

# THE CONSTITUTIONALITY OF IRREBUTTABLE PRESUMPTIONS

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## I. INTRODUCTION

Twenty-five years ago, in *Fairfax County Fire and Rescue Services v. Newman*, the Supreme Court of Virginia was called upon to decide the standard for assessing the constitutionality of a statutory presumption: that is, a law which “makes the proof of one particular fact presumptive evidence of another fact.”<sup>1</sup> The employer in that case argued that it had been denied due process by a workers’ compensation rule that certain health problems suffered by firefighters were “presumed” to be occupational diseases suffered in the line of duty and covered under the law.<sup>2</sup> The court unanimously concluded that, for any presumption to be constitutional under the due process clause, even in a civil case, “the presumption *must* be rebuttable.”<sup>3</sup>

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<sup>1</sup> 222 Va. 535, 539, 281 S.E.2d 897, 900 (1981) (citing *Crenshaw v. Commonwealth*, 219 Va. 38, 42, 245 S.E.2d 243, 246 (1978)).

<sup>2</sup> The court was ruling on what was then section 65.1-47.1 of the Virginia Code, entitled “Presumption as to death or disability from respiratory disease,” which at that time provided:

The death of, or any condition or impairment of health of, salaried or volunteer fire fighters caused by respiratory diseases . . . hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this act unless the contrary be shown by a preponderance of competent evidence . . . .

VA. CODE ANN. § 65.1-47.1 (West 1990) (repealed 1991). That presumption is now codified at section 27-40.1.

<sup>3</sup> *Newman*, 222 Va. at 539–40, 281 S.E.2d at 900 (emphasis added) (citing *Crenshaw*, 219 Va. at 42, 245 S.E.2d at 246). This was not some slip of the pen; the court later reiterated in the same opinion that “[t]he second prong of the [constitutional] test requires the presumption to be rebuttable. . . . As long as an employer may introduce evidence in rebuttal of the presumption, the employer’s constitutional rights of due process have been protected.” *Id.* at 541, 281 S.E.2d at 901. In announcing this rule, *Newman* did not explicitly include the words “even in a civil case,” as I have done, but that *was* a civil case, and the court saw no reason to hesitate to adopt such a standard of review, even though it cited nothing but a line of criminal cases to support this proposition. *See infra* note 7.

This necessarily implies, as the Court of Appeals of Virginia has much more recently reasoned, that all irrebuttable presumptions must be unconstitutional.<sup>4</sup> To keep things simple, I shall refer to this rule as the holding in *Newman*, even though that case also established a number of other points that are of no concern to us here.<sup>5</sup> The court thought that its holding was dictated by both state and federal law, for it announced that it was interpreting the requirements of “due process of law under the Fourteenth Amendment of the United States Constitution and Article I, § 11 of the 1971 Virginia Constitution.”<sup>6</sup> In support of this conclusion, however, the court cited no federal cases, and no authority but its own holdings in a line of earlier criminal cases dating back almost thirty years.<sup>7</sup>

That holding has never been overruled, qualified, or retracted by the Supreme Court of Virginia, and it obviously remains the law of this commonwealth.<sup>8</sup> Even to this day, the court of appeals continues to believe that a presumption must be rebuttable before it will survive

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<sup>4</sup> *Medlin v. County of Henrico Police*, 34 Va. Ct. App. 396, 407 n.5, 542 S.E.2d 33, 39 n.5 (2001) (“[I]rrebuttable presumptions are unconstitutional . . .”); *see also* *Town of Purcellville Police v. Bromser-Kloeden*, 35 Va. Ct. App. 252, 262, 544 S.E.2d 381, 385–86 (2001) (citing *Newman* for the rule that a presumption must be rebuttable to be constitutional).

<sup>5</sup> Actually, the court held that this requirement was only half of a two-part test for testing the constitutionality of any presumption under the due process clause; the court added that “a ‘natural and rational’ evidentiary nexus must exist between the fact proved and the fact presumed.” *Newman*, 222 Va. at 539–40, 281 S.E.2d at 900 (citing *Crenshaw*, 219 Va. at 42, 245 S.E.2d at 246). This distinct constitutional requirement of a rational evidentiary nexus is well settled, as we shall see, and I take no issue with that part of the court’s holding.

<sup>6</sup> *Id.* at 539, 281 S.E.2d at 900.

<sup>7</sup> The only legal authority the court cited in *Newman* for this proposition was its holding in *Crenshaw v. Commonwealth*. *Id.* at 539–40, 281 S.E.2d at 900. In that earlier case, in support of its ruling that a statutory presumption must be rebuttable to survive a due process challenge, the court had also cited no federal cases, and no authority but two other criminal cases it had decided in 1953 and 1956. *See Crenshaw*, 219 Va. at 42, 245 S.E.2d at 246. *Newman* was thus the first time the court applied that standard in its review of a statutory presumption in a *civil* case. To make matters worse, as we shall see, *Crenshaw* was very poorly reasoned and wrong even in its understanding of what the constitution requires in a criminal case.

<sup>8</sup> In a case decided several years after *Newman*, the Supreme Court of Virginia briefly cited and described three opinions by the United States Supreme Court—all of them written before 1976—which had adopted a more discriminating and nuanced approach to measuring the federal constitutionality of irrebuttable presumptions. *Etheridge v. Med. Ctr. Hosp.*, 237 Va. 87, 98, 376 S.E.2d 525, 530 (1989). But those three federal cases were all decided *before* the Virginia Supreme Court’s contrary rulings in both *Newman* and *Crenshaw*, and none of them involved the requirements of the Virginia Constitution. So it is impossible to argue with a straight face that *Etheridge* somehow overruled or modified the holdings in those two other cases. It is no wonder that the Virginia Court of Appeals continues to cite *Newman* as the law of Virginia, even after *Etheridge*, and has done so three times in the past eight years. *See infra* note 9.

constitutional scrutiny. In three cases decided within the past eight years, the Court of Appeals of Virginia, citing *Newman*, concluded that a challenged statutory presumption was constitutional only after first checking to ensure, among other things, that it was rebuttable.<sup>9</sup>

So far as I am aware, until today nobody has ever publicly challenged or questioned the Virginia Supreme Court's holding in *Newman* that all irrebuttable presumptions are unconstitutional. But that statement is simply not true. Indeed, it *cannot* be true, because it would wreak havoc with the law of this state.

For starters, there is something inherently suspicious on its face about the categorical declaration that "irrebuttable presumptions are unconstitutional," even if only because of its remarkable brevity. Given the complexity of modern constitutional doctrine, it is rarely possible to accurately state any rule of constitutional law in fewer than fifty words.

Moreover, the United States Congress obviously does not think that irrebuttable presumptions are unconstitutional, because it enacts them all the time. For example, one federal statute on the books declares that when a coal miner is shown by X-ray or other clinical evidence to have pneumoconiosis (black lung disease), "there shall be an *irrebuttable presumption* that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be."<sup>10</sup> Many other federal statutes adopt similar presumptions that may not be rebutted.<sup>11</sup>

The Virginia General Assembly also believes that it has the power to enact valid irrebuttable presumptions. Out of the dozens of Virginia statutes that declare that certain facts "shall be presumed," many add an explicit provision that the presumption "may be rebutted"<sup>12</sup>—which

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<sup>9</sup> *Town of Purcellville Police*, 35 Va. Ct. App. at 261–62, 544 S.E.2d at 385–86; *Medlin*, 34 Va. Ct. App. at 407 n.5, 542 S.E.2d at 39 n.5; *City of Hopewell v. Tirpak*, 28 Va. Ct. App. 100, 122 n.24, 502 S.E.2d 161, 172 n.24 (1998), *aff'd in part, vacated in part on other grounds*, 258 Va. 103, 515 S.E.2d 557 (1999); *see also* *Hur v. Va. Dep't of Soc. Servs. Div. of Child Support Enforcement*, 13 Va. Ct. App. 54, 59, 409 S.E.2d 454, 457 (1991) (not citing *Newman*, but likewise rejecting a due process challenge to a statute after the court concluded that the law merely created a rebuttable presumption).

<sup>10</sup> Black Lung Benefits Act, 30 U.S.C. § 921(c)(3) (2000) (emphasis added).

