STEPPING BACK FROM THE THICKET: A PROPOSAL FOR THE TREATMENT OF REBUTTABLE PRESUMPTIONS AND INFERENCES

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TABLE OF CONTENTS

I. INTRODUCTION

Rebuttable presumptions and inferences address a very common situation: Proving one fact indirectly by establishing other facts that support the existence of the presumed or inferred fact. Beneath the calm surface of this simple proposition, this area of law has evolved into a confused and unpredictable state. Few legal concepts have generated the amount of confusion that has characterized the use of rebuttable presumptions in civil proceedings. One commentator has summarized the frustration awaiting those who venture into this legal thicket, stating: "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of

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despair."[1] Despite extensive commentary,[2] dealing with rebuttable presumptions in civil litigation remains as difficult and unpredictable as ever.

The Iowa Supreme Court has described this area as a "thicket" that must eventually be tamed.[3] The Advisory Committee for the Iowa Rules of Evidence also recognized this confusion and was initially unable to agree on appropriate language for a rule governing presumptions in civil proceedings.[4] On July 1, 1986, the Supreme Court Advisory Committee on the Rules of Evidence submitted its recommendations for the treatment of rebuttable presumptions.[5] To date, the Committee's recommendations have not been acted

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1. Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. 255, 255 (1937), *quoted in* RICHARD O. LEMPERT & STEPHEN H. SALTZBURG, A MODERN APPROACH TO EVIDENCE 803 (2d ed. 1982). Judge Learned Hand was less charitable in his critique, stating: "Judges have mixed it up until nobody can tell what on earth it means and the important thing is to get something which is workable and which can be understood and I don't much care what it is." Learned Hand, 18 A.L.I. PROC. 217-18 (1941), *quoted in* Neil S. Hecht & William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U. L. REV. 527, 527 (1978).

2. *See* Mason Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L.J. 275, 275 n.1 (listing authorities comprehensively); *see also* EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 344, at 973 n.1 (3d ed. 1984); 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 65 (1977); 1 JACK B. WEINSTEIN & MATTHEW BERGER, WEINSTEIN'S EVIDENCE § 301, at 301-17 (1979); Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. Rev. 697, 697 n.2 (1984); *see generally* Ann Lents, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEX. L. REV. 1329 (1974); J.P. McBaine, *Presumptions: Are They Evidence?*, 26 CAL. L. REV. 519 (1938).

3. "The commentators are in much disagreement as to the effect of contrary evidence on a presumption. . . . We do not enter that thicket at this time, but hold as a legal proposition on the present record that the presumption of mailing the notice . . . was dispelled." Liberty Mut. Ins. Co. v. Caterpillar Tractor Co., 353 N.W.2d 854, 859 (Iowa 1984) (citations omitted).

4. Iowa R. Evid. 301 provides:

> Nothing in these rules shall be deemed to modify or supersede existing law relating to presumptions in civil actions and proceedings.
>
> **[1983 Advisory Committee Comment]**
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> The Committee has not reached a consensus as to appropriate language for a rule governing presumptions in civil actions and proceedings. *In re* Estate of Givens, 119 N.W.2d 191 (Iowa 1963), suggests that presumptions are evidence and that "clear, satisfactory and convincing evidence" is needed to rebut a presumption. Federal Rule 301, as applied, permits rebuttal based on sufficient evidence such that a factfinder can act upon it. Omaha Indian Tribe (Treaty of 1854) v. Wilson, 575 F.2d 620 (8th Cir. 1978). If the Federal Rule 301 were adopted, Courts could not balance the weight attributable to a specific presumption against the rebutting evidence, as in Eygabroad v. Gruis, 247 Iowa 1346, 79 N.W.2d 215 (1956). Rather, all rebuttable presumptions would be treated as a procedural device that only shifts the burden of going forward to the opposing party.

IOWA R. EVID. 301.

5. The recommendation states, in part:

> For over two years, [the Iowa Supreme Court's] Committee has been investigating the need for and proposals concerning Uniform Iowa Rules of Evidence regarding presumptions. Iowa statutory law was surveyed concerning usage of the terms "prima facie," "burden of proof" and "presumption." The terms,

upon, and the Iowa Rules of Evidence do not address rebuttable presumptions.

