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## §3.13 “Presumptions” in Criminal Cases

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### §3.13 “Presumptions” in Criminal Cases

To help the prosecutor carry the heavy burden imposed on the state in criminal cases, courts and legislatures have created what are often called “presumptions,” but which, because of constitutional constraints, can only operate as inferences. Consider, for example, the critical element of mens rea (criminal intent). Often it is hard to prove because there is no direct evidence, and yet intent may be strongly suggested by what the defendant apparently did—shooting someone at close range is likely to suggest intent to kill. Hence many jurisdictions have recognized a “presumption” inviting an inference of intent on the basis of proved behavior. After the government offers evidence indicating that the defendant committed the charged criminal act, it may be entitled to an instruction at the end of the case suggesting to the jury that one usually “intends the natural and probable consequences of his voluntary acts.”<sup>1</sup>

#### Presumption instruction

Properly framing such an instruction is hard since a presumption operating against the accused cannot properly be a substitute for evidence that is not there, and should not enhance or supplement the evidence offered beyond its natural probative force in the eyes of the jury. Yet even the mildest language that urges or reassures the jury may have such effects. Hence presumption instructions raise multiple concerns: They might dilute or undercut the requirement of proof beyond a reasonable doubt; they might amount to an adverse comment on the fact that the accused has not testified, or they might deprive him of the right to a jury trial on important factual issues. When such instructions are required or invited by statutory enactment, they raise questions about legislative determination (or predetermination) of points that courts rightly think they should decide, such as the sufficiency of evidence.<sup>2</sup>

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§3.13 1. *See, e.g.*, *Agnew v. United States*, 165 U.S. 36, 53 (1896) (recognizing common law presumption that one intends the natural and probable consequences of voluntary acts). Often it is said that “general intent” crimes are those from which it is possible to infer the necessary mens rea from the act itself and that “specific intent” crimes are those in which additional evidence is required to prove intent. *See generally* 1 LaFare & Scott, *Substantive Criminal Law* §§3.5-3.6 (1986).

2. *Carella v. California*, 491 U.S. 263, 266 (1989) (mandatory instructions “directly foreclosed independent jury consideration” of intent and improperly relieved state of burden of persuasion); *County Court of Ulster v. Allen*, 442 U.S. 140, 156 (1979) (ultimate test of constitutional validity is that the device “must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt”); *Leary v. United States*, 395 U.S. 6, 55 (1969) (Black, J., concurring) (Congress has “no more constitutional power to tell a jury it can convict” upon “false and baseless evidence” than it has to tell juries they can convict “without any evidence at all”); *United States v. Gainey*, 380 U.S. 63, 87 (1965) (Black, J., dissenting) (founders designed federal government so that assessment of facts in lawsuits, and instructions given to juries, were matters within exclusive judicial competence). *See generally* Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 *Yale L.J.* 165, 203-205 (1969).

## **“Presumption” is misnomer**

The term “presumption” is a misnomer in criminal cases. Certainly the notorious “conclusive presumption,” which purports to require the jury to find a particular point no matter what the evidence shows to be true, has no proper place in criminal trials.<sup>3</sup>

Criminal presumptions relating to elements of a charged offense are best understood—and explained to the jury—not as presumptions at all, but as permissive inferences that the trier may draw or not as it chooses. In civil cases “presumption” means a finding that must be made in the absence of counterproof challenging the basic or presumed facts. But in criminal cases the trier of fact must be left free to draw or reject the conclusion suggested by presumption instructions. Hence the very term “presumption” should be avoided altogether in criminal jury instructions, at least when used against the defendant.<sup>4</sup>

## **Procedural function of presumptions**

In civil cases presumptions have a powerful effect, often implementing important substantive policies by helping take cases to the jury that might otherwise fail and by sometimes imposing mandatory findings. A hallmark of civil presumptions is that they shift to the party against whom they operate the burden of production (sometimes even the burden of persuasion), and it is this aspect of their nature that makes them so powerful. Criminal presumptions cannot operate in these ways for at least two reasons.

## **Cannot have mandatory effect**

First, a criminal presumption cannot have mandatory effect on an element of a charged offense. As the Supreme Court has held, “verdicts may not be directed against [criminal] defendants” in whole or in part.<sup>5</sup> It logically follows that a criminal presumption cannot shift the burden of production to the defendant on an element in the offense<sup>6</sup> because failing to meet that burden

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3. *See* *Carella v. California*, 491 U.S. 263, 266 (1989) (disapproving “mandatory directions” as foreclosing independent jury consideration and relieving prosecution of burden of persuasion); *Morissette v. United States*, 342 U.S. 246, 275 (1952) (disapproving a conclusive presumption because it would “effectively eliminate intent as an ingredient of the offense” and conflict with presumption of innocence); *Hereford v. State*, 342 P.3d 1201, 1207 (Wyo. 2015) (in criminal cases, presumption that operates against the defendant is an inference; presumption is a misnomer).