<sup>11</sup> *E.g.*, *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 296 (1995) (interpreting the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, and noting that "[f]or certain injuries the statute creates a conclusive presumption of incapacity to earn wages"); *see also* 8 U.S.C. § 1228(c) (2000); 11 U.S.C. § 1126(f) (2000); 12 U.S.C. §§ 632, 1849(d), 2244(b), 3760(e), 3764(b) (2000); 15 U.S.C. §§ 37(c), 54(a), 77b(a)(3), 80a-2(a)(34) (2000); 16 U.S.C. §§ 1455(e)(2), 1907 (2000); 22 U.S.C. § 2197(j) (2000); 25 U.S.C. § 657 (2000); 33 U.S.C. § 1508(b)(1) (2000); 38 U.S.C. § 8521 (2000); 42 U.S.C. § 9115(b)(1) (2000); 43 U.S.C. § 1340(c)(2) (2000); 45 U.S.C. § 231k(a) (2000).

<sup>12</sup> There are over a dozen Virginia statutes that declare that some fact "shall be presumed" and then go on to explicitly recite that such presumption is "rebuttable" or "may be rebutted." *E.g.*, VA. CODE ANN. §§ 8.01-46.1 (2002), 8.01-413.01 (2000), 15.2-2314 (2003

would be a strange and redundant thing to spell out if all constitutionally valid presumptions, by definition, were rebuttable.

Moreover, dozens of statutes scattered throughout the Virginia Code explicitly create an irrebuttable presumption by specifying the circumstances under which certain facts will be “*conclusively* presumed.” Examples of such conclusive presumptions can be found in Virginia’s laws on Public Procurement;<sup>13</sup> Civil Remedies and Procedure;<sup>14</sup> Corporations;<sup>15</sup> Counties, Cities, and Towns;<sup>16</sup> Courts of Record;<sup>17</sup> Domestic Relations;<sup>18</sup> Elections;<sup>19</sup> Fiduciaries;<sup>20</sup> Highways, Bridges, and Ferries;<sup>21</sup> Insurance;<sup>22</sup> Motor Vehicles;<sup>23</sup> Property and Conveyances;<sup>24</sup> Public Service Companies;<sup>25</sup> Religious and Charitable Matters;<sup>26</sup> Taxation;<sup>27</sup> and Workers’ Compensation.<sup>28</sup> Every one of these statutes creates an irrebuttable presumption; both in ordinary usage and as a legal term of art, it is undisputed that a *conclusive* presumption and an *irrebuttable* presumption are the exact same thing.<sup>29</sup>

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& Supp. 2006), 19.2-159 (2004 & Supp. 2006), 33.1-346 (2005), 33.1-373 (2005), 38.2-1322 (2002), 38.2-1603 (2002 & Supp. 2006), 38.2-4230 (2002), 46.2-1209 (2005 & Supp. 2006), 58.1-2224 (2004), 62.1-194 (2006), 63.2-1202 (2002 & Supp. 2006), 63.2-1233 (2002 & Supp. 2006), 64.1-76 (2002). Still others achieve the same result more indirectly by providing that some fact “shall be presumed . . . unless the contrary be shown” by competent evidence. *E.g., id.* §§ 15.2-1511 (2003), 27-40.1 (2004), 51.1-813 (2005). Others explicitly create a “rebuttable presumption,” in those exact words. *E.g., id.* §§ 18.2-61 (2004 & Supp. 2006), 46.2-341.27 (2005).

<sup>13</sup> *Id.* § 2.2-4372(D) (2005).

<sup>14</sup> *Id.* § 8.01-313(A)(2) (2000).

<sup>15</sup> *Id.* § 13.1-643(E) (2006).

<sup>16</sup> *Id.* §§ 15.2-2627, -5126 (2003), -5431.15(A) (2003), -6302 (2003 & Supp. 2006), -6409(J) (2003).

<sup>17</sup> *Id.* § 17.1-258.5 (Supp. 2006).

<sup>18</sup> *Id.* § 20-163(D) (2004).

<sup>19</sup> *Id.* § 24.2-434 (2006).

<sup>20</sup> *Id.* §§ 26-40 (2004), -40.01(B) (2004 & Supp. 2006).

<sup>21</sup> *Id.* §§ 33.1-184, -431(D) (2005).

<sup>22</sup> *Id.* §§ 38.2-2807(D) (2002), -2906(D) (2002), -5009(A)(2) (Supp. 2006).

<sup>23</sup> *Id.* § 46.2-2080 (2005).

<sup>24</sup> *Id.* §§ 55-58.1(3), -79.77(C), -106.2, -131, -248.47 (2003).

<sup>25</sup> *Id.* § 56-480 (2003).

<sup>26</sup> *Id.* § 57-15(B) (Supp. 2006).

<sup>27</sup> *Id.* §§ 58.1-2282(B), -3832(3) (2004).

<sup>28</sup> *Id.* §§ 65.2-300(A), -404(B), -504(C), -515(A) (2002).

<sup>29</sup> This point is beyond dispute. The terms “irrebuttable presumption” and “conclusive presumption” mean the exact same thing. BLACK’S LAW DICTIONARY 1223 (8th ed. 2004). This point is made in every leading treatise on evidence law. *E.g.*, 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 497 (6th ed. 2006); RICHARD D. FRIEDMAN, THE ELEMENTS OF EVIDENCE 553 (3d ed. 2004); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 112 (3d ed. 2003); ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW 109 (2d ed. 2004); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 5.02[1] (2006); GLEN WEISSENBERGER & JAMES

But you can hardly blame the Virginia General Assembly for supposing that it has the lawful authority to draft irrebuttable presumptions. Only one year after the Virginia Court of Appeals recently declared open season on conclusive presumptions with its statement that “irrebuttable presumptions are unconstitutional,”<sup>30</sup> another panel of that same court paradoxically announced that the General Assembly is ordinarily free to enact conclusive statutory presumptions if it wishes to do so.<sup>31</sup> The apparent message from the court of appeals to the General Assembly is this: “If you have a *lot* of extra time on your hands, you may enact all the conclusive presumptions you like (go ahead; make our day), although we shall then be obligated to strike down every single one of them as unconstitutional.” That sounds like a rather spiteful taunt for a court to make, don’t you think?

But the strangest irony of all is the fact that even the Supreme Court of Virginia, although it may not realize that it has been doing so, regularly makes up irrebuttable presumptions itself. Here are three obvious examples.

(1) The supreme court has held that “[i]n Virginia, a child under 7 years of age is *conclusively* presumed to be incapable of contributory negligence.”<sup>32</sup> That is an irrebuttable presumption, plain and simple.

(2) When a statute forbids possession or use of a deadly weapon, whether a given instrument falls within that category is generally a

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J. DUANE, WEISSENBERGER’S FEDERAL EVIDENCE § 301.2 (5th ed. 2006). That is why any presumption, if it is not rebuttable, is conclusive by definition. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (noting that a presumption is “not a conclusive one” if it is “rebuttable”); *Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985) (“A mandatory presumption may be either conclusive or rebuttable.”). That usage has been consistently adopted in Virginia as well. *Grant v. Mays*, 204 Va. 41, 44, 129 S.E.2d 10, 12–13 (1963) (contrasting a “conclusive presumption” with one that may be rebutted); *Henrico County Div. of Fire v. Woody*, 39 Va. Ct. App. 322, 328, 572 S.E.2d 526, 529 (2002) (contrasting “a rebuttable presumption” and “a conclusive presumption” as opposites). The reported cases, legal dictionaries, and evidence treatises appear to be unanimous on this point; I do not know of one that has ever suggested otherwise.

<sup>30</sup> *Medlin v. County of Henrico Police*, 34 Va. Ct. App. 396, 407 n.5, 542 S.E.2d 33, 39 n.5 (2001).

<sup>31</sup> *Woody*, 39 Va. Ct. App. at 329, 572 S.E.2d at 529 (“Had the General Assembly wished to write a conclusive presumption into Code § 65.2-402, it could have done so.”). The *Woody* opinion does not even cite the court’s holding one year earlier in *Medlin*, nor suggest how the two are to be reconciled, but it certainly gives no indication that the court was laboring under any mistaken impression that there might be some distinction between conclusive and irrebuttable presumptions. On the contrary, the court of appeals in that very case correctly contrasted “a rebuttable presumption” and “a conclusive presumption” as if they were opposites. *Woody*, 39 Va. Ct. App. at 328, 572 S.E.2d at 529.

