evidence,[41] the presumption does not come into operation. If the trier of fact is a jury, the better practice is to instruct it to this effect without using the term "presumption."[42]

(3) *X* may testify at trial that he did not receive the letter or may otherwise attempt to controvert *PF*. The evidence introduced to rebut *PF* need persuade the trial judge only to the extent of believing that a jury could reasonably find in favor of the opponent on the issue involved.[43] The judge may determine that this evidence is sufficient to support a finding of nonreceipt, in which case the presumption is dispelled. Whether the evidence will be believed by the trier of fact is not properly a factor for the trial judge's consideration. The judge does not weigh evidence, he merely determines whether if believed it would support a verdict as a matter of law.[44]

In any of these situations, if the presumption is dispelled, the trier of fact determines whether the letter was received as if the presumption had never existed.[45] Receipt of the letter is a disputed fact, the truth of which must be proved by the party with the burden of proof on the issue by a preponderance of the evidence. However, since re-

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[40] *See* CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment (West 1968). *See generally* CAL. JURY INSTRUCTIONS CIVIL 4.03 (West, 5th ed. 1969) [hereinafter cited as BAJI] (res ipsa loquitur instructions).

[41] For a discussion of the different standards of proof, *see* note 66 *infra*.

[42] B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 46.3 (1972) [hereinafter cited as JEFFERSON]. *See generally* C. Rpt. No. 93-1597 to accompany HR 5463, P.L. 93-595 (FED. R. EVID. 301, presumptions in general and in civil actions and proceedings); Stumbo, *Presumptions — A View at Chaos*, 3 WASHBURN L.J. 182, 208-12 (1964).

[43] CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment (West 1968); JEFFERSON, *supra* note 42, § 45.1.

[44] *See* Griffin v. Sardella, 253 Cal. App. 2d 937, 943, 61 Cal. Rptr. 834, 838 (5th Dist. 1967).

[45] CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment; CAL. EVID. CODE § 605, Law Rev. Comm'n Comment (West 1968); JEFFERSON, *supra* note 42, § 46.3.

ceipt of a letter properly mailed has an underlying basis in probability and logical inference, the evidence of proper mailing is circumstantial evidence which creates an inference of *PF*, and may be sufficient either independently, or with other evidence, to sustain the burden of proof.[46]

When a presumption affecting the burden of producing evidence[47] has been dispelled by the introduction of evidence of the nonexistence of *PF*, the judge should say nothing regarding the presumption in his instructions.[48] The proponent (the one who is relying on the presumption) may, however, request an instruction directing the jury's attention to inferences which may reasonably be drawn from the evidence which established *BF*. If the judge chooses to give this instruction, he must also instruct that the jury may not find the existence of *PF* unless after weighing all of the evidence in the case and drawing from it any reasonable inferences which the jury feels are warranted, that it is more probable than not that *PF* exists.[49]

2. *THE FEDERAL RULES OF EVIDENCE*

After a lengthy debate,[50] the Congress, in the Federal Rules of Evidence, adopted the doctrine that rebuttable presumptions affect only the burden of going forward with the evidence.[51] These pre-

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[46] CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment (West 1968).

[47] The res ipsa loquitur presumption is an exception to this rule. The opponent in a res ipsa loquitur case may controvert the presumed fact that his negligence was the proximate cause of the accident or injury by introducing evidence sufficient to support a finding that he was not negligent, *see* Carrick v. Pound, 276 Cal. App. 2d 689, 692, 81 Cal. Rptr. 234, 236 (5th Dist. 1969); WITKIN, *supra* note 10, § 288, or that if he was, such negligence was not a proximate cause of plaintiff's injury. CAL. EVID. CODE § 646(c) (West Supp. 1976). If he does so, the mandatory effect of the presumption disappears. *See* Slater v. Kehoe, 38 Cal. App. 3d 819, 833, 113 Cal. Rptr. 790, 800 (1st Dist. 1974). The plaintiff, however, is still entitled to, and on request the judge must give, an instruction telling the jury that if, after weighing all of the evidence and inferences therefrom, it believes that it is more probable than not that the injury was caused by the defendant's negligence, then it should find for the plaintiff. CAL. EVID. CODE § 646(c) (West Supp. 1976); BAJI, *supra* note 40, 4.02 (1970 revision). If the opponent presents evidence which dispels the inference as a matter of law, then the plaintiff is not entitled to this instruction. *See* Leonard v. Watsonville Community Hospital, 47 Cal. 2d 509, 518, 305 P.2d 36, 41 (1956).

[48] *See* CAL. EVID. CODE § 604, Assembly Judiciary Comm. Comment (West 1968); JEFFERSON, *supra* note 42, § 46.3.

[49] *See* BAJI, *supra* note 40, 4.02 (1970 revision) (res ipsa loquitur instruction).

[50] When the proposed FEDERAL RULES OF EVIDENCE were being considered by Congress, the House version of rule 301 would have treated rebuttable presumptions in civil cases as a form of evidence. H. Rpt. No. 93-650 to accompany H.R. 5463, P.L. 93-595. The proposed House amendment failed, largely on the basis of California's unsuccessful experience with a similar rule. S. Rpt. No. 93-1277 to accompany H.R. 5463, P.L. 93-595; C. Rpt. No. 93-1597 to accompany H.R. 5463, P.L. 93-595.

[51] Rule 301 of the FEDERAL RULES OF EVIDENCE provides:

> In all civil actions and proceedings provided for by Act of Congress

sumptions appear to have even less effect than the California presumptions affecting the burden of producing evidence. Under federal rule 301, if the proponent produces evidence sufficient to support a finding of *BF*, and the adverse party offers no evidence contradicting *PF*, the court will instruct the jury that if it finds *BF*, it "may presume" the existence of *PF*. If the adverse party offers evidence contradicting *PF*, the court cannot instruct the jury that it "may presume" the existence of *PF* from proof of *BF*. The court may, however, instruct the jury that it "may infer" the existence of *PF* from proof of *BF*.[52] The fact that the jury *may*, rather than *must*, presume *PF* when *BF* is established and no evidence contradicting *PF* is introduced, suggests that the jury is not required to find *PF* under these conditions. If so, then a rebuttable presumption in the federal courts[53] is no more than a standardized inference.[54]

B. PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

Presumptions affecting the burden of proof[55] are defined by the Evidence Code as presumptions which "implement some public policy other than to facilitate the determination of the particular action in which the presumption is being applied."[56] Some of the public policies which presumptions implement include: the establishment of a parent child relationship,[57] the validity of marriage,[58]

> or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[52] C. Rpt. No. 93-1597 to accompany H.R. 5463, P.L. 93-595.

[53] Rule 302 of the Federal Rules of Evidence states that in diversity cases in which state law governs an element of a claim or defense, any state presumption affecting the claim or defense must also be recognized. This rule does not apply when state law doesn't supply the rule of decision as to the claim or defense, or to a presumption which operates on lesser "tactical" aspects of the case. FED. R. EVID. 302, Advisory Comm. Notes. *See also*, J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 302[01]-[02] (1975) [hereinafter cited as WEINSTEIN].

[54] *See* United States v. Jones, 418 F.2d 818, 822 n.3 (8th Cir. 1969).

[55] The California Evidence Code originally designated eight presumptions affecting the burden of proof: § 661 (legitimacy); § 662 (owner of legal title is owner of beneficial title); § 663 (ceremonial marriage valid); § 664 (official duty regularly performed); § 665 (ordinary consequences of voluntary act); § 666 (judicial action lawful exercise of jurisdiction); § 667 (death of a person not heard from in seven years); § 668 (unlawful intent) (West 1968). In 1967, § 669 (failure to exercise due care) was added. (West 1968). In 1976, § 661 was repealed. (West Supp. 1976).

[56] CAL. EVID. CODE § 605 (West Supp. 1976).