Regardless of the difficulties that exist in this area, rebuttable presumptions are a permanent fixture on the landscape of civil law[6] and can be a deciding factor in certain cases. Members of the bench and bar are continually faced with presumptions,[7] and many presumptions are governed by different legal standards. The current state of law leaves Iowa practitioners guessing as to how certain presumptions should be treated.[8] In some cases, this void has the practical effect of turning judges into legislators, raising concerns about the separation of power between the judiciary and the legislature.[9] Judges, lawyers, and legislators need workable guidelines for establishing and using rebuttable presumptions. A starting point for this reform should be Iowa Rule of Evidence 301.

The purpose of this Article is to propose a rule of evidence to govern the use of rebuttable presumptions and inferences. As a starting point, this Article provides a background for analysis with a discussion of the relevant definitions and an examination of the reasons that form a foundation for rebuttable presumptions. This Article then discusses the role of rebuttable presumptions in litigation and reviews the two competing theories that have

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> or variations thereof, appear throughout the Iowa Code in approximately 374 statutes. We found very little continuity with respect to usage.
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> In order to provide consistency with respect to the application of terms such as "presumption," "burden of proof," "inference" and "prima facie," the Committee researched many different theories and tried to assess their impact on Iowa's statutory and case law. Our goal was to create Rules concerning presumptions that would assist the trial court and bar without disrupting the existing statutory and case law.

The Committee's recommendation is reprinted in 1 ALLAN D. VESTAL & PHILIP WILLSON, IOWA PRACTICE § 37:23 (Supp. 1992). Further, the Committee recommended Iowa adopt a rule of evidence modeled after the Hawaii rules. *Id.* For a discussion of the Committee's proposal, see *infra* text accompanying notes 172-76.

6. "The term presumption seems likely to be with us forever . . . ." JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 344, at 589 (4th ed. 1992). "[B]oth the term and concept of a presumption, however misunderstood, are so engrained in the law that it is difficult to imagine their early demise." *Id.* at 588.

7. In addition to rebuttable presumptions created by judicial decision, a cursory review of the Iowa Code reveals dozens of presumptions created by statute. Presumptions may appear in almost any civil proceeding, ranging from property disputes, *e.g.*, Frederick v. Shorman, 147 N.W.2d 478, 483 (Iowa 1966) (holding deed executed and delivered creates presumption to convey), to civil rights actions, *e.g.*, Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 165 (Iowa 1983) (discussing rebuttable presumptions in employment discrimination). To further complicate this area, new types of rebuttable presumptions are continually created. *See, e.g.*, IOWA CODE § 562A.36 (1993) (creating presumption of retaliatory action by landlord against tenant).

8. Unfortunately, there does not appear to be a general rule for evaluating the weight of presumptions or determining which standard will apply to the party opposing the presumed fact. 7 JAMES A. ADAMS & KASEY W. KINCAID, IOWA PRACTICE, EVIDENCE § 301.1 (1988).

9. *See infra* note 120 and accompanying text.

dominated this area of law. After this background is provided, this Article examines the problems involved with the use of rebuttable presumptions and inferences in Iowa. The analysis then shifts to an evaluation of Federal Rule of Evidence 301 and the treatment of rebuttable presumptions in other states. After this Article critiques the rules from other jurisdictions, it offers a proposed rule of evidence.

This Article steps away from the notion that all rebuttable presumptions should be treated in an identical fashion. Rather than focusing on the prominent theories as an advocate or opponent, this analysis focuses on presumptions in the context of their historical development and individual nature. The proposed rule of evidence offered in this Article provides a framework to accommodate the unique aspects of each class of rebuttable presumptions.

II. A BACKGROUND FOR ANALYSIS: UNDERSTANDING REBUTTABLE PRESUMPTIONS AND INFERENCES

A. *Definitions*

One source of confusion in this area has been the inconsistent use of important terms.[10] Any attempt to improve this area of law must provide for clarity in the use of key terms and minimize the consequences of a misapplication of terminology. Two terms central to this analysis are "rebuttable presumption" and "inference." Other terms related to this discussion are "conclusive presumption," "prima facie case," and an "assumption."

When viewed in the abstract, the differences between these terms may appear to be academic distinctions with no practical significance. When these terms are applied to a particular dispute, however, their distinction may be the deciding factor in a case.[11]

A rebuttable presumption is a legal fiction[12] that allows the finder of fact to determine "the existence of one fact (the presumed fact), for which

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10. One commentator summarized the consequences of imprecision in this area:

> A discussion of presumptions in Iowa is handicapped at the outset by the difficulty of determining whether in a given case the court is raising a true presumption or a mere permissible inference. The tendency of the Iowa court is to use interchangeably the terms "presumption," "inference," "*prima facie* case," "presumption of law," and "presumption of fact."