<sup>32</sup> *Grant*, 204 Va. at 44, 129 S.E.2d at 12 (emphasis added) (citations omitted). The court added that “[c]hildren between the ages of 7 and 14 are presumed to be incapable of exercising care and caution for their own safety, and this presumption prevails unless rebutted by sufficient proof to the contrary.” *Id.* (citations omitted).

question of fact for the jury.<sup>33</sup> Nevertheless, the Supreme Court of Virginia has held that some weapons may be declared “*per se . . .* deadly,”<sup>34</sup> and that “[t]here are deadly weapons such as a loaded pistol, a dirk, or an axe, which the court may pronounce *as a matter of law* a ‘deadly weapon.’”<sup>35</sup> That is simply another way of saying that the law creates an irrebuttable presumption that such weapons are deadly.

(3) Another well-known irrebuttable presumption created by the Virginia Supreme Court is the doctrine of “negligence *per se*,” which identifies certain kinds of conduct that are deemed to constitute negligence as a matter of law.<sup>36</sup> That rule also operates exactly like an irrebuttable presumption of negligence, for in such cases the jury is instructed that it must find the defendant negligent if he is shown to have violated a statute enacted for the public benefit.<sup>37</sup>

It boggles the mind to try to imagine how these three conclusive presumptions, among many others, were made up by the same state supreme court that has more recently declared that all irrebuttable presumptions are unconstitutional.<sup>38</sup> Logically there are only three

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<sup>33</sup> Pannill v. Commonwealth, 185 Va. 244, 254, 38 S.E.2d 457, 462 (1946) (“Generally, unless a weapon is *per se* a deadly one, the jury should determine whether it, and the manner of its use, places it in that category, and the burden of showing these things is upon the Commonwealth.”).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (emphasis added). As we shall see, by the way, this judicially-created presumption would still be open to serious constitutional challenge even if *Newman* were overruled. See *infra* notes 82–83 and accompanying text.

<sup>36</sup> See Schlimmer v. Poverty Hunt Club, 268 Va. 74, 78–79, 597 S.E.2d 43, 46 (2004) (“A party relying on negligence *per se* does not need to establish common law negligence provided the proponent of the doctrine produces evidence supporting a determination that the opposing party violated a statute enacted for public safety, that the proponent belongs to the class of persons for whose benefit the statute was enacted and the harm suffered was of the type against which the statute was designed to protect, and that the statutory violation was a proximate cause of the injury.” (citing Halterman v. Radisson Hotel Corp., 259 Va. 171, 176–77, 523 S.E.2d 823, 825 (2000))).

<sup>37</sup> Butler v. Frieden, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967). Thus, for example, the jury in a case of negligence *per se* will be instructed by the trial judge: “If you believe from the evidence that the plaintiff stepped into the highway into the path of the defendant’s car when it was close and in dangerous proximity to him, *then he was negligent.*” RONALD J. BACIGAL & JOSEPH S. TATE, VIRGINIA PRACTICE JURY INSTRUCTION § 32:9 (2006) (emphasis added).

<sup>38</sup> If the Virginia Supreme Court’s holding in *Newman* were good law, and all irrebuttable presumptions were an unconstitutional denial of due process under the Virginia Constitution, defendants should start arguing that their constitutional rights are violated any time they are denied the chance to put on evidence and make closing arguments in an effort to persuade a jury that, “at least in this one special case, my unusually precocious six-year-old victim could be guilty of contributory negligence,” or “my loaded firearm should not be considered a deadly weapon,” or “my admitted violation of this ordinance enacted for the public safety was not negligence.” Each one of those defendants can truthfully claim that his defense would be severely prejudiced by a

possible explanations, and none of them reflect very well on the court. (1) The court simply did not know or else forgot that conclusive presumptions and irrebuttable presumptions are the same thing. (2) The court mistakenly made the indefensible assumption that the due process clause grants the judiciary greater latitude than it does to the legislative branch in making up irrebuttable presumptions.<sup>39</sup> (3) The court knew full well that its holding in *Newman* would logically require the reversal of the conclusive presumptions it had made up in earlier cases, and those cases have in fact already been overruled *sub silentio*, but the court declined to say so out loud until some litigant called them on this, and—until today—the court has been silently waiting for more than a quarter of a century for someone to point this out.

Moreover, the Supreme Court of the United States does not usually have any difficulty upholding and enforcing irrebuttable presumptions. Six years before *Newman* was decided, the Court explicitly rejected the suggestion that irrebuttable presumptions are always unconstitutional. In *Weinberger v. Salfi*, the Supreme Court was confronted with a due process challenge to the Social Security Act's presumption that denied all benefits to certain widows whose husbands died less than nine months after their marriage.<sup>40</sup> The Court noted that the presumption was, of course, "conclusive, because applicants were not afforded an opportunity to disprove the [presumed] presence of [an] illicit purpose" behind the marriage.<sup>41</sup> Nevertheless, the Court held that the statute was consistent with due process, and that even a conclusive presumption dealing with the noncontractual distribution of public benefits is

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judicially-created presumption that conclusively and irrebuttably removed those factual questions from the jury.

<sup>39</sup> That assumption would be absolutely indefensible. In contrast with the judiciary, the elected representatives of the legislature in any free society always have *more* power to fashion presumptions, since common-law presumptions created by the courts contain the potential to rewrite statutes in ways that would amount to an illegitimate and possibly unconstitutional usurpation of the legislative role. *See infra* note 83. This is a fundamental axiom of democratic theory in any self-governing political order.

<sup>40</sup> 422 U.S. 749 (1975). Under the statute, a woman who was married to an insured wage earner for less than nine months before his death could still qualify as his "widow" entitled to social security benefits in a few other ways—such as (for example) if they had children together, or if either legally adopted the child of the other during their marriage. *See id.* at 754 n.2, 780–81. In the absence of such other evidence, however, no woman could qualify for benefits under that program unless she was married to the wage earner for at least nine months before his death.

<sup>41</sup> *Id.* at 768. This quotation is taken from a portion of the Court's opinion that was describing the views and reasoning of the district court in that case, but it is plain from the context that the Supreme Court agreed with the lower court's indisputable description of the statute as "a conclusive presumption." If the Supreme Court had thought that the presumption was in fact rebuttable, it would have reversed the lower court on that ground alone, without engaging in extensive and unnecessary discussion to distinguish its earlier rulings that had overturned *irrebuttable* presumptions for other reasons. *Id.* at 768–74.

normally constitutional, provided only that it is “rationally related to a legitimate legislative objective.”<sup>42</sup>

There is no question, therefore, that *Newman* was wrong the very day it was decided, at least in its construction of what is required by the Due Process Clause of the *federal* Constitution.<sup>43</sup> More recently, in *Michael H. v. Gerald D.*, the Supreme Court of the United States once again squarely held that a party adversely affected by a presumption is *not* denied due process of law merely because the presumption is conclusive or irrebuttable.<sup>44</sup> The Court rejected a constitutional challenge to a California statute which provided that “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”<sup>45</sup> A majority of five Justices agreed that this statute did not violate the Due Process Clause of the United States Constitution, even though it created a *conclusive* presumption that a man claiming to be the biological father of a child born to someone else’s wife is not a “parent” entitled to visitation as a matter of right under California law.<sup>46</sup> Since that time, the Court has

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<sup>42</sup> *Id.* at 772. The Court distinguished earlier cases that had applied a stricter standard to the constitutional review of irrebuttable presumptions that burdened fundamental constitutional rights—although even those cases never held that such presumptions were automatically unconstitutional merely because they were conclusive. *Id.* at 768–72.

<sup>43</sup> In support of its holding that all presumptions must be rebuttable to be constitutional, the Supreme Court of Virginia in *Newman* did not cite or discuss *Weinberger v. Salfi*, or any other case decided by the Supreme Court of the United States.

<sup>44</sup> 491 U.S. 110, 119 (1989).