[57] *Id.*

[58] *Id.*

the stability of titles to property,[59] the security of those who entrust themselves or their property to the administration of others,[60] and establishing the ownership of community property.[61]

A presumption affecting the burden of proof does not necessarily have an underlying basis in probability and logical inference. It exists because it implements some desired public policy. The lack of an underlying logical inference often provides a hint as to how a particular presumption should be classified. Since presumptions affecting the burden of producing evidence are usually based on probability and are designed to facilitate the determination of the action in which they are applied, they always have logical underpinnings. Since public policy can justify creating presumptions for reasons other than probability and logic, the lack of an underlying logical inference indicates that the presumption affects the burden of proof.[62] For example, death is presumed from a seven year unexplained absence.[63] Such a presumption directly conflicts with the logical inference that life continues for its normal expectancy. The fact that a logical inference does not underlie the presumption suggests that the presumption affects the burden of proof.[64]

As with a presumption affecting the burden of producing evidence, a presumption affecting the burden of proof depends on the proponent's establishing the requisite basic fact.[65] Once *BF* is estab-

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[59] *See* Develop-Amatic Engineering v. Republic Mortgage Co., 12 Cal. App. 3d 143, 148, 91 Cal. Rptr. 193, 195 (1st Dist. 1970); CAL. EVID. CODE § 605 (West Supp. 1976).

[60] *See* Estate of Gelonese, 36 Cal. App. 3d 854, 862, 111 Cal. Rptr. 833, 838 (1st Dist. 1974); CAL. EVID. CODE § 605 (West Supp. 1976).

[61] *See* Baron v. Baron, 9 Cal. App. 3d 933, 939, 88 Cal. Rptr. 404, 407 (2d Dist. 1970).

[62] CAL. EVID. CODE § 605, Law Rev. Comm'n Comment (West 1968).

[63] CAL. EVID. CODE § 667 (West 1968).

[64] The underlying public policies include those favoring the distribution of estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy. CAL. EVID. CODE § 605, Law Rev. Comm'n Comment (West 1968).

[65] During the course of litigation, both parties may have occasion to utilize presumptions to assist in their cases. It is possible that the basic facts of two presumptions can be established and that the two presumed facts will be inconsistent. In this situation, the practice in most jurisdictions is for the court to apply that presumption which it determines is founded on the weightier considerations of policy and logic. If there is no such preponderance, the court disregards both presumptions. *See* UNIFORM RULES OF EVIDENCE 301(b) (1974 Act); MCCORMICK (2d ed.), *supra* note 17, § 345, at 823-24; Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 932 & n.41 (1931); MORGAN, BASIC PROBLEMS OF EVIDENCE, 37 (1962).

In California, however, the rule is unclear. The Evidence Code is silent on the subject of conflicting presumptions and under some circumstances California Code of Civil Procedure section 1859 (West 1967) may dictate a different approach. That statute states that a particular statute prevails over a general statute which conflicts with it. In Rader v. Thrasher, 57 Cal. 2d 244, 252, 368 P.2d 360, 364-65, 18 Cal. Rptr. 736, 740-41 (1962), the court relied

lished, to dispel a presumption affecting the burden of proof, the opponent must produce evidence sufficient to persuade the trier of fact by a specified degree of proof[66] that *PF* does not exist.[67] Again,

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on this rule of statutory construction to find that a special presumption of lack of consideration where a fiduciary obtains an advantage prevailed over a general presumption arising from a written instrument. The Uniform Parentage Act, however, adopted in California as CIVIL CODE §§ 7000 *et seq.* (West Supp. 1976), adopts the Uniform Rules of Evidence approach for conflicting presumptions which arise under that act. CIVIL CODE § 7004(b) provides that if two or more presumptions arise which conflict with each other, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls." (West Supp. 1976). *See also* CHADBOURN, LAW REVISION STUDY, *supra* note 23, at 1099.

[66] Unlike the burden of producing evidence, a party does not satisfy the burden of proof by merely introducing evidence which, if believed, would be sufficient to sustain a finding in his favor. The party having the burden of proof not only must introduce evidence, he must also persuade the trier of fact of the existence or nonexistence of the fact or contention, and do so to a specified degree of certainty. CAL. EVID. CODE § 502 (West 1968). The levels of proof required to satisfy the burden of proof are:

(1) Preponderance of the evidence: such evidence as when weighed with that opposed to it, has more convincing force and greater probability of truth. BAJI, *supra* note 40, 2.60. Unless another standard is specified, the burden of proof requires proof by a preponderance of the evidence. CAL. EVID. CODE § 115 (West 1968).

(2) Clear and convincing proof: proof by evidence that is clear, explicit, and unequivocal; that is so clear as to leave no substantial doubt; or that is sufficiently strong to demand the unhesitating assent of every reasonable mind. *See* Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544 (1899); United Professional Planning, Inc. v. Superior Court, 9 Cal. App. 3d 377, 386, 88 Cal. Rptr. 551, 556 (4th Dist. 1970).

(3) Beyond a reasonable doubt: proof by evidence that leaves no reasonable doubt. Reasonable doubt is defined as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

CAL. PENAL CODE § 1096 (West 1972); CALIFORNIA JURY INSTRUCTIONS, CRIMINAL 2.90 (West, 3d ed. 1970) [hereinafter cited as CALJIC].

(4) Raise a reasonable doubt: proof by evidence sufficient to raise a reasonable doubt concerning the existence or nonexistence of a fact or contention. JEFFERSON, *supra* note 42, at § 45.1.

The question whether the evidence adduced by a party who has the burden of proof carries the required weight is for the trier of fact and not a court of review. Estate of Gelonese, 36 Cal. App. 3d 854, 863, 111 Cal. Rptr. 833, 838 (1st Dist. 1974). The standard of proof required to satisfy the burden is set for the edification and guidance of the trial court; its usefulness to a court of review is limited. On appeal, the question is whether there is substantial evidence to support the trial judge's determination. If there is, the determination will be sustained on appeal. Crail v. Blakely, 8 Cal. 3d 744, 750, 505 P.2d 1027, 1032, 106 Cal. Rptr. 187, 192 (1973). In other words, until the contrary is established, the trial judge is presumed to have used the proper standard of proof at trial. Baron v. Baron, 9 Cal. App. 3d 933, 939, 88 Cal. Rptr. 404, 407 (2d Dist. 1970).

[67] CAL. EVID. CODE § 606, Assembly Judiciary Comm. Comment (West 1968).

it is possible for only *BF* to be in dispute, or for *BF* to be established and *PF* disputed, or both *BF* and *PF* to be disputed. If, for example, it can be shown that *Y* has been absent without explanation for seven years, then *Y* is presumed to be dead.[68] *BF* is *Y*'s unexplained seven years absence, and *PF* is that *Y* is dead. *X*'s response to the introduction of evidence of *BF* will determine the effect of the presumption.[69]

(1) *X* may introduce either no evidence, or evidence which the court determines is insufficient to controvert either *BF* or *PF*. If this occurs, the presumption has the same effect as a presumption affecting the burden of producing evidence.[70] If *BF*, *Y*'s seven years unexplained absence, has already been established as a matter of law, then the jury is instructed that *Y* is dead. If *BF* has not been established as a matter of law, the jury is instructed that if it finds *BF* to exist, it must also find *PF*.[71]

(2) *X* may introduce evidence which the court determines is sufficient to put *Y*'s seven years unexplained absence at issue, and either introduce no evidence or insufficient evidence to controvert *Y*'s death. In this situation, the judge will send the matter to the jury with instructions that if it finds that *Y* has been absent without explanation for seven years, it must also find that he is dead.[72] The better practice is to instruct the jury to this effect without using the term "presumption."[73]

(3) *X* may introduce evidence which the court determines is sufficient to sustain a finding that *Y* is not dead. In this situation the jury is instructed that if it finds that *Y* has been absent without explanation for seven years, then it must find that *Y* is dead unless the evidence persuades it by the requisite degree of proof[74] that *Y* is alive.[75] Again, the better practice is to instruct the jury to this effect

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[68] CAL. EVID. CODE § 667 (West 1968).