4. A presumption in favor of an accused does not raise the same constitutional concerns. The jury is normally instructed on the presumption of innocence, which is simply a way to emphasize that the burden of proof rests entirely on the government, which must establish the defendant’s guilt beyond a reasonable doubt. *See* §3.11, *supra*.

5. *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979). *See also* *United States v. Piche*, 981 F.2d 706, 716 (4th Cir. 1992) (judge “may not direct a verdict, even a partial verdict, for the government” in criminal case).

6. Whether a finding can be directed with respect to a fact that is not an element, but tends to prove an element, is similarly questionable. Such direction may infringe on the right to a jury trial. This issue is intertwined with the constitutionality of binding judicial notice in criminal proceedings. *See* §2.12, *supra*. Proposed-but-rejected FRE

would logically generate an instruction directing the jury to find the presumed fact.<sup>7</sup>

### **Cannot shift burden of proof on element**

Second, *Winship* held that the prosecution has the burden of proving every element of the crime beyond a reasonable doubt. To the extent a presumption shifts or dilutes this burden, it violates due process. But the constitutional limits imposed by *Winship* are developed further in *Mullaney* and *Patterson*, which address the allocation of burdens in connection with criminal defenses,<sup>8</sup> and it is unclear how far *Mullaney* and *Patterson* restrict legislatures in defining the elements of crimes and defenses, hence not entirely certain how far the Constitution restricts use of statutory presumptions to allocate burdens.<sup>9</sup>

### **Ambiguity pitfall**

The leading case addressing these issues is *Sandstrom v. Montana*, where the trial court told the jury that the law “presumes that a person intends the ordinary consequences of his voluntary acts.” Defendant was convicted of murder on facts indicating a brutal attack with a knife and shovel, but the Supreme Court reversed because it found that the quoted phrase was ambiguous and could have been interpreted in four different ways, at least two of which violated defendant’s due process rights. First, the jury could have thought it had no choice on the issue of intent—that the presumption was conclusive. Second, it could have thought the presumption shifted to defendant the burden of persuasion—that it was to find intent unless defendant proved lack of intent. Third, the jury could have thought the presumption shifted to the defendant the burden of production—that it was to find intent unless defendant offered evidence that he lacked intent. And fourth, the jury could have thought the instruction invited an inference of intent—that it was being told it could find intent on the basis of defendant’s behavior. When viewed in either of the first two ways, the presumption instruction violated the *Winship* requirement of proof beyond

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303 would not have allowed mandatory presumptions even for lesser facts. *See* ACN (although arguably judge could direct jury to find against accused on fact that is not an element, “tradition is against it”).

7. It is true that an inference instruction may also shift the burden of production because the defendant takes the risk of an adverse jury finding if rebutting evidence is not produced. But this is different from a mandatory instruction directing the jury to find the inferred fact in absence of counterproof.

8. *See* §§3.11-3.12, *supra*.

9. One type of criminal presumption that seems likely to survive constitutional challenge is one that merely requires the defendant to produce evidence in support of a defense before it will be submitted to the jury. For example, the “presumption of sanity” means that insanity does not become an issue in the case (and no insanity instruction is given) unless the defendant comes forward with evidence sufficient to support the defense of insanity. *See* *Leach v. Kolb*, 911 F.2d 1249, 1256 (7th Cir. 1990) (no constitutional violation to dismiss insanity defense where defendant fails to introduce sufficient evidence), *cert. denied*, 498 U.S. 972. *See also* Model Penal Code §1.12(2)(a) (1962) (Code does not “require the disproof of an affirmative defense unless and until there is evidence supporting such defense”).

reasonable doubt of every element in the offense, so the Court in *Sandstrom* reversed the conviction.<sup>10</sup>

*Sandstrom* sends a clear warning that ambiguities in presumption instructions can be costly and may violate a defendant's due process rights when they bear on elements in the offense and seem either to be conclusive or to shift the burden of persuasion to the defendant. Several years later in *Francis v. Franklin*, the Court reached the same result in another murder prosecution that generated a similar instruction, even though the trial judge emphasized that the presumption may be rebutted and that the prosecutor bore the burden of proving intent beyond a reasonable doubt.<sup>11</sup> And the Supreme Court and many lower courts have often found constitutional error in similar ambiguities in presumption instructions.<sup>12</sup>

### **Can shift production burden; invite inference**

Neither *Sandstrom* nor *Francis* condemned a presumption instruction that clearly conveys either the third or the fourth message—shifting burden of production or inviting an inference.<sup>13</sup> Inference instructions do not violate *Sandstrom*,<sup>14</sup> although to satisfy due process the inference must follow rationally from proven basic facts (see next section). But it is doubtful that a presumption can be used to shift the burden of production with respect to an element of the crime.