<sup>45</sup> *Id.* at 117 (quoting CAL. EVID. CODE § 621 (West Supp. 1989) (repealed 1992)). There is an analogous provision in Virginia’s Domestic Relations Law, which provides that “a child born to a surrogate within 300 days after assisted conception” is conclusively presumed to result from the assisted conception if no interested party seeks a contrary judicial determination within two years after the birth. VA. CODE ANN. § 20-163(D) (2004).

<sup>46</sup> Justice Scalia, writing for a plurality of four Justices, explicitly and correctly reasoned that an otherwise permissible statutory presumption is not unconstitutional merely because it is conclusive. *Michael H.*, 491 U.S. at 119–21. In a separate concurrence, Justice Stevens rejected almost everything else in the plurality opinion, but he agreed with the plurality that (1) the challenged California statute was constitutional, even though he also agreed that (2) it created a “conclusive presumption” against the man claiming to be the biological father, *id.* at 135 (Stevens, J., concurring), by establishing “as a matter of law” that he was not a parent within the meaning of California law, *id.* at 133, thereby denying him the right to insist on “a judicial determination that he is her biological father.” *Id.* at 132. Justice Stevens nevertheless concurred that the statute was constitutional, despite the detrimental impact of its conclusive presumption that the alleged biological father could not be her legal “parent” within the meaning of state law, because of his view that the California statutory scheme gave the trial judge sufficient discretion to award visitation to the man where that appeared to be in the best interests of the child. *Id.* at 135–36. In other words, even though Justice Stevens disagreed with the plurality as to whether California law erected an irrebuttable presumption that the alleged biological father was ineligible to seek visitation with the daughter of another man’s wife in the discretion of the trial judge, he agreed with the plurality that the law created an



shown no hesitation in enforcing irrebuttable presumptions. In a recent labor law case, the Court unanimously upheld and enforced what it called a pair of “conclusive presumptions” that had been adopted by the National Labor Relations Board concerning the existence of majority support for a union in the period immediately following board certification, even though those presumptions could not be rebutted.<sup>47</sup>

At least since the Supreme Court’s holding in *Michael H.*, it is now settled, if there was ever really any doubt, that a statutory presumption does not violate federal constitutional requirements merely because it is conclusive or irrebuttable. That case therefore partially overruled the Supreme Court of Virginia to the extent that the holding in *Newman* was based on an interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. But technically *Newman* remains good law in Virginia, because that ruling was also based on the court’s interpretation of the due process requirements of the state constitution, and Virginia, like any state, enjoys the “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”<sup>48</sup> That is why one cannot honestly fault the Virginia Court of Appeals for declaring, twelve years after the decision in *Michael H.*, that irrebuttable presumptions are still unconstitutional, at least in Virginia.<sup>49</sup> And that is why the Supreme Court of Virginia is theoretically free, if it wishes, to adhere to its ruling in *Newman* that all irrebuttable presumptions are a violation of due process, at least under the state constitution. But that course is out of the question as a practical matter. As this paper shall demonstrate, the holding in *Newman* is utterly incoherent. There is nothing unconstitutional, illegal, or even un-American about irrebuttable presumptions. They have always abounded in our law. The only real mystery in this context is how the Supreme Court of Virginia was misled into declaring something so horribly mistaken.

## II. DUE PROCESS AND IRREBUTTABLE PRESUMPTIONS: WHAT DOES THE CONSTITUTION REQUIRE?

To understand the constitutional validity of irrebuttable and conclusive presumptions, we must first identify what they are. To begin

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irrebuttable presumption that such a man could not be the legal “parent” of the child with an automatic right to visitation, and that *this* irrebuttable presumption was consistent with due process. *Id.* at 132–35. Not even the dissenters in *Michael H.* suggested that a statutory presumption must automatically be struck down merely because it is conclusive.

<sup>47</sup> *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996).

<sup>48</sup> *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

<sup>49</sup> *See cases cited supra* note 4.

with, there is some disagreement as to whether there truly is such a thing as an “irrebuttable presumption.” It all depends on how one identifies the defining characteristic of a “presumption,” which has been aptly described as perhaps one of “the slipperiest member[s] of the family of legal terms.”<sup>50</sup> Indeed, “one author has listed no less than eight senses in which the term has been used by the courts.”<sup>51</sup>

Federal Rule of Evidence 301 provides that a presumption “imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption.”<sup>52</sup> By that standard, some purists insist that all true presumptions must be rebuttable, by definition, and that an “irrebuttable presumption” is an oxymoron, since any presumption that conclusively compels a certain finding does not shift a burden of production to anyone; it simply ends the discussion entirely.<sup>53</sup> But that would render tautological and meaningless the insistence of the Virginia Supreme Court that a presumption “must be rebuttable” to survive constitutional scrutiny.<sup>54</sup>

Then again, under the broader view, it is often said that the defining characteristic of a presumption is merely that it involves any “mandatory inference drawn from a fact in evidence,”<sup>55</sup> or any “rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts.”<sup>56</sup> Under this broader definition,

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<sup>50</sup> 2 BROUN ET AL., *supra* note 29, at 495.

<sup>51</sup> *Id.* (citing Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196–207 (1953)).

<sup>52</sup> FED. R. EVID. 301.

<sup>53</sup> *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 29 (stating that conclusive or irrebuttable presumptions “are not really presumptions”); PARK, LEONARD & GOLDBERG, *supra* note 29 (“True presumptions must also be distinguished from so called ‘conclusive presumptions’ or ‘irrebuttable presumptions.’ These devices are not actually presumptions at all, even though they operate in a mandatory fashion and even though they express a relationship between certain basic facts and a presumed fact.”); WEINSTEIN & BERGER, *supra* note 29 (“A so-called irrebuttable presumption does not satisfy the definition of a presumption because fact B must be assumed conclusively rather than conditionally.”).

<sup>54</sup> If all true presumptions are rebuttable by definition, as some have insisted, it would be meaningless for the Supreme Court of Virginia to declare that a presumption is constitutional only if it is rebuttable. Indeed, it would literally be as absurd as a “rule” declaring that a presumption is constitutional only if it is a presumption.

<sup>55</sup> *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978).

<sup>56</sup> *Martin v. Phillips*, 235 Va. 523, 526, 369 S.E.2d 397, 399 (1988) (citation omitted). The court added, however, that “[t]he primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.” *Id.* (citation omitted). If the court meant to imply that all presumptions, by definition, always shift the burden of producing evidence to the opposing party, then there could strictly be no such thing as a truly irrebuttable presumption, as pointed out above.

which has been accepted by *Black's Law Dictionary*<sup>57</sup> as well as the General Assembly and Supreme Court of Virginia,<sup>58</sup> one may intelligibly describe something as a presumption that is irrebuttable, and distinguish it from one that may be rebutted.<sup>59</sup> When courts or legislatures or commentators refer to something as an "irrebuttable presumption," they invariably mean to describe a legal rule that can be expressed in some variation of this formulation: "If a party is able to offer undisputed proof of some fact A, then it shall be conclusively presumed that some other fact B is also true as a matter of law, and the opposing party shall not be allowed to offer any evidence or argument to the contrary."

But even though we can intelligibly describe such rules as irrebuttable or conclusive presumptions, the fact remains that they do not have much in common with the operation of an ordinary presumption, which is usually rebuttable. A conclusive presumption does not shift any burden of proof or any burden of production to the opposing party. It simply ends the discussion entirely, by establishing a legal equivalence between two facts and dictating that proof of one

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<sup>57</sup> The most recent edition defines a *presumption* simply as "[a] legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts." BLACK'S LAW DICTIONARY 1223 (8th ed. 2004). That reference work adds the observation that "[m]ost presumptions [but not all of them] are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence[.]" *id.*, and defines a *conclusive or irrebuttable presumption* as "[a] presumption that cannot be overcome by any additional evidence or argument," *id.*, thus rejecting the narrower view of those who insist that all true presumptions are rebuttable. The Supreme Court of the United States agrees, and has recently defined "conclusive presumptions" as those presumptions "which direct the jury to presume an *ultimate* element of the offense based on proof of certain *predicate* facts (e.g., 'You must presume malice if you find an intentional killing')." *Neder v. United States*, 527 U.S. 1, 10 (1999).