[69] If the opponent already has the same burden of proof as to the nonexistence of PF as would be assigned by the presumption, then the presumption can have no effect and no instruction should be given regarding it. *See* CAL. EVID. CODE § 606, Assembly Judiciary Comm. Comment (West 1968); JEFFERSON, *supra* note 42, § 46.4, at 814; Morgan, *supra* note 17, 61-62; Morgan, *Further Observations on Presumptions*, 16 SO. CAL. L. REV. 245, 260 (1942). Thus, for example, if X is the plaintiff in an ejectment action claiming an estate as tenant for the life of Y, and the defendant is claiming as the remainderman, then X has the burden of showing that Y is alive. If the defendant is able to establish the seven year unexplained absence of Y, X's burden is unaffected. If the jury is not convinced that it is more probable than not that Y is alive, it must find for the defendant, with or without the presumption. *See* Morgan, *supra* note 17, 69.

[70] *See* text accompanying note 40 *supra*.

[71] CAL. EVID. CODE § 606, Assembly Judiciary Comm. Comment (West 1968).

[72] *Id.*

[73] *See* JEFFERSON, *supra* note 42, § 46.4, at 813.

[74] *See* note 66 *supra*.

[75] CAL. EVID. CODE § 606, Assembly Judiciary Comm. Comment (West 1968).

without using the term "presumption."[76]

IV. PRESUMPTIONS IN CRIMINAL PROCEEDINGS

A. IN GENERAL

In criminal trials, it is often difficult for the prosecution to prove actual participation in criminal activities, except circumstantially from such evidence as defendant's presence when the illegal acts were committed or from possession of contraband.[77] To lessen the prosecution's task of establishing guilt,[78] legislatures often create criminal presumptions which may shift to the defendant[79] the burden of producing certain evidence.[80]

Although akin to rebuttable presumptions, criminal presumptions do not operate as in the civil context. If they did and the defendant failed to produce the requisite proof to rebut the presumption, the jury would be instructed that it must find that the presumed fact has been established.[81] Because it is axiomatic that neither a verdict nor the finding of any element of a crime can be directed against an ac-

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[76] *See* note 73 *supra*.

[77] *Cf.* United States v. Gainey, 380 U.S. 63, 65-66 (1965).

[78] In the federal system, criminal presumptions may serve a secondary purpose of making undesirable activities amenable to federal jurisdiction. Mere possession of narcotics, for example, is not now a federal crime unless it can somehow be linked to a failure to comply with taxing, interstate or foreign commerce statutes. Presumptions are often utilized to supply this link. *See, e.g.*, Turner v. United States, 396 U.S. 398, 401-02 (1970) (knowledge of illegal importation of narcotics and possession of narcotics not in original stamped packages inferred from proof of possession of those narcotics). *See also* WEINSTEIN, *supra* note 53, at 303-9.

[79] There are other devices which, although conceptually distinct, have similar effects and limitations. For example, if a statute provides that the elements of a crime shall be A and B, it may also provide for an exception, C. The burden is then placed on the defendant to plead the existence of C and then to satisfy the burden of producing evidence with regard to C and possibly to satisfy the burden of proof as well. In other cases, the legislature may provide that D is an affirmative defense to the crime, in which event the burden of proof is allocated to the defendant to raise a reasonable doubt about the existence of D (except for the defense of insanity which requires the defendant to prove it by a preponderance of the evidence). *See* United States v. Black, 512 F.2d 864, 867 (9th Cir. 1975) (distribution of a controlled substance by a physician); People v. Montalvo, 4 Cal. 3d 328, 333-34 & n.3, 428 P.2d 205, 208-09 & n.3, 93 Cal. Rptr. 581, 584-85 & n.3 (1971) (age as an element of the offense); People v. Moran, 1 Cal. 3d 755, 760-61, 463 P.2d 763, 765, 83 Cal. Rptr. 411, 413 (1970) (entrapment); People v. Loggins, 23 Cal. App. 3d 597, 604, 100 Cal. Rptr. 528, 532-33 (3d Dist. 1972) (mitigation of homocide); People v. Johnson, 18 Cal. App. 3d 458, 464, 95 Cal. Rptr. 316, 319 (2d Dist. 1971) (witness is an accomplice). *See generally* MCCORMICK (2d ed.), *supra* note 17, § 346. *But see* Mullaney v. Wilbur, 421 U.S. 684 (1974) (state may not shift the burden of persuasion to the defendant as to a material element of the crime charged).

[80] *See* Mullaney v. Wilbur, 421 U.S. 684, 702-03 n.31 (1974); Barnes v. United States, 412 U.S. 837, 846 n.11 (1973).

[81] *See* MCCORMICK (2d ed.), *supra* note 17, § 342, at 804.

cused in a criminal case,[82] such an instruction is impermissible.[83] It follows that no true presumptions can exist in the criminal context.

Although both the California Evidence Code and the federal courts use the term "presumption" in criminal proceedings, the term is both imprecise and misleading in this context. A more accurate description of the relationship between *BF* and *PF* in the criminal setting is the phrase, *standardized criminal inference*, since finding *PF* from $\bar{B}F$ is always permissive, never mandatory. The use of any other label but *inference* tends to cause confusion and may lead to erroneous jury instructions.[84] The term, *standardized criminal inference*, will be used hereafter in this Comment.

B. CALIFORNIA'S TREATMENT OF STANDARDIZED CRIMINAL INFERENCES

In California criminal proceedings, standardized inferences which establish facts essential to guilt operate similarly to presumptions in civil cases, with the following major differences: (1) the basic facts giving rise to the inferences must be proved beyond a reasonable doubt,[85] (2) the standard of proof required to rebut the inferences

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[82] 9 WIGMORE (3d ed.), *supra* note 23, § 2495, at 312.

[83] *See* ALI MODEL PENAL CODE § 1.12(1) P.O.D. (1962); MCCORMICK (2d ed.), *supra* note 17, § 342, at 804.

[84] Although the term "presumption" has traditionally been used in criminal cases, most practitioners realize that their effect is not mandatory. *See* MCCORMICK (2d ed.), *supra* note 17, § 342, at 804. The mere use of the term "presumption" in a criminal case, however, can be a trap for the unwary and an obstacle in the defendant's path to a fair trial. The California Jury Instructions manual for criminal cases, CALJIC, *supra* note 66, graphically illustrates the attendant dangers of the sloppy use of the term "presumption." CALJIC Appendix B, *Instructing on Rebuttable Presumptions in Criminal Cases*, recommends that judges, when instructing juries on the operational effect of presumptions in criminal cases use language taken from the civil sections. In doing so, the drafters have confused the permissible effect of a presumption in a civil case with that of a standardized inference in a criminal case. CALJIC recommends that if there is not evidence sufficient to support a finding of the nonexistence of the presumed fact, the jury is to be instructed as follows: "If [you] find the basic fact beyond a reasonable doubt, [you] *must* assume the existence of the presumed fact." (emphasis added). This is tantamount to directing the jury to find against the defendant on that element of the crime. Whatever the limits may be to the use of presumptions in criminal cases, this CALJIC instruction is clearly beyond them. *Cf.* People v. Katz, 47 Cal. App. 3d 294, 301, 120 Cal. Rptr. 603, 608 (2d Dist. 1975) (instruction telling jury it "should" find PF from undisputed BF was constitutional because not the same as saying it "must" find PF.)

[85] CAL. EVID. CODE § 607 (West 1968) states:

> When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

is merely raising a reasonable doubt,[86] and (3) since a jury cannot be directed to find against an accused on any essential element of a crime, a standardized inference is not mandatory.[87]

As with civil presumptions, a standardized criminal inference may affect either the burden of proof or the burden of producing evidence. During the course of the trial, the prosecution may rely on either type of inference to establish an element of its case. If the prosecution establishes beyond a reasonable doubt the facts giving rise to an inference, then for all practical purposes, the inference shifts a burden to the defendant.[88] The extent of the defendant's burden depends upon the type of inference invoked.

If the inference is one affecting the burden of proof, for example the inference that a driver with a blood alcohol content of 0.10 per cent or greater was under the influence of alcohol at the time of the alleged offense,[89] then the defendant's burden is to raise a reasonable doubt as to the existence of the presumed fact. So long as the prosecution establishes the basic facts, the jury is instructed on the existence of the standardized criminal inference. This is true regardless of the strength of the evidence the defendant introduces to rebut the presumed fact. The judge should be careful to stress, however, that the defendant satisfies his burden upon raising a reasonable doubt as to the existence of the presumed fact,[90] no stronger showing is required.