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10. *Sandstrom v. Montana*, 442 U.S. 510, 520-524 (1979). *See also* *Patterson v. New York*, 432 U.S. 197, 215 (1977) (a state “must prove every ingredient of an offense beyond a reasonable doubt” and “may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements”).

11. *Francis v. Franklin*, 471 U.S. 307, 311-312 (1985).

12. *Yates v. Evatt*, 500 U.S. 391, 397 (1991) (cannot instruct that malice is “implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse”); *Carella v. California*, 491 U.S. 263, 264-266 (1989) (constitutional error to use presumption terminology even though taken directly from statute); *Medley v. Runnels*, 506 F.3d 857 (9th Cir. 2007) (courts may not create mandatory presumptions that relieve prosecutor of burden to prove facts to jury beyond reasonable doubt; presumption that flare gun qualified as firearm under state law violated due process).

13. *See* *Francis v. Franklin*, 471 U.S. 307, 314 n.3 (1985) (not deciding “whether a mandatory presumption that shifts only a burden of production to the defendant” is consistent with due process); *Sandstrom v. Montana*, 442 U.S. 510, 527 (1979) (Rehnquist, J., concurring) (if charge had “merely described a permissive inference,” it would not offend constitutional jurisprudence). *See also* *Dupuy v. Cain*, 201 F.3d 582, 587 (5th Cir. 2000) (instruction that jury may conclude that one intends the natural and probable consequences of his actions unless “evidence in this case leads the jury to a different or contrary conclusion” did not create a presumption of intent).

14. *United States v. Vreeken*, 803 F.2d 1085, 1092 (D.C. Cir. 1986) (upholding instruction that “[y]ou may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done”), *cert. denied*, 484 U.S. 963; *United States v. Silva*, 745 F.2d 840, 850-852 (4th Cir. 1984) (upholding instruction that “it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts”), *cert. denied*, 470 U.S. 1031.

In response to the state's argument in *Sandstrom* that shifting the burden of production meant only that defendant had to "produce some evidence," the Court commented with obvious skepticism that this burden "is often described quite differently" when it rests on the prosecution. The Court also observed that a prosecutor who fails to carry the burden suffers "a directed verdict in favor of the defense," but such direction "is not possible" when defendants fail to carry the burden.<sup>15</sup> Some states have been more emphatic yet, simply prohibiting the use of presumptions to shift the burden of production regarding an element to defendants in criminal cases,<sup>16</sup> a result generally supported by cases and commentators.<sup>17</sup>

### Peripheral presumptions

Clearly the greatest constitutional concerns relate to presumptions that bear on elements of charged offenses and are the basis for jury instructions, as in *Sandstrom* itself. Courts often use presumptions in resolving preliminary issues such as the propriety of a search or the competency of the accused to stand trial, and *Sandstrom* has no application in these peripheral settings.<sup>18</sup>

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15. *Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979) (comment seems implicitly to acknowledge that carrying the burden of production means not just offering "some evidence," but offering enough to support a jury finding in light of the burden of persuasion; for points prosecutors must prove, that would mean evidence to support a finding beyond reasonable doubt; on points in affirmative defenses, that would mean enough evidence to support a finding by a preponderance).

16. *See, e.g.*, Alaska R. Evid. 303(a)(1) & (d); Vermont R. Evid. 303(d).

17. *See, e.g.*, *United States v. Silva*, 745 F.2d 840, 851-852 (4th Cir. 1984) (disapproving instruction that inference may be drawn "unless the contrary appears from the evidence" because it might suggest defendant has a proof burden), *cert. denied*, 470 U.S. 1031; *United States v. Garrett*, 574 F.2d 778, 780-783 (3d Cir. 1978) (condemning introductory phrase "unless the evidence of a case leads you to a contrary conclusion"), *cert. denied*, 436 U.S. 919. *And see generally* Burke, *The Tension Between In re Winship and the Use of Presumptions in Jury Instructions After Sandstrom*, *Allen and Clark*, 17 N.M. L. Rev. 55, 68-71 (1987); M. Graham, *Presumptions—More Than You Wanted to Know and Yet Were Too Disinterested to Ask*, 17 *Crim. L. Bull.* 431, 441 (1981); Note, *After Sandstrom: The Constitutionality of Presumptions That Shift the Burden of Production*, 1981 *Wis. L. Rev.* 519, 549-554.

18. *Medina v. California*, 505 U.S. 437, 449-452 (1992) (although criminal trial of an incompetent defendant violates due process, state may create a presumption of competency or put burden of proving incompetency on defendant); *United States v. Nunez*, 877 F.2d 1470, 1472-1473 (10th Cir. 1989) (wiretap authorization order is presumptively valid; defendants failed to prove the contrary).