<sup>58</sup> As noted above, the Virginia General Assembly and the appellate courts of this state have assumed that there is such a thing as a conclusive presumption, and that it can be meaningfully distinguished from a rebuttable presumption. I have learned from the editors of *A Guide to Evidence in Virginia*, published by the Boyd-Graves Conference of the Virginia Bar Association, that a revision of that reference work is already underway for the forthcoming 2007 edition, which will provide that

[i]n all civil actions and proceedings not otherwise provided for by Virginia law, a *rebuttable* presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

A GUIDE TO EVIDENCE IN VIRGINIA § 301 (forthcoming 2007) (emphasis added). The word *rebuttable*, which does not appear in this sentence from § 301 of the 2006 edition, is obviously being added to distinguish such presumptions from those that are irrebuttable and therefore do not shift any burden of production.

<sup>59</sup> Professor Friedman probably sums it up best when he says that "not everything that is called a presumption is rebuttable." FRIEDMAN, *supra* note 29.

automatically requires a finding that the other is also true as a matter of law. As Justice Scalia has pointed out, however, “the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not.”<sup>60</sup> This is why courts and legal scholars universally agree that any so-called “irrebuttable presumption,” regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of *substantive* law masquerading in the traditional language of a presumption.<sup>61</sup> As one leading writer has observed, “a conclusive or irrebuttable presumption is really an awkwardly expressed rule of law.”<sup>62</sup>

And this is why the Supreme Court was correct in *Michael H.* to reject any suggestion that the Due Process Clause categorically forbids an irrebuttable presumption. Any ordinary rule of substantive law can be easily recast into the language of an irrebuttable presumption, and vice versa, with no change in its meaning or operation. As Justice Scalia correctly observed in that case, “In this respect there is no difference between a rule which says that the marital husband shall be

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<sup>60</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion).

<sup>61</sup> See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998) (noting that the National Labor Relations Board’s “irrebuttable presumption of majority support for the union during the year following certification” is one of those “evidentiary presumptions” that “are in effect substantive rules of law”); *Michael H.*, 491 U.S. at 117, 119 (plurality opinion) (observing that although the California statute—providing that “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage”—was “phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law” (quoting CAL EVID. CODE § 621 (West Supp. 1989) (repealed 1992))); *United States v. Chase*, 18 F.3d 1166, 1172 n.7 (4th Cir. 1994) (“A conclusive or irrebuttable presumption is considered a rule of substantive law.”); 2 BROUN ET AL., *supra* note 29, at 525 n.16 (“Conclusive presumptions are really statements of substantive law . . . .”); RICHARD EGGLESTON, EVIDENCE, PROOF, AND PROBABILITY 92 (1978) (“Conclusive presumptions, sometimes called irrebuttable presumptions of law, are really rules of law. Thus it is said that a child under the age of fourteen years is conclusively presumed to be incapable of committing rape . . . . [This] is only another way of saying that such a child cannot be found guilty of rape.”); MUELLER & KIRKPATRICK, *supra* note 29 (“Substantive law sometimes borrows the language of presumptions. . . . These rules are not really presumptions but substantive principles expressed in the language of presumptions.”); PARK, LEONARD & GOLDBERG, *supra* note 29, at 109–10 (“[Conclusive or irrebuttable presumptions] are not evidence rules at all. They are new rules of substantive law.”); WEINSTEIN & BERGER, *supra* note 29 (“An irrebuttable presumption is a rule of substantive law when [the presumed fact] is a material proposition.”); WEISSENBERGER & DUANE, *supra* note 29 (“The term ‘conclusive presumption’ denotes what is more properly considered a rule of substantive law as opposed to an evidentiary, procedural device.”); JOHN H. WIGMORE, A STUDENT’S TEXTBOOK OF THE LAW OF EVIDENCE 454 (1935) (“‘Conclusive presumptions’ or ‘irrebuttable presumptions’ are usually mere fictions, to disguise a rule of substantive law (e.g., the conclusive presumption of malice from an unexcused defamation); and when they are not fictions, they are usually repudiated by modern courts.”).

<sup>62</sup> FRIEDMAN, *supra* note 29 (emphasis omitted).

irrebuttably presumed to be the father, and a rule which says that the adulterous natural father shall not be recognized as the legal father.”<sup>63</sup>

Of course, the constitutional requirement of due process does impose some limits on the use of evidentiary presumptions in civil and criminal litigation.<sup>64</sup> In a criminal case it forbids the use of a presumption to establish an essential element of the prosecution’s case or to shift the burden of proof to the defense on the central issue of intent, but that is true regardless of whether the presumption is rebuttable.<sup>65</sup> The Constitution also sets certain relatively minimal requirements that a presumption be shown to have at least some rational basis,<sup>66</sup> but that requirement also applies to both rebuttable and irrebuttable presumptions.<sup>67</sup> But none of those limits require a law to be struck down merely because it is worded or operates like an irrebuttable presumption.

The inherent absurdity of the ruling in *Newman* can be easily demonstrated. Compare the following statutes, which are obviously just four different ways of saying the exact same thing, and ask yourself which of them are unconstitutional under the holding in that case.

1. “It shall be unlawful to possess a loaded firearm in any school.”
2. “It shall be unlawful to possess a deadly weapon in any school. For the purposes of this statute, a deadly weapon shall be *defined* to include any loaded firearm.”

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<sup>63</sup> *Michael H.*, 491 U.S. at 120 (plurality opinion).

<sup>64</sup> A complete discussion of such constitutional limits is outside the scope of this paper. For a more detailed examination of the controlling Supreme Court precedents, see WEINSTEIN & BERGER, *supra* note 29, § 5.04[3][a]–[5].

<sup>65</sup> It is a denial of due process to instruct a jury that a criminal defendant’s intent is to be “presumed” from certain other facts, even if the jury is told “the presumption may be rebutted.” *Francis v. Franklin*, 471 U.S. 307, 309 (1985).

<sup>66</sup> See WEINSTEIN & BERGER, *supra* note 29, § 5.04[3][a]. This was the point the Virginia Supreme Court got right in *Newman* when it stated that, before a presumption may be upheld as constitutional, “a natural and rational evidentiary nexus must exist between the fact proved and the fact presumed.” *Fairfax County Fire & Rescue Servs. v. Newman*, 222 Va. 535, 539–40, 281 S.E.2d 897, 900 (1981).

<sup>67</sup> Several cases decided by the United States Supreme Court in the early 1970s struck down “irrebuttable presumptions” on constitutional grounds—not merely because they were irrebuttable, but because they were not shown to have a sufficient logical basis in experience. But the Court has since distinguished and limited those cases to presumptions that burden the exercise of a fundamental constitutional right, *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), and several Justices have even more recently observed (as many academic commentators had done) that those cases did not truly turn on the procedural implications of the operation of such alleged “presumptions,” but rather on the fit between those substantive legislative classifications and the purposes they were designed to serve. *Michael H.*, 491 U.S. at 120–21 (plurality opinion) (collecting authorities).

3. "It shall be unlawful to possess a deadly weapon in any school. For the purposes of this statute, any loaded firearm shall be deemed a deadly weapon *as a matter of law*."
4. "It shall be unlawful to possess a deadly weapon in any school. For the purposes of this statute, any loaded firearm shall be *irrebuttably presumed* to be a deadly weapon."

All of these statutes are absolutely identical in substance, meaning, and operation; all that distinguishes them is a meaningless variation in semantics. But which of them would be unconstitutional under *Newman*? It is far from obvious, because there are two different ways to read the holding in that case. One reading makes the rule of that case absurd, and the other renders it practically meaningless. And either way it is dead wrong.