If the standardized criminal inference relied upon by the prosecution is one affecting the burden of producing evidence, its effect is similar to a presumption affecting the burden of producing evidence in a civil case.[91] In *People v. Hemmer*,[92] for example, the prosecution relied on a standardized criminal inference that permitted the trier of fact to infer intent to commit theft by fraud if leased proper-

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[86] *Id.*

[87] In People v. Katz, 47 Cal. App. 3d 294, 301, 120 Cal. Rptr. 603, 608 (2d Dist. 1975), the court said that a statute which would require an inference of a presumed fact from proof of a basic fact in a criminal case would no longer be a rule of evidence, but of law, creating the crime. *See also* CAL. EVID. CODE §§ 604, 607, Assembly Judiciary Comm. Comments (West 1968); ALI MODEL PENAL CODE § 1.12 (1), P.O.D. (1962); MCCORMICK (2d ed.), *supra* note 17, § 342, at 804; 9 WIGMORE (3d ed.), *supra* note 23, § 2495. *See generally* United States v. Gainey, 380 U.S. 63, 70 (1965).

[88] *See* Mullaney v. Wilbur, 421 U.S. 684, 702-03 n.31 (1974); People v. Katz, 47 Cal. App. 3d 294, 120 Cal. Rptr. 603 (2d Dist. 1975); People v. Schreiber, 45 Cal. App. 3d 917, 119 Cal. Rptr. 812 (3d Dist. 1975); People v. Lachman, 23 Cal. App. 3d 1094, 100 Cal. Rptr. 710 (2d Dist. 1972). *See also* text accompanying notes 160-69, *infra*.

[89] CAL. VEH. CODE § 23126 (West Ann. Supp. 1976). *See also* text accompanying notes 112-13, *infra*.

[90] CAL. EVID. CODE § 607, Assembly Judiciary Comm. Comment (West 1968).

[91] *See* text accompanying notes 33-49 *supra*. *But see* text accompanying notes 85-87 *supra* and text accompanying note 102 *infra*.

[92] 19 Cal. App. 3d 1052, 97 Cal. Rptr. 516 (4th Dist. 1971).

ty is not returned within 20 days after the owner makes a written demand for it.[93] Since the inference implemented no public policy other than to facilitate a determination of the particular action in which it was applied, it affected the burden of producing evidence.[94] The trial court instructed the jury using the standardized criminal inference in spite of evidence introduced at trial that the demand letter was not received, that the failure to return the vehicle was due to the unsafe condition of the tires, and that the lessor had been contacted three times regarding the location of the automobile.[95] The District Court of Appeals reversed holding that the trial judge should have made a preliminary finding whether or not the evidence, *if believed*, would have been sufficient to support a finding of lack of intent to commit theft by fraud.[96] Since the evidence clearly was sufficient to support such a finding, the standardized criminal inference disappeared from the case and it was error to give any instruction regarding it. Any inferences which the jury chose to draw should have been based solely on the evidence before it, not on a standardized inference which stated the law presumed an intent to commit theft by fraud.[97]

With either type of standardized criminal inference, it is improper to use the term "presumption" when instructing the jury.[98] Furthermore, the judge in a criminal trial cannot direct the jury to return a verdict against the defendant on any issue essential to his guilt.[99] The judge can only instruct the jury according to the applicable legal principles and tell it that unless from all of the evidence it has a reasonable doubt of the existence of *PF*, it "should"[100] find that

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[93] CAL. PENAL. CODE § 484(b) (West 1972). The prosecution also relied on CAL. VEH. CODE § 10855 (West Ann. 1971) (presumption of intent to embezzle leased vehicle from failure to return it within five days after the expiration of the lease).

[94] 19 Cal. App. 3d at 1060, 97 Cal. Rptr. at 521; CAL. PENAL CODE § 484(c) (West 1972).

[95] 19 Cal. App. 3d at 1061, 97 Cal. Rptr. at 521.

[96] *Id.*, 97 Cal. Rptr. at 522.

[97] *Id.*, 97 Cal. Rptr. at 521-22.

[98] *See generally* United States v. Gainey, 380 U.S. 63, 71 n.7 (1965); State v. Sykes, 2 Wash. App. 929, 471 P.2d 138, 140-41 (1970).

[99] *See* text accompanying notes 81-83 *supra*.

[100] In People v. Katz, 47 Cal. App. 3d 294, 301, 120 Cal. Rptr. 603, 608 (2d Dist. 1975), the court considered whether an instruction telling the jury that it "should" find knowledge based on certain circumstances was the same as telling it that it "must." The court held that the trial judge was simply advising the jury on the applicable rule of law and that the jury had the power to disregard the instructions and acquit the defendant. Therefore, the statute, which apparently called for a mandatory finding, was not unconstitutionally applied. In view of United States v. Gainey, 380 U.S. 63, 70-71 (1965), this decisional limitation would seem to be essential. *See* text accompanying notes 178-82 *infra*.

PF exists.[101] Nonetheless, it is clear that the jury has the power to disregard the judge's instruction and find the defendant guilty of a lesser crime than that shown by the evidence or acquit despite the facts established by the undisputed evidence.[102]

V. THE CONSTITUTIONALITY OF STANDARDIZED CRIMINAL INFERENCES[103]

The notion that a defendant is innocent until proven guilty runs to the very heart of the Anglo-American judicial system.[104] The prosecution must prove beyond a reasonable doubt every element of the crime before the defendant may be stigmatized by a criminal conviction or lose his liberty.[105] A standardized criminal inference permits the trier of fact to conclude that the prosecution has proved an element of the crime, *PF*, beyond a reasonable doubt if the prosecution proves some other fact, *BF*, beyond a reasonable doubt.[106] This pro-

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[101] *See, e.g.*, CAL. JURY INSTRUCTIONS MISDEMEANOR 16.834 (West 1971) (set out in text accompanying note 179 *infra*).

[102] *See* People v. Katz, 47 Cal. App. 3d 294, 301, 120 Cal. Rptr. 603, 608 (2d Dist. 1975); CAL. EVID. CODE §§ 604, 607, Assembly Judiciary Comm. Comments (West 1968).

[103] The constitutional difficulties which append to the use of presumptions in criminal cases are usually not a problem in civil proceedings. Unlike standardized criminal inferences, due process in civil cases probably does not require that there be a rational connection between the basic and presumed facts in a rebuttable presumption. *See* Speiser v. Randall, 357 U.S. 513, 523 (1958); MCCORMICK (2d ed.), *supra* note 17, § 344, at 818-19; WIGMORE (3d ed.), *supra* note 23, § 2486, at 275; Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 541 (1955); Note, *The California Evidence Code: Presumptions*, 53 CALIF. L. REV. 1439, 1467-71 (1965). *But see* Western & Atlantic R. Co. v. Henderson, 279 U.S. 639, 644 (1929) (rational connection test held applicable to a civil presumption). This, is so because in civil cases the courts or the legislature have the prerogative of placing the burden of proof on either party, provided only that the allocation does not offend some fundamental principle of justice. *See* Lavine v. Milne, 96 S.Ct. 1010, 1016 (1976); Speiser v. Randall, 357 U.S. at 523; MCCORMICK (2d ed.), *supra* note 17, § 344, at 818. Thus, the normal allocation of the burden of proof can be varied to implement a desired public policy. CAL. EVID. CODE § 604 & Assembly Judiciary Comm. Comment (West 1968). This is not to suggest that there are no limits on rebuttable civil presumptions. Presumptions which interfere with an "interest of transcending value" may still be found to be unconstitutional. *See* Speiser v. Randall, 357 U.S. at 523-26 (presumption interfering with freedom of speech); MCCORMICK (2d ed.), *supra* note 17, § 344, at 818.

[104] *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453-56 (1895).

[105] *See In re* Winship, 397 U.S. 358, 364 (1970); Coffin v. United States, 156 U.S. 432, 453-55 (1895).

[106] The beyond-a-reasonable-doubt standard of proof applies only to the issue of guilt itself. Other issues which may arise in the course of the proceedings are governed by a variety of lesser standards of proof:

(1) Slight or prima facie showing: proof of corpus delicti, People v. Amaya, 40 Cal. 2d 70, 76, 251 P.2d 324, 327 (1952).