Note, *Presumptions in the Law of Iowa*, 20 IOWA L. REV. 147, 147 (1934) (citations omitted). In the past, the phrase "presumption of fact" was used to describe an inference and the phrase "presumption of law" was used to describe a rebuttable presumption. *See* BLACK'S LAW DICTIONARY 1186 (6th ed. 1990). The current trend is to reject the use of the phrases "presumption of fact" and "presumption of law." *Id.*

11. *See infra* text accompanying notes 22-27.

12. Each rebuttable presumption contains an element of legal fiction, because evidence is offered to demonstrate the basic facts, not the presumed fact. Some rebuttable presumptions

there may be no direct evidence, upon presentation of proof of other facts (the basic facts)."[13] Once the basic facts supporting the rebuttable presumption are established, the existence of the presumed fact will be assumed until the opposing party meets a specific burden to challenge the existence of the presumed fact.[14] A rebuttable presumption is "coercive: once the basic facts are established, the trier of fact is compelled to find the ultimate fact unless evidence of the nonexistence of the ultimate fact has been introduced."[15] Rebuttable presumptions may be created by legislation or judicial opinion,[16] and are normally based on logic, judicial economy, social policy, and common sense.[17] Once a party establishes a rebuttable presumption, the burden placed on the party opposing the presumption may be a relatively light burden of production or a heavier burden of persuasion. This burden may be the deciding factor in a case. Unfortunately, Iowa law leaves this burden undefined in many situations.

An inference is a close cousin of the rebuttable presumption. Unfortunately, the terms have been used interchangeably and the distinction between an inference and a rebuttable presumption has become blurred. An inference is a logical conclusion the finder of fact is permitted, but not required, to make once certain basic facts are established.[18] An inference is distinguished from a rebuttable presumption because the finding of an inference is never mandatory, even if no evidence is offered to rebut the inferred fact.[19] Another difference between an inference and a rebuttable presumption is that the consideration of an inference is not limited to the basic facts introduced to support the inference.[20] Unlike a rebuttable presumption, the inference can be made in light of all the evidence produced.[21]

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are based entirely on a legal fiction, such as those created by the Uniform Simultaneous Death Act. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 33 (1962); *see infra* text accompanying notes 46-47.

13. ADAMS & KINCAID, *supra* note 8, § 301.1, at 96. For a presumption to be valid, there must be a rational connection between the basic and presumed facts. *See* STRONG ET AL., *supra* note 6, § 345, at 589.

14. ADAMS & KINCAID, *supra* note 8, § 301.1, at 96.

15. Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431, 438 (1980-81).

16. *Presumptions in the Law of Iowa*, *supra* note 10, at 152.

17. *See infra* text accompanying notes 41-60.

18. ADAMS & KINCAID, *supra* note 8, § 301.1, at 96. An example of an inference is the doctrine of *res ipsa loquitur*. Iowa adheres to the majority view that *res ipsa loquitur* amounts to an inference of negligence. *See* Schneider v. Swaney Motor Car Co., 136 N.W.2d 338, 343 (Iowa 1965).

19. *See* ADAMS & KINCAID, *supra* note 8, § 301.1, at 96-97.

20. ADAMS & KINCAID, *supra* note 8, § 301.1, at 97.

21. In other words, the inference instruction is not uniquely an aspect of the law of presumptions but is part of the larger problem of the sufficiency of the evidence. David W. Louisell, *Construing Rule 301: Instructing the Jury on Civil Actions and Proceedings*, 63 VA. L. REV. 281, 310 (1977).