On the one hand, it is possible to read *Newman* as a rule that requires the invalidation of any law, no matter how it is worded, that operates precisely like an irrebuttable presumption and is therefore, for all practical purposes, the functional equivalent of such a presumption. Under that reading, the due process clause of the Virginia Constitution would require the courts to strike down all four of the statutes outlined above, along with almost every other substantive legal rule on the books. That would of course be ludicrous. As the Supreme Court of the United States correctly warned—six years before *Newman* made that very mistake—any categorical ban on irrebuttable presumptions in the name of the Due Process Clause, if consistently applied, would be “a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.”<sup>68</sup> And it would not stop there, for under that reading *Newman* would also require the state supreme court to abrogate all of the irrebuttable and conclusive presumptions it has made up itself, including its ruling that the judicial branch has the power to declare that a loaded firearm constitutes a deadly weapon as a matter of law.<sup>69</sup>

To avoid that extreme result, one could plausibly read *Newman* as forbidding only rules of law that explicitly use the language of an

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<sup>68</sup> *Weinberger*, 422 U.S. at 772. To be precise, the Court was describing what would happen if the Due Process Clause required the rejection of every irrebuttable presumption in public welfare legislation that “presumed a fact which was not necessarily or universally true.” *Id.* at 768. That conclusion would obviously follow with far greater force if one were to adopt and consistently enforce an even more extreme rule, such as the Virginia Supreme Court’s later holding in *Newman*, which would strike down *all* presumptions in *any* kind of legislation merely upon a finding that they are irrebuttable. *Newman*, 222 Va. at 539–40, 281 S.E.2d at 900 (citing *Crenshaw v. Commonwealth*, 219 Va. 38, 42, 245 S.E.2d 243, 246 (1978)).

<sup>69</sup> *Pannill v. Commonwealth*, 185 Va. 244, 253–54, 38 S.E.2d 457, 462 (1946).

irrebuttable presumption. Under that much narrower reading, only the fourth statute above would be unconstitutional, but not the others, even though all four are literally identical in both their meaning and how they would operate at any trial. That bizarre conclusion would flagrantly violate the legal axiom that “[c]onstitutional distinctions should not be based on technicalities in draftsmanship that do not affect the merits.”<sup>70</sup> It would also render the rule in *Newman* utterly trivial, for the Virginia General Assembly could then always circumvent that supposed constitutional limitation with ridiculous ease, by simply rewriting any statute to make it say the same thing without using the three forbidden words “irrebuttable,” “conclusive,” or “presumption.” In the next section of this paper we shall see how easy this is to do by taking a close look at a number of Virginia’s statutory irrebuttable presumptions.

So the ruling in *Newman* is either absurd or virtually meaningless. And either way it is surely wrong because it would require (if nothing else) the invalidation of the fourth statute listed above—a statute that is plainly constitutional. That fact can be easily missed, of course, since the U.S. Constitution imposes such severe limits on the use of presumptions to assist the prosecution in a criminal case. For example, when a statute makes some act a crime, the jurors may not be instructed that a man’s commission of that act, or his intent to do so, is “presumed” from other actions or facts, including some event taking place at a later date.<sup>71</sup> This is why Virginia Code section 18.2-183 is plainly unconstitutional in creating a rebuttable presumption of fraudulent intent in bad check cases when the defendant fails to make payment within five days after learning that his check has been dishonored by the bank for insufficient funds.<sup>72</sup> That is quite different, however, from any presumption, rebuttable or otherwise, that is used by the legislature as an awkward way of *defining* the essential terms of a criminal statute. Just as surely as a legislature may forbid possession of a loaded firearm in a school, it may do the same thing indirectly and a bit clumsily, if it wishes, by forbidding the possession of a deadly weapon—and then providing that a loaded firearm shall be irrebuttably presumed to be a deadly weapon. As one noted commentator has aptly observed: “Oddly enough, the most powerful way in which a jurisdiction can ease the prosecution’s burden is

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<sup>70</sup> WEINSTEIN & BERGER, *supra* note 29, § 5.04[5].

<sup>71</sup> *Carella v. California*, 491 U.S. 263, 265 (1989) (holding that it is unconstitutional to tell jurors that the defendant’s “intent to commit theft by fraud is presumed” if he failed to return a rented vehicle within a specified number of days after a request for its return).

<sup>72</sup> James J. Duane, *The Virginia Presumption of Fraudulent Intent in Bad Check Cases: The Statute That Dare Not Speak Its Name*, 31 VA. B. ASS’N NEWS J. 10 (June/July 2005).

also the one least vulnerable to constitutional attack: It may simply alter the definition of the crime.”<sup>73</sup>

This was the fatal flaw in the reasoning of the Supreme Court of Virginia in *Crenshaw v. Commonwealth*,<sup>74</sup> the only case the court later cited in *Newman* in support of its contention that all irrebuttable presumptions are unconstitutional.<sup>75</sup> In *Crenshaw*, the court had erroneously reasoned that a statute criminalizing the possession of a radar detector in a motor vehicle—because the law added that the “[t]he Commonwealth need not prove that the device in question was in an operative condition or being operated”<sup>76</sup>—was unconstitutional because it created an irrebuttable presumption that was “a purely arbitrary mandate, violative of due process.”<sup>77</sup> But the constitutional validity of such a statute depends *entirely* on whether possession of an inoperable radar detector may be forbidden as a rational exercise of the legislative police power (an issue outside the scope of this article), and has nothing to do with whether the legislature chooses to frame that prohibition in the language of an irrebuttable presumption. Assuming for the sake of argument that a legislature could lawfully forbid possession of an inoperable radar detector, just as it can (for example) declare an unloaded gun to be a dangerous weapon,<sup>78</sup> there is no possibility that the legislature would violate the due process clause merely because it chose to draft such a prohibition with the language of an irrebuttable presumption.

Moreover, even if *Crenshaw* had correctly stated the constitutional rule applicable to presumptions in criminal cases, it was extremely questionable for the state supreme court to later cite that standard in *Newman* as the rule governing civil cases as well. “Although there are constitutional considerations involved in the use of presumptions in civil cases, the problems are simply not of the same magnitude.”<sup>79</sup> Indeed, as one leading evidence treatise persuasively reasons, it is “relatively unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases,”<sup>80</sup> in which burdens of

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<sup>73</sup> FRIEDMAN, *supra* note 29, at 570.

<sup>74</sup> 219 Va. 38, 245 S.E.2d 243 (1978).

<sup>75</sup> See *supra* note 7.

<sup>76</sup> *Crenshaw*, 219 Va. at 40 n.1, 245 S.E.2d at 245 n.1.

<sup>77</sup> *Id.* at 43, 245 S.E.2d at 247.

<sup>78</sup> *McLaughlin v. United States*, 476 U.S. 16 (1986).

<sup>79</sup> 2 BROUN ET AL., *supra* note 29, at 522.

<sup>80</sup> *Id.* at 525.



proof are assigned “not for constitutional reasons, but for reasons of probability, social policy, and convenience.”<sup>81</sup>

To add to the irony, the Supreme Court of Virginia has gotten matters exactly backwards by holding that the judiciary has greater leeway than the legislature to create irrebuttable presumptions. Under either a narrow or a broad reading, the ruling in *Newman* would clearly (but erroneously) dictate that the Virginia General Assembly may not constitutionally pass a law to regulate the use of deadly weapons and then provide that a loaded firearm shall be irrebuttably presumed to be a deadly weapon. Yet that same court took it for granted in *Pannill* that the judiciary had the power to take that factual issue away from the jury through the creation of just such a conclusive presumption.<sup>82</sup> The truth is almost surely just the opposite. Under the due process clause, once the legislature has identified some factual issue as an element of a criminal offense, the judiciary has no power to decide that question or to remove it from the jury’s consideration, no matter how “obvious” the issue may seem. A criminal defendant has a constitutional right to demand that the *jury* decide whether the government has proved all the factual elements of the charged offense as specified by the legislature, including the ultimate issues and not merely their “factual components.”<sup>83</sup>

In addition to all of these other compelling objections to the reasoning and holding of *Newman*, that case—even if it is given its narrowest possible interpretation and only applied to statutes that explicitly use the language of a conclusive presumption—would require the invalidation of many statutes that have no constitutional infirmity at all. We can see these points more clearly by taking a look at some of the many irrebuttable presumptions that are scattered throughout the Code of Virginia, and the implications that would follow if they were subjected to a consistent application of the holding in *Newman*.

### III. A LOOK AT SOME OF THE IRREBUTTABLE PRESUMPTIONS IN THE VIRGINIA CODE

The Virginia General Assembly frequently uses the language of conclusive presumptions when drafting statutes, although it uses that

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<sup>81</sup> *Id.* at 522; see also *Lavine v. Milne*, 424 U.S. 577, 585 (1976) (“Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.”).

<sup>82</sup> *Pannill v. Commonwealth*, 185 Va. 244, 253–54, 38 S.E.2d 457, 462 (1946).