(2) Reasonable probability of guilt: holding the defendant to answer after preliminary examination, People v. Nagle, 25 Cal. 2d 216, 222, 153 P.2d 344,

cedure raises two questions. First, does the proof of *BF* beyond a reasonable doubt insure that *PF* is true beyond a reasonable doubt? The answer must be no unless the relationship which connects *BF* and *PF*, the inference, is also true beyond a reasonable doubt. If, for example, a statute makes possession of a narcotic with knowledge of its illegal importation a crime, and if the prosecution proves beyond a reasonable doubt only that the defendant possessed such a narcotic, this evidence alone would be insufficient for a jury to infer beyond a reasonable doubt that the defendant knew that the drugs were illegally imported. In order for proof of possession to be the equivalent of proof of knowledge, the prosecution must also show that there are no domestic sources of the narcotic and that a person likely to possess such a narcotic would also be likely to know of its illegal importation.[107] This raises the second question: whether a standardized criminal inference in which the inference or connecting relationship is not true beyond a reasonable doubt is compatible with a due process standard which requires every element of the offense to be proved beyond a reasonable doubt.[108]

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347 (1944); CAL. PENAL CODE § 872 (West 1972).

(3) Preponderance of the evidence: territorial jurisdiction of the crime, People v. Cavanaugh, 44 Cal. 2d 252, 262, 282 P.2d 53, 59 (1955); venue, People v. Megladdery, 40 Cal. App. 2d 748, 764, 106 P.2d 84, 93 (1st Dist. 1940); defendant's absence from the state as tolling the statute of limitations, People v. McGill, 10 Cal. App. 2d 155, 159-60, 51 P.2d 433, 435 (2d Dist. 1935); proof of insanity by defendant, People v. Daugherty, 40 Cal. 2d 876, 901, 256 P.2d 911, 924 (1953) and CAL. EVID. CODE § 522 (West 1968); defendant's proof of entrapment, People v. Valverde, 246 Cal. App. 2d 318, 325, 54 Cal. Rptr. 528, 532-33 (5th Dist. 1966); proof of other crimes by defendant during the guilt phase of the trial, People v. McClellan, 71 Cal. 2d 793, 804, 457 P.2d 871, 878, 80 Cal. Rptr. 31, 38 (1969); *cf.* proof of guilt of crime when at issue in a civil case, Estate of Nelson, 191 Cal. 280, 286, 216 P. 368, 370 (1923); proof of voluntariness of a confession, People v. Hutchings, 31 Cal. App. 3d 16, 20, 106 Cal. Rptr. 905, 907 (1st Dist. 1973). *But see* People v. Stroud, 273 Cal. App. 2d 670, 678, 78 Cal. Rptr. 270, 275 (5th Dist. 1969).

(4) Preponderance of substantial evidence: proof of other crimes committed by defendant, to show identity through a common modus operandi, People v. Durham, 70 Cal. 2d 171, 187 n.15, 449 P.2d 198, 208-09 n.15, 74 Cal. Rptr. 262, 272-73 n.15 (1969).

(5) Clear and convincing evidence: defendant's burden to support a motion to withdraw a guilty plea, People v. Cruz, 12 Cal. 3d 562, 566, 526 P.2d 250, 252, 116 Cal. Rptr. 242, 244 (1974).

[107] *See* text accompanying notes 122-28 *infra*.

[108] Numerous critics have argued that standardized criminal inferences are incompatible with due process and should not be permitted. *See, e.g.*, Barnes v. United States, 412 U.S. 837, 852 (1973) (Brennan, J., dissenting); Turner v. United States, 396 U.S. 398, 425 (1969) (Black, J., dissenting); United States v. Gainey, 380 U.S. 63, 75 (1965) (Black, J., dissenting); Ashford and Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L. J. 165 (1969); Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, DUKE L. J. 919 (1970); Fuller and Urich, *An Analysis of the Constitutionality of Statutory Presumptions that Lessen the Burden of the Prosecution*, 25 U. MIAMI L. REV. 420 (1971); Murray and Aitken, *The Constitutionality of California's Under-the-Influence-of-Alcohol Presump-*

A. THE STANDARD OF PROOF

1. CURRENT STATE OF THE LAW

If a statute provides that the elements of a crime are *X*, *Y* and *Z*, it may also provide that under certain circumstances one of the elements may be inferred from the proof of a basic fact, which may or may not be another element of the crime. In California, for example, the legislature has declared "drunk driving" to be a crime.[109] The elements of the offense are: (1) driving a motor vehicle, (2) upon a public highway, (3) while under the influence of alcohol.[110] As in all criminal prosecutions, the state has the burden of proving each element of the offense beyond a reasonable doubt.[111] To make it easier for the prosecution to meet its burden, the legislature has created a standardized criminal inference that if by chemical analysis the level of alcohol in the defendant's blood is 0.10 per cent or more by weight, it shall be "presumed" that he was under the influence of alcohol at the time of the alleged offense.[112] In this situation, *BF* is a blood alcohol content of 0.10 per cent or greater. *PF* is that the defendant was under the influence of alcohol at the time of the alleged offense.

This inference has the effect of removing one troublesome and time consuming element of proof from the prosecution's case: the relationship between blood alcohol content and being under the influence. Medical evidence has established that there is a rational relationship between a 0.10 blood alcohol level, *BF*, and being under the influence, *PF*.[113] But is the relationship between the two facts sufficiently strong to accord due process?

The modern development[114] of the United States Supreme Court's position on the issue of the required relationship between *BF* and *PF*

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tion, 45 SO. CAL. L. REV. 955 (1972); Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 157 (1970); Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970).

[109] CAL. VEH. CODE § 23102(a) (West Ann. Supp. 1976).

[110] *See* People v. Moore, 20 Cal. App. 3d 444, 451, 97 Cal. Rptr. 601, 604 (2d Dist. 1971).

[111] *See In re* Winship, 397 U.S. 358, 364 (1970); People v. Lachman, 23 Cal. App. 3d 1094, 1097, 100 Cal. Rptr. 710, 712 (2d Dist. 1972).

[112] CAL. VEH. CODE § 23126 (West Ann. Supp. 1976).

[113] *See* People v. Schrieber, 45 Cal. App. 3d 917, 920, 119 Cal. Rptr. 812, 813 (3d Dist. 1975); R. DONIGAN, CHEMICAL TESTS AND THE LAW 10-19, 291-94 (2d ed. 1966).

[114] The cornerstone upon which the United States Supreme Court constructed the tests for the constitutionality of standardized criminal inferences was Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35 (1910), a civil wrongful death action. In that case, the Court held:

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of

in a criminal trial began in 1943 with *Tot v. United States.*[115] In *Tot*, the defendant challenged a statute which presumed that a firearm in the possession of a person previously convicted of a crime of violence had been shipped through interstate commerce.[116] In holding the statute invalid, the Court said:

> [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 one from proof of the other is arbitrary because of the lack of connection between the two in common experience.[117]

The Court established the "rational connection" test[118] as the standard by which inferences in criminal cases would be tested.[119] This test persisted[120] until 1969, when the Court decided *Leary v.*

> equal protection of the law it is only essential that there shall be some *rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *Id.* at 43 (emphasis added).

This rule was extended to standardized criminal inferences in Yee Ham v. United States, 268 U.S. 178 (1925). In that case the Court held, relying exclusively on *Turnipseed*, that an inference of knowledge of unlawful importation of smoking opium from possession was logical and reasonable and not violative of due process or the right against self-incrimination. *Id.* at 184-85.

[115] 319 U.S. 463 (1943).

[116] Federal Firearms Act, ch. 850, § 2, 52 Stat. 1250.

[117] 319 U.S. at 467-68 (emphasis added).

[118] In People v. Stevenson, 58 Cal. 2d 794, 797, 376 P.2d 297, 298-99, 26 Cal. Rptr. 297, 298-99 (1962), the California Supreme Court explained the "rational connection" requirement as meaning that: "according to the teachings of experience, the proved fact must at least be a 'warning signal' of the presumed fact and have a 'sinister significance.'"