When the terms rebuttable presumption and inference are used interchangeably, the effect is to minimize any differences between them. The differences between a rebuttable presumption and an inference, however, may be the deciding factor in a particular case. Consider a situation in which a party against whom an inference is directed produces no evidence to challenge the inference. If the party that established the inference moves for a directed verdict, the opponent's silence will not, in itself, be sufficient to grant the directed verdict.[22] In contrast, if a party opposing a rebuttable presumption remains silent, the presumed fact must be found to exist.[23] In that situation, the party that established the rebuttable presumption will likely prevail on a motion for a directed verdict.[24]

The distinction between these two concepts may also be significant when it is time to instruct the jury. If evidence is submitted to challenge an inference, the logical force of the inference remains and the finder of fact may consider the inference.[25] On the other hand, some cases hold if a specific amount of evidence is introduced to oppose the presumed fact, the rebuttable presumption disappears entirely from the case and the finder of fact cannot consider the presumption.[26] In that event, a rebuttable presumption will have less strength than an inference.[27]

In spite of scholarly debate and complex distinctions, rebuttable presumptions and inferences are nothing more than the formalization of a relatively simple exercise in logic.[28] Everyone routinely uses a similar thought process as part of everyday life. For example, when people wake they may conclude it rained overnight because the roads are wet and water is standing, even though they did not see or hear the rainfall. Rebuttable pre-

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22. *See* ADAMS & KINCAID, *supra* note 8, § 301.1, at 96.

23. *Id.*

24. *Id.*

25. *Id.* at 96-97.

26. *See* Dyson v. Dyson, 25 N.W.2d 259, 262 (Iowa 1946) (stating "presumptions disappear when facts to the contrary appear").

27. "The strict operation of the bursting bubble theory may give a presumption less force that an inference . . . ." CLEARY ET AL., *supra* note 2, § 344, at 975 n.16.

28. Presumptions were a part of English law as early as 1628. *See* McBaine, *supra* note 2, at 522. Even though the ancient presumptions bear little resemblance to their modern counterparts, consideration of the following example illustrates the logical simplicity behind rebuttable presumptions.

The first treatise on evidence in English law was published in 1754 and contained this description of a violent, or strong, presumption:

> As if a Man be found suddenly dead in a Room, and another be found running out in Haste with a bloody Sword.
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> This is a violent Presumption that he is the Murderer, for the Blood, the Weapon, and the hasty Flight, are all the necessary Concomitants to such horrid Facts, and the next Proof to the Sight of the Fact itself, is the Proof of those Circumstances that do necessarily attend such Fact.

Id. at 522-23 (quoting CHIEF BARON GILBERT, THE LAW OF EVIDENCE, BY A LATE LEARNED JUDGE (1754)).

sumptions and inferences stem from that same thought process, even though generations of legal development have contorted this basic logic.

Rebuttable presumptions and inferences must be distinguished from three other legal concepts: a conclusive presumption, a prima facie case, and an assumption. A conclusive, or irrebuttable, presumption is actually a substantive rule of law that requires the finding of a presumed fact once certain basic facts are established.[29] A conclusive presumption is distinguished from a rebuttable presumption because no evidence to rebut the conclusively presumed fact will be admitted.[30]

Another legal concept often linked with rebuttable presumptions is the prima facie case.[31] This phrase has developed into a somewhat ambiguous concept that encompasses two meanings.[32] A prima facie case may mean evidence sufficient to require a particular conclusion in the absence of an explanation.[33] In that situation, the prima facie case has the effect of a rebuttable presumption. A prima facie case may also describe evidence sufficient to permit the suggested conclusion, similar to an inference.[34]

The word "presumption" has also been used to describe facts that are assumed by law to be true.[35] Several assumed facts have been labeled as presumptions even though they do not fall within the definition of a rebuttable presumption.[36] As previously defined, a rebuttable presumption does not come into existence until the party seeking to establish the presumed fact has presented sufficient evidence to support a finding of the basic facts from which the presumed fact may follow.[37] In certain situations, an assumption has been labeled as a presumption, even though the assumption exists without the establishment of any basic facts.[38] For example, the "presumption" of regularity of administrative procedure is not a rebuttable presumption because the assumed fact exists without the production of any evidence concerning the regularity of the administrative procedure.[39] Evidence of the

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29. STRONG ET AL., *supra* note 6, § 342, at 579.

30. *Id.*; *see also* Larson v. Board of Trustees of Police Retirement Sys., 401 N.W.2d 860, 862-63 (Iowa 1987) (Wolle, J., dissenting).

31. *See* Broun, *supra* note 2, at 699.

32. *See* BLACK'S LAW DICTIONARY 1189-90 (6th ed. 1990).

33. *See* Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 168-69 (Iowa 1983) (Schultz, J., concurring in part and dissenting in part); *see also* Louisell, *supra* note 21, at 291.

34. *See* CLEARY ET AL., *supra* note 2, § 342, at 965 n.4.

35. *See* ADAMS & KINCAID, *supra* note 8, § 301