<sup>83</sup> *United States v. Gaudin*, 515 U.S. 506, 509–15 (1995); see James J. Duane, *Stipulations, Judicial Notice, and a Prosecutor’s Supposed “Right” to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in Old Chief v. United States*, 168 F.R.D. 405, 436 n.135 (1996) (arguing that *Gaudin* calls into question the assumption of many lower courts that they have the power to essentially rewrite the essential elements of criminal statutes by deciding that certain instruments qualify as “deadly weapons” as a matter of law).

language to mean many different things.<sup>84</sup> These statutes, as it turns out, amply bear out the adage that a conclusive or irrebuttable presumption is usually nothing more than “an awkwardly expressed rule of law.”<sup>85</sup> As we shall see, however, none of them are unconstitutional for that reason, and the consistent application of the contrary ruling in *Newman* would lead to intolerable—and sometimes comical—results.

Usually, the Virginia General Assembly uses an irrebuttable presumption, just as the Supreme Court of Virginia typically does,<sup>86</sup> to create or express a rule of *substantive* law. For example, Virginia Code section 55-248.47, which governs the sale or lease of a manufactured home, provides that “[t]he landlord shall not unreasonably refuse or restrict the sale or rental of a manufactured home located in his manufactured home park by a tenant. . . . Any refusal or restriction because of race, color, religion, national origin, familial status, elderliness, handicap, or sex shall be *conclusively presumed* to be unreasonable.”<sup>87</sup>

This statute most certainly establishes an irrebuttable presumption, because it denies the defendant any opportunity to offer evidence to persuade the court that his refusal to rent to a family based on their race was reasonable under the circumstances. But surely the statute is not unconstitutional for that reason. There is no doubt that the Virginia General Assembly had the constitutional authority, if it had chosen, to draft a statute declaring that a refusal to rent to a person because of race

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<sup>84</sup> To add to the confusion, the Supreme Court of Virginia also sometimes uses the language of presumptions in ways that are not strictly accurate. For example, that court recently declared that in a wrongful death case, in the absence of evidence to the contrary, “it will be presumed that the deceased acted with ordinary care,” and described this as “the presumption of ordinary care.” *Hot Shot Express, Inc. v. Brooks*, 264 Va. 126, 136, 563 S.E.2d 764, 769 (2002). But the fact is that, just like the misnamed presumption of innocence, this

so-called “presumption” is not evidence—not even an inference drawn from a fact in evidence—but instead is a way of describing the [defendant’s] duty both to produce evidence of [contributory negligence] and to convince the jury [by a preponderance of the evidence].

. . . The principal inaccuracy is the fact that it is not technically a “presumption”—a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an “assumption” that is indulged in the absence of contrary evidence.

*Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978). Many so-called “presumptions,” like this supposed presumption of a decedent’s freedom from contributory negligence, are not true presumptions at all, but are merely a way of describing the burden of persuasion by reminding us of what we assume at the start of the trial before *any* evidence has been offered on the subject either way.

<sup>85</sup> FRIEDMAN, *supra* note 29.

<sup>86</sup> For examples of how the state’s highest court has done the same thing, see *supra* notes 32–37.

<sup>87</sup> VA. CODE ANN. § 55-248.47 (2003) (emphasis added).

or certain other personal characteristics “shall be forbidden.” That is precisely what the General Assembly intentionally accomplished, however imperfectly, through the clumsy wording of this statute.<sup>88</sup>

In Virginia, as in many other states, the language of an irrebuttable presumption is often used by legislatures and courts as an ungainly method of writing a *definition*. As one leading treatise puts it, any time some statute provides that fact A leads to an irrebuttable presumption of fact B, “[f]act B becomes another way of stating fact A.”<sup>89</sup> Here is a good example from Virginia’s Workers’ Compensation Law, which provides: “For the purposes of this section, ‘injurious exposure’ means an exposure to the causative hazard of such disease which is reasonably calculated to bring on the disease in question. Exposure to the causative hazard of pneumoconiosis for ninety work shifts shall *be conclusively presumed to constitute injurious exposure*.”<sup>90</sup> This is simply a maladroit method of defining “injurious exposure.” The Virginia General Assembly could have made this definition just as precisely and even more clearly by deleting the four redundant words italicized above, declaring instead simply that “exposure to the causative hazard of pneumoconiosis for ninety work shifts shall constitute injurious exposure.”

That act also provides that, in an action involving a deceased worker, any children under the age of eighteen of that employee “shall be *conclusively presumed to be* dependents wholly dependent for support upon the deceased employee.”<sup>91</sup> This is, of course, just another way of defining those dependents entitled to relief under that provision, and could have been accomplished just as easily without the use of any presumption, merely by defining any child under the age of eighteen as a dependent entitled to relief under that act. There was no need to make any mention of any presumption of any sort, but you can’t blame the members of the General Assembly for wanting to sound more like lawyers. It’s all just innocent fun, since nothing turns on the distinction between these two ways of saying the same thing—nothing, that is, apart from the suggestion in *Newman* that one of these two equivalent formulations is just fine but the other is plainly unconstitutional.

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<sup>88</sup> For another example of a Virginia law which unnecessarily creates an irrebuttable presumption merely to define a rule of substantive law, Virginia’s Insurance Law provides: “If all moneys accruing to the fund are exhausted in payment of retrospective premium adjustment charges, all liability and obligations of the association’s policyholders with respect to the payment of retrospective premium adjustment charges shall terminate and shall be *conclusively presumed to have been discharged*.” *Id.* § 38.2-2807(D) (2002) (emphasis added). That is just a more complicated way of saying, as statutes routinely do, that the policyholders shall have no further liability or obligations.

<sup>89</sup> WEINSTEIN & BERGER, *supra* note 29.

<sup>90</sup> VA. CODE ANN. § 65.2-404(B) (2002) (emphasis added).

<sup>91</sup> *Id.* § 65.2-515(A) (emphasis added).

Although courts and academic commentators have frequently asserted that irrebuttable presumptions are really just rules of substantive law<sup>92</sup> (and that is usually true), the Virginia General Assembly has gotten so swept up in the fun that it sometimes uses such presumptions to announce rules of *procedure* as well. When it does so, however, the language of a presumption is typically employed in a context where it means nothing at all. For example, one Virginia statute on service of process declares:

In the case of a nonresident defendant not licensed by the Commonwealth to operate a motor vehicle, . . . the address reported by such a defendant to any state or local police officer, or sheriff investigating the accident sued on, if no other address is known, shall be *conclusively presumed to be* a valid address of such defendant for the purpose of the mailing provided for in this section . . . .<sup>93</sup>

This “conclusive presumption” is nothing more than a specification of those addresses that are proper for the service required under that statute. The four otiose words italicized here should have been left out of this statute entirely; their omission would not change the meaning or the operation of this strange statute in the slightest degree.

Likewise, one portion of Virginia’s Banking and Finance Law decrees with lamentable ambiguity that “[s]ervice on a party to the account made at the address on record at the financial institution shall be *presumed to be* proper service for the purposes of this section.”<sup>94</sup> If the Virginia General Assembly had intended to make this “presumption” rebuttable, they easily could (and probably would) have said so, although it is extremely unlikely that they could have intended something so bizarre. Statutes defining proper methods of service are useless unless they are written with precision and clarity. Any statute that announces a merely *rebuttable* presumption that some address will be sufficient for service of process would be tantamount to a statutory dare to “roll the dice and use this address for service at your peril, for only time will tell whether the judge will later conclude that the defendant can rebut the presumption that this address is usually the right one to use.”<sup>95</sup> On the other hand, in the much more likely event that the General Assembly meant for this presumption to be conclusive, then the three words italicized above—the so-called “presumption” in this statute—were completely redundant, and the meaning of the statute would not be changed in the slightest detail if they were deleted altogether.

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<sup>92</sup> See *supra* note 61.

<sup>93</sup> VA. CODE ANN. § 8.01-313(A)(2) (2000) (emphasis added).

<sup>94</sup> *Id.* § 6.1-125.3(D) (1999) (emphasis added).

<sup>95</sup> Perhaps the only truly fitting title for such a statute would be: “DO YOU FEEL LUCKY, PUNK?”