[119] The government argued, in addition to the rational connection test, that the presumption's validity should be tested by the comparative convenience of producing evidence of the ultimate fact. *See* Morrison v. California, 291 U.S. 82 (1934). The Court held that these were not independent tests, but that the second was merely a corollary of the first. The argument from convenience was admissible only where the inference was a permissible one, where the defendant had more convenient access to proof, and where there was no unfairness in requiring him to come forward with proof to rebut the presumption. If the rule were otherwise, the Court said, the legislature might decree that the finding of an indictment should create a presumption of the existence of all facts essential to guilt. 319 U.S. at 467-70.

The government also sought to sustain the statute by arguing that since Congress could have created the crime without including the presumed fact as one of the elements, it had the lesser power to create the presumption in question. *See* Ferry v. Ramsey, 277 U.S. 88 (1928). This argument was almost summarily rejected. The Court said: "Congress, for whatever reason, did not seek to pronounce general prohibition of possession . . . of firearms in order to protect interstate commerce." 319 U.S. at 472.

[120] The rational connection test was reaffirmed in United States v. Gainey, 380 U.S. 63 (1965) (presumption that defendant was carrying on the business of a distiller without giving the required bond from presence at the site of an illegal still held to satisfy the rational connection test), and in United States v. Romano, 382 U.S. 136 (1965) (presumption that defendant was in possession,

United States.[121] In *Leary*, the defendant challenged a statutory inference that possession of marijuana, unless satisfactorily explained, was sufficient to prove knowledge that the marijuana had been illegally imported.[122] In testing the validity of the statute, the Court required a stronger relationship between *BF* and *PF* than it had in *Tot.* The Court said that a statutory criminal inference is:

> . . . '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.[123]

To determine whether the statute in *Leary* was constitutional under this standard, the Court first examined the statute's legislative history.[124] When it was found to be insufficient to support the inference, the Court went outside the record and conducted an exhaustive survey of the available, pertinent data.[125] It found that although "most domestically consumed marijuana is . . . of foreign origin,"[126] a substantial quantity of marijuana is domestically produced. The Court said that to sustain the statute it must find on the basis of the available evidence that a majority of marijuana possessors were either aware of the high rate of importation or were aware that their marijuana was grown abroad.[127] Although it appears from the Court's discussion of the data that there was a "rational connection" between possession and knowledge, the Court refused to uphold the statute. The evidence available was simply insufficient to conclude that it was more likely than not that "a majority of possessors 'knew' the source of their marijuana."[128]

In *Leary*, the Court found the statutory inference unconstitutional under the "more-likely-than-not" standard. The Court expressly reserved the question of "whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use."[129]

The Court has heard two standardized criminal inference cases since *Leary*, but neither required that the Court decide whether due process required standardized criminal inferences to meet the reason-

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custody, and control of an illegal still held too tenuous to support reasonable inference of guilt).

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

[122] Narcotics Control Act of 1956, ch. 629, title I, § 101, 70 Stat. 567.

[123] 395 U.S. at 36 (emphasis added).

[124] *Id.* at 39-40.

[125] *Id.* at 40-43 & nn. 76-90.

[126] *Id.* at 41.

[127] *Id.* at 46-47.

[128] *Id.* at 53.

[129] *Id.* at 36 n.64.

able doubt standard.[130] In *Turner v. United States*,[131] the Court upheld a statute which authorized an inference of knowledge of illegal importation from the proved fact of possession of heroin, but struck it down when applied to cocaine.[132] The Court's analysis was similar to that used in *Leary*. After the legislative history and the available data were reviewed, the Court concluded that the inference was a proper one as applied to heroin. The overwhelming evidence was that if heroin was produced at all in this country, it was only produced in minute quantities. Therefore, "to possess heroin is to possess imported heroin."[133] The Court then said:

> Whether judged by the more-likely-than-not standard applied in *Leary* . . . or by the more exacting reasonable-doubt standard normally applicable in criminal cases, [the inference] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.[134]

With respect to cocaine, however, the Court found that substantial quantities of the drug were lawfully produced in this country. Based on the same reasoning process it used in *Leary*, the Court found that the inference of knowledge of illegal importation from possession could not satisfy the more-likely-than-not standard.[135] It was therefore invalid.[136]

In *Barnes v. United States*,[137] the most recent decision on the constitutionality of standardized criminal inferences,[138] the Court again was not required to decide whether the reasonable doubt standard was constitutionally mandated. *Barnes* involved convictions for the

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[130] *But see* Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, DUKE L.J. 919, 923 n.24, 925 (1970) (arguing that the Supreme Court has adopted, at least for the federal courts, the reasonable doubt standard for standardized criminal inferences).

[131] 396 U.S. 398 (1970) (7-2 decision).

[132] Narcotic Drugs Import and Export Act, acts of Feb. 9, 1909, ch. 100, § 2(c), (f), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570. Turner was also convicted of possessing heroin and cocaine not from the original stamped package, Act of Aug. 16, 1954, ch. 736, 68A Stat. 550. The Court also upheld this inference with respect to heroin, but struck it down when applied to cocaine. 396 U.S. at 419-24.

[133] 396 U.S. at 416.

[134] *Id.*

[135] *Id.* at 419.

[136] *Id. See also* Erwing v. United States, 323 F.2d 674, 682 (9th Cir. 1963).

[137] 412 U.S. 837 (1973) (6 to 3 decision).

[138] Unlike *Tot*, *Gainey*, *Romano*, *Leary*, and *Turner*, the presumption challenged in *Barnes* was the common law inference of guilty knowledge drawn from unexplained possession of stolen goods. The inference was supported by impressive historical authority. The Court reserved judgment on the question of whether a judge formulated inference with less precedent might properly be given to the jury where its effect was to shift the burden of producing evidence to the defendant. 412 U.S. at 846 n.11.

possession of stolen United States Treasury checks. One element of the crime was that the possessor of the checks know that they were stolen.[139] The district court instructed the jury that possession of recently stolen property, unless satisfactorily explained, was a circumstance from which it could reasonably infer that the person in possession knew that property had been stolen.[140] Mr. Justice Powell, writing for the majority, reviewed the modern standardized criminal inference cases. After commenting on the standards that had been applied, he said:

> What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.[141]

Since the Court found that the inference in *Barnes* satisfied the more stringent reasonable doubt standard, it did not consider whether lesser standards would have been constitutional.[142]

Although *Turner* and *Barnes* still leave the appropriate standard for judging the constitutionality of standardized criminal inferences in doubt,[143] they at least appear to settle one issue. Criminal inferences which satisfy the more restrictive reasonable doubt standard are not violative of due process,[144] and will be permitted by the Court.[145] The Court has not yet had to decide whether a criminal inference which meets the more-likely-than-not standard, but not the reasonable doubt standard, is constitutional.[146] Until it does so, the status of all criminal inferences which do not satisfy the stricter stan-

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[139] 18 U.S.C. § 1708 (1970).

[140] 412 U.S. at 839-40.

[141] *Id.* at 843.

[142] *Id.* at 846.

[143] *But see* note 130 *supra.*

[144] *See* text accompanying note 108 *supra.*

[145] *See, e.g.*, Barnes v. United States, 412 U.S. 837, 845-46 (1973); Turner v. United States, 396 U.S. 398, 410-16 (1969).