It has been observed that every *statute of limitations* is, for all practical purposes, a “conclusive presumption” that actions after that deadline are barred.<sup>96</sup> Some Virginia statutes make that explicit, by using irrebuttable presumptions as a roundabout way of prescribing a statute of limitations. For example, Virginia’s Domestic Relations Law provides:

A child born to a surrogate within 300 days after assisted conception pursuant to an order under subsection B of § 20-160 or a contract under § 20-162 is *presumed* to result from the assisted conception. *This presumption is conclusive* as to all persons who fail to file an action to test its validity within two years after the birth of the child.<sup>97</sup>

Here we see that the traditional language of an irrebuttable presumption is simply being used to state that any action to challenge the rebuttable presumption must be brought within two years after the birth of the child. For other examples in which an irrebuttable presumption was unnecessarily used to define a statute of limitations, Virginia law declares that it is “conclusively presumed” that (1) a voter’s registration was proper if no petition to challenge that registration is filed within six months,<sup>98</sup> (2) all writings admitted to record were in proper form for recording if they are not challenged within three years after they were recorded, except in cases of fraud,<sup>99</sup> and (3) the transfer of church property was properly conducted if no petition seeking to set such a transfer aside is filed within one year after the trustees’ deed is recorded.<sup>100</sup> If all irrebuttable presumptions are truly unconstitutional, then all of these statutes must be struck down on the grounds that they deny due process to everyone who is denied the chance to contest the regularity of some filing just because nobody objected to it sooner. In fact, there was no need to use any presumption, much less a conclusive one, in any of these statutes. All of them could have made the same point by declaring that any action to challenge or dispute the legality or propriety of some event must be filed within a certain period after that event. That is what statutes of limitations *always* do.

Other Virginia statutes employ the language of presumptions in contexts where it has absolutely no meaning at all. The Virginia Freedom of Information Act contains this provision:

Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public

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<sup>96</sup> *Stogner v. California*, 539 U.S. 607, 616 (2003).

<sup>97</sup> VA. CODE ANN. § 20-163(D) (2004) (emphasis added).

<sup>98</sup> *Id.* § 24.2-434 (2006).

<sup>99</sup> *Id.* § 55-106.2 (2003).

<sup>100</sup> *Id.* § 57-15(B) (Supp. 2006).

records and meetings shall be *presumed* open, unless an exemption is properly invoked.<sup>101</sup>

In the last sentence of this paragraph the word *presumed* has no discrete meaning at all. The obvious intent of the assembly was to specify that all public records and meetings shall be open to the public unless some specific statutory exception applies, but that is precisely what this sentence would have said if that meaningless word were simply deleted. Then again, that is exactly what this paragraph would have said if that entire *sentence* were deleted, since the preceding sentence said the same thing.

Another portion of the Virginia Freedom of Information Act contains perhaps the most bizarre presumption on the books in this state, when it curiously provides that “[a]ny failure by a public body to follow the procedures established by this chapter shall be *presumed* to be a violation of this chapter.”<sup>102</sup> Well, of course it is; that always goes without saying. The statute contains no mention of any possibility that this presumption may be rebutted, and certainly appears to create a conclusive presumption, but it would be absurd to strike it down as unconstitutional on those grounds. Otherwise a public body charged with a violation of this law could always remind the judge: “Sorry, Your Honor, but your hands are tied; it would be unconstitutional to conclusively find us in violation of this chapter merely because we failed to follow the procedures it requires!”

Here is another example of a Virginia statute in which an irrebuttable presumption is used for no real purpose at all. Virginia’s Workers’ Compensation Law dogmatically decrees: “Every employer and employee, except as herein stated, shall be *conclusively presumed* to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby.”<sup>103</sup> Imagine the consequences for Virginia’s tort law system if this conclusive presumption were struck down on the grounds that “all irrebuttable presumptions are unconstitutional”! By that logic, every injured worker who wishes to sue his employer should be able to insist “Well, *I* never agreed to accept workers’ compensation benefits as my exclusive remedy, and my right to due process means that I must be given the chance to rebut the application of that inflexible presumption to defeat my right to sue my employer.” That would be nonsense, of course. Any plaintiff who took that position would surely be advised by the judge: “You don’t understand; your willingness to be bound by this law is simply

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<sup>101</sup> *Id.* § 2.2-3700(B) (2005) (emphasis added).

<sup>102</sup> *Id.* § 2.2-3713(E) (emphasis added).

<sup>103</sup> *Id.* § 65.2-300(A) (2002) (emphasis added).

immaterial, because you are subject to this law whether you like it or not.” But that is why there was no need to insert this silly and irrelevant presumption in this statute to begin with. In truth, this is another poorly drafted statute that should not have mentioned any presumption at all. Its point could have been made more accurately and succinctly by simply declaring that all employers and employees are bound by this statutory scheme, and that it shall furnish the employees’ exclusive remedy. The gratuitous extra nonsense about a make-believe presumption that “we will all pretend that everyone has agreed to accept and comply with this statute” is no more necessary here than it would be at the beginning of any other law, including statutes (such as the capital murder law) that impose far more drastic penalties for their violation.

Besides, it does great violence to the concept of a “presumption” when it is used, as it is here, to insist that something is true when we know that it is virtually always false. Genuine presumptions are always used to establish facts that we know to be true at least most of the time, even though we know they might be false in a given case (for example, that a man inexplicably missing for seven years is presumably deceased<sup>104</sup>). But for a legislature to dogmatically decree with a gratuitous conclusive presumption that all the state’s workers and employers have agreed to something, even though they were given no say in the matter and many of them were born after the legislation was written, is as unnecessary—and as unhelpful—as the days when my mother unpersuasively insisted to her children: “You’ll eat it, and you’ll *like* it.”

#### IV. CONCLUSION

When the Supreme Court of Virginia laid down the rule in *Newman* that all presumptions “must be rebuttable” to survive constitutional scrutiny, it announced a standard that was incoherent and indefensible. If that standard were consistently applied to every statute that operates *exactly* like an irrebuttable presumption, it would lead to legal anarchy and would require the overturning of nearly every substantive rule of Virginia law. On the other hand, if the ruling in *Newman* is to be applied only to those statutes that explicitly use the words “presume” or “presumption,” it creates a trivial and absurd rule that can be easily circumvented by the legislature any time it pleases. Either way, that ruling—if consistently followed—would require the invalidation of many poorly drafted laws on the books, because of the Virginia General Assembly’s unfortunate penchant for gratuitously using the language of conclusive presumptions when drafting definitions, substantive and procedural legal rules, and even for no particular purpose at all. It would

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<sup>104</sup> *Id.* § 64.1-105(A)(1).

also require the rejection of the many irrebuttable and conclusive presumptions that the Supreme Court of Virginia has created on its own, like the conclusive presumption that a child under the age of seven cannot be guilty of contributory negligence.

Why has that not yet taken place? The only possible explanation is that the lawyers in this state can be divided into four groups: (1) some simply do not know about the holding in *Newman*, even though it has now been on the books for a quarter of a century; (2) of those who know about *Newman*, some have not stopped long enough to think carefully about its outrageous implications; (3) of those lawyers who have realized those implications, all but one of them, in a remarkable demonstration of unselfish loyalty to the legal system, have chosen to not say anything for fear of temporarily unraveling that system altogether; and then (4) there's me.

Well, now the cat is out of the bag, and it's just as well. The answer to this problem is perfectly clear. There are two things that need to be done in Richmond, and the sooner the better.

The Supreme Court of Virginia must take the first available opportunity to explicitly overrule its statement in several cases, most recently *Newman*, that presumptions must be rebuttable to comply with the commands of the due process clause. That rule must be rejected entirely, and not merely watered down or qualified, because it is totally false and there was never any trace of truth or sense to it at all.<sup>105</sup>

Meanwhile, the Virginia General Assembly could do us all a great favor if it would stop writing statutes that explicitly create a "conclusive presumption," and then remove that phrase from the several dozen statutes where it now appears. That language is never necessary in any statute, and its lamentable frequency in the Virginia Code can only lead to a wide range of tragic and comical results as long as the highest court of the state insists that such presumptions are always unconstitutional.

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<sup>105</sup> To be truly gracious, the court might even go so far as to confess that what it said in *Newman* was never true, not even when it was first written, although it might be easier for the court to save face by simply declaring that *Newman* has been effectively overruled by subsequent decisions by the Supreme Court of the United States, including *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).