[146] In 1972, an unsuccessful attempt was made to establish the reasonable doubt standard as the minimum permissible for the federal courts. In the United States Supreme Court's original order promulgating the Federal Rules of Evidence, there was included rule 303, presumptions in criminal cases. This rule would have formally adopted the reasonable doubt standard for all inferences operating on a question of guilt in federal criminal cases. Rule 303, however, was not included in the final statute. It was deleted by Congress because the subject of presumptions in criminal cases was addressed in bills pending before the committee to revise the federal criminal code. H. Rpt. No. 93-650 to accompany H.R. 5463, P.L. 93-595. Since rule 303 was not adopted, its value as persuasive authority is minimal. *See generally* Mississippi Public Corporation v. Murphee, 326 U.S. 438, 444 (1946); Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 870 (1963) (opposing submission of the Rules of Civil Procedure to the Congress).

dard is in question.[147]

In California, the courts require only that the presumed fact be more likely than not to flow from the preliminary fact proved.[148] Since California's standardized criminal inferences have not been tested by the higher reasonable doubt standard, they thus fall into the category of inferences whose constitutionality is open to question.[149]

2. *THE REASONABLE DOUBT STANDARD*

Although the more-likely-than-not standard as applied to standardized criminal inferences is still arguably permissible under the Court's decisions, the due process requirements of the fifth and fourteenth amendments seem to mandate the adoption of the reasonable doubt standard. As the due process clause is now interpreted, a defendant cannot be convicted of a criminal offense unless all of the elements of the crime have been proved beyond a reasonable doubt.[150] To allow an element of the crime essential to guilt to be inferred from a determination that the presumed element is more likely than not to follow from the establishment of another element is to allow conviction without due process.

The requirement that *BF* be established beyond a reasonable doubt[151] does not fully protect the accused, since without the aid of the inference, *BF* alone would be insufficient to establish the necessary element of the crime. *BF* must be connected to *PF*. For example, proof that a defendant had a blood alcohol content of 0.10 per cent, standing alone, is insufficient to prove that the accused was under the influence of alcohol at the time of the alleged offense. Without the operation of the inference, the prosecution would have to prove beyond a reasonable doubt that a person with a 0.10 per cent blood alcohol level is under the influence. If, for example, the prosecution could only show that the defendant had a blood alcohol content of 0.10 per cent and that 51 per cent of the people with that blood

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[147] Numerous jurisdictions have established the reasonable doubt standard as the constitutional minimum for standardized criminal inferences. *See, e.g.*, United States v. Johnson, 433 F.2d 1160, 1168 (D.C. Cir. 1970); State v. Odom, 83 Wash. 2d 541, 520 P.2d 152, 156 (1974). *But see* People v. Kirkpatrick, 32 N.Y. 2d 17, 25, 343 N.Y.S. 70, 76, 295 N.E. 2d 753, 757 (1973).

[148] *See, e.g.*, People v. Stevenson, 58 Cal. 2d 794, 797, 376 P.2d 297, 298, 26 Cal. Rptr. 297, 298 (1962) (rational connection standard); People v. Schrieber, 45 Cal. App. 3d 917, 920, 119 Cal. Rptr. 812, 813 (3d Dist. 1975) (rational connection standard); People v. Lachman, 23 Cal. App. 3d 1094, 1097, 100 Cal. Rptr 710, 712 (2d Dist. 1972) (more-likely-than-not standard); People v. Hemmer, 19 Cal. App. 3d 1052, 1059, 97 Cal. Rptr. 516, 520 (4th Dist. 1971) (more-likely-than-not standard).

[149] California's standardized criminal inferences may in fact satisfy the reasonable doubt standard. Until they are tested by that standard, however, their constitutionality must be regarded as suspect.

[150] *See* text accompanying notes 104-05 *supra*.

[151] CAL. EVID. CODE § 607 (West 1968).

alcohol content would be under the influence of alcohol, the judge could not properly give the case to the jury. The prosecution would have failed as a matter of law to establish its case and a verdict would be directed for the defendant.[152]

For the drunk driving defendant to be accorded due process, it must be true beyond a reasonable doubt that a driver with a blood alcohol content of 0.10 per cent is under the influence of alcohol. This burden should not be lessened simply because a standardized inference is operative. Although a standardized inference may act in lieu of proof by the prosecution, it should not thereby lessen the defendant's right to due process. Only if a court determines that a rational juror could find that the relationship between *BF* and *PF* is true beyond a reasonable doubt is due process assured in a criminal case.

B. THE VALIDITY OF STANDARDIZED CRIMINAL INFERENCES

It has been suggested that standardized inferences ought not to be permitted in criminal cases.[153] Mr. Justice Black condemned standardized criminal inferences for unconstitutionally impairing the accused's right to trial by jury,[154] his right to remain silent,[155] his right to procedural due process,[156] and his right to confront the witnesses against him.[157]

These arguments are unconvincing. All criminal convictions are, to some extent, based on inferences. A jury verdict is nothing more than an inference of defendant's guilt or innocence from the evidence presented at trial.[158] The process does not require 100 per cent certainty of guilt. So long as the trier of fact can infer the defendant's guilt from the evidence beyond a reasonable doubt, due process is satisfied.[159] Likewise, the use of a standardized criminal inference to establish *PF* is not a deprivation of due process so long as *BF* has been proven beyond a reasonable doubt and the strength of the connecting factor is sufficient to satisfy the reasonable doubt standard.

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[152] *See generally* Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1153 n.10 (1960).

[153] *See* note 108 *supra*.

[154] United States v. Gainey, 380 U.S. 63, 81 (1965) (Black, J., dissenting).

[155] *Id.* at 87-88.

[156] United States v. Turner, 396 U.S. 398, 425 (1970) (Black, J., dissenting).

[157] *Id.* at 433.

[158] *See generally* JEFFERSON, *supra* note 42, § 46.1, at 796.

[159] *See* Norwitt v. United States, 195 F.2d 127, 134 (9th Cir. 1952), *cert. den.* 344 U.S. 817 (1952); CAL. PENAL CODE § 1096 (West 1972).

A standardized criminal inference is merely an expression of common sense or a substitute for a body of evidence which the legislatures or the courts have decided need not be presented at every trial. Although the use of standardized criminal inferences lessens the burden on the prosecution in that it does not have to reestablish the strength of the connecting factor in every case, recognizing the validity of a standardized criminal inference does not shift any additional burden to the defendant.[160] Whether *PF* is proved by a standardized criminal inference or by direct evidence, the compulsion on the accused to present evidence on his own behalf is the same: if he is to avoid conviction he must come forward with evidence. The effect of the inference is no more compelling than the evidence for which it substitutes.[161] Thus, it is not the operation of the inference, but the strength of the connecting factor that determines if due process has been satisfied.

Whether the strength of the connecting factor between *BF* and *PF* is sufficient to satisfy due process is determined by the courts. In making this determination, the courts must decide either from the legislative history and other available data,[162] or from common sense and experience[163] that as a matter of law a reasonable juror would find *PF* from proof of *BF* with the degree of certainty required by due process. If as a matter of law the reasonable juror would find *PF* to flow from *BF* beyond a reasonable doubt, there is no sensible reason why the prosecution should have to reestablish the relationship in every case. Often a standardized criminal inference is based on exhaustive legislative studies, hearings, and reports. In these situations, it would be impractical to put all of the data on which the legislature relied in creating the inference before every jury in every case.[164]

Moreover, the defendant would not likely benefit from such a re-

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[160] Some commentators argue that the defendant has in fact no burden in a criminal trial and therefore any presumption which places one on him is unconstitutional. *See, e.g.*, Murry and Aitken, *The Constitutionality of California's Under-the-Influence-of-Alcohol Presumption*, 45 SO. CAL. L. REV. 955, 987 (1972). While it is true that there cannot be a true shifting of the burden of proof or the burden of producing evidence in a criminal trial, *see* text accompanying notes 80-82 *supra*, it is unrealistic to say that the defendant has no burden. As a practical matter, the prosecution may shift the burden to him by presenting evidence which the jury is likely to find compelling. In this situation, the defendant has the alternatives of presenting enough of his own evidence to raise a reasonable doubt, or to suffer conviction.

[161] *See generally* Barnes v. United States, 412 U.S. 837, 846-47 (1973). As the majority said in *Barnes*, "The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination." *Id. at* 847.

[162] *See, e.g.*, Turner v. United States, 396 U.S. 398, 410-15 & nn. 10-27 (1969); Leary v. United States, 395 U.S. 6, 38-43 (1968).

[163] *See, e.g.*, Barnes v. United States, 412 U.S. 837, 846 n.11 (1973); United States v. Gainey, 380 U.S. 63, 71 (1965).

[164] *See* note 162 *supra*.

quirement. In *Turner v. United States*,[165] for example, the jury was instructed that it "could infer" from the defendant's unexplained possession of heroin that he knew the drugs he possessed had been unlawfully imported.[166] The jury was further instructed that it was the sole judge of the facts and inferences to be drawn therefrom. It was told that all of the elements of the crime must be proved beyond a reasonable doubt and that the inference authorized by the statute did not require the defendant to produce any evidence. To convict, the jury was informed, it "'must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant.'"[167]

The practical effect of this instruction was of course that the burden of proof on the issue of knowledge shifted to the defendant.[168] Assuming all other elements were proved, he had to produce enough evidence to raise a reasonable doubt about the source of his heroin if he was to avoid conviction. But he was arguably in no worse a position than if the prosecution were required to put before the jury the mass of evidence on which the legislature relied, assuming that were possible. He may in fact have been better off. He did not have to refute the voluminous data which the United States Supreme Court found overwhelmingly supported the inference.[169] Instead, he had to produce only enough evidence to raise a reasonable doubt in the minds of the jurors based on the vague and permissive instructions quoted above. Thus, when a statutory criminal inference satisfies the reasonable doubt standard of proof, the prosecution should not be precluded from using it.

Furthermore, the alternatives to standardized criminal inferences may be even less desirable. The usual reason the legislatures or the courts create criminal inferences is to make it easier for the prosecution to prove some of the more vexatious elements of crimes.[170] Common examples are knowledge,[171] intent,[172] and intoxication.[173] Such elements would frequently be impossible to prove without the operation of a standardized criminal inference. In these situations,

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[165] 396 U.S. 398 (1969).

[166] *Id.* at 402.

[167] *Id.* at 406-07.

[168] *See* Barnes v. United States, 412 U.S. 837, 846 n.11 (1973); Erwing v. United States, 323 F.2d 674, 679 (9th Cir. 1963).

[169] *See* text accompanying note 133 *supra*.

[170] *See* note 77 and accompanying text *supra*.

[171] *See, e.g.*, Barnes v. United States, 412 U.S. 837 (1973) (knowledge from possession of recently stolen goods); CAL. PENAL CODE § 496(2) (West Supp. 1976) (knowledge that property is stolen from failure of secondhand dealer to make reasonable inquiry).

[172] *See, e.g.*, WASH. REV. CODE ANN. § 9A.52.040 (1976) (intent to commit a crime inferred from unlawful breaking into a building).

[173] *See, e.g.*, CAL. VEH. CODE § 23126 (West Ann. Supp. 1976).

the standardized criminal inference may act as a halfway house which prevents the elimination of the element as a part of the crime.[174]

The legislature, for example, could make it a crime to drive a vehicle upon a public highway with a blood alcohol content of 0.10 per cent or higher.[175] Under such a criminal statute, being under the influence would be eliminated as an element of the crime. But would the defendant benefit? When being under the influence was an element with the inference used to establish the relationship between blood alcohol content and being under the influence, the defendant at least had the opportunity to rebut *PF* by his own independent evidence.[176] But if *BF* is made an element of the crime and *PF* eliminated, proof that he was not under the influence of alcohol at the time of the offense would be immaterial.

C. INSTRUCTING THE JURY ON STANDARDIZED CRIMINAL INFERENCES

Apart from the issue of what standard of proof should be applicable to the relationship between *BF* and *PF* in a standardized criminal inference, is the problem of properly instructing the jury regarding the inference. To be free of error, the instruction must accurately reflect the procedural effect of the inference.

In a federal criminal proceeding, the procedural effect of a standardized inference is that it permits, but does not require, *PF* to be found from proof of *BF*. When the trier of fact is a jury, the judge, in his instructions, stresses the permissiveness of the inference. The jury is told that it may regard *BF* as sufficient evidence of *PF*, but is never required to. The judge further instructs the jury that it should determine whether the evidence in the case warrants any inference which the law permits to be drawn from proof of *BF*.[177]

In California, the judge's instructions put much less emphasis on the permissiveness of the standardized criminal inference than is true in the federal instructions. The jury is not told that it "may"

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[174] It is possible that the elimination of standardized criminal inferences would result in the redefinition of many crimes and an increase in the number of strict liability offenses. For a general discussion of the concept of strict liability in criminal offenes, *see* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 31 (1972); Wasserstrom, *Strict Liability in Criminal Law*, 12 STAN. L. REV. 731 (1960).

[175] *See generally* United States v. Romano, 382 U.S. 136, 144 (1965); Tot v. United States, 319 U.S. 463, 472 (1943). *See also* note 174 *supra*.

[176] *See* People v. Schrieber, 45 Cal. App. 3d 917, 922, 119 Cal. Rptr. 812, 815 (3d Dist. 1975).

[177] *See, e.g.*, Barnes v. United States, 412 U.S. 837, 840 n.3 (1973); Gainey v. United States, 380 U.S. 63, 69-70 (1965).

find *PF* from proof of *BF* (an inference), nor that it "must" so find (a presumption), but that it "should" so find.[178] The "presumption of intoxication" in drunk driving cases is illustrative. The jury is instructed:

> If the evidence establishes beyond a reasonable doubt that . . . [the defendant's blood alcohol content was 0.10 per cent or more], you *should* find that the defendant was under the influence of intoxicating liquor at the time of the alleged offense, unless from all the evidence you have a reasonable doubt that he was in fact under the influence of intoxicating liquor at the time of the alleged offense.[179]

Thus, in California, the practical effect of a standardized criminal inference falls somewhere between that of a pure presumption and that of a pure inference. Unfortunately, the average juror will probably be unaware of these fine distinctions. The trial judge instructs the jury that if it finds *BF* beyond a reasonable doubt, it "should" find *PF*, unless it is persuaded by the evidence that there is a reasonable doubt of the existence of *PF*. If the state proves *BF* and nothing more, there will be no evidence of the nonexistence of *PF* unless the defendant chooses to introduce some. Under these circumstances, telling the jury that it "should" find *PF* is very close to telling it that it "must." It is probably a very unusual jury which, after being instructed that it "should" find one way, will have the temerity to find the other.[180]

The Code justifies this instruction by saying that the judge is merely advising the jury of what its duty "should" be. The Assembly Committee Comment to Evidence Code section 604 states:

> [T]he jury should be instructed on the rules of law applicable, including those rules of law called presumptions. The fact that the jury may choose to disregard the applicable rules of law should not affect the nature of the instructions given.[181]

In other words, the jury has the power to acquit in spite of the judge's instructions.[182] Since this is the law, the jury should be clearly and unequivocally instructed to that effect. The permissiveness of the inference should be stressed. In order to accord with due process, the jury should be told that it "may" find *PF* from *BF*, not that it "should," and then only if the strength of the relationship between *BF* and *PF* satisfies the reasonable doubt standard.

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[178] *See, e.g,* People v. Katz, 47 Cal. App. 3d 294, 301, 120 Cal. Rptr. 603, 608 (2d Dist. 1975); CAL. JURY INSTRUCTIONS MISDEMEANOR 16.834 (West 1971).

[179] CAL. JURY INSTRUCTIONS MISDEMEANOR 16.834 (West 1971).

[180] *See generally* Kadish and Kadish, *On Justified Rule Departures by Officials,* 59 CALIF. L. REV. 905 (1971); Scheflin, *Jury Nullifications: The Right to Say No,* 45 SO. CAL. L. REV. 168 (1972).

[181] *See also* People v. Katz, 47 Cal. App. 3d 294, 301, 120 Cal. Rptr. 603, 608 (2d Dist. 1975).

[182] *Id.*

VI. CONCLUSION

The California Evidence Code's treatment of presumptions is unquestionably superior to that which it replaced. It has proven to be a rational and highly workable system. Thus far, the appellate court decisions do not evidence the difficulties some commentators predicted from functioning under a bifurcated system of rebuttable presumptions.[183] With regard to standardized criminal inferences, however, California's system is confusing and constitutionally suspect. In this crucial area, it is suggested that California require that the evidence necessary to invoke the inference be sufficient for a rational juror to find the inferred fact beyond a reasonable doubt, and that the jury instructions be changed to reflect the permissiveness of the inference.

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[183] *See, e.g.*, Note, *The California Evidence Code: Presumptions*, 53 CALIF. L. REV. 1439, 1449-50 (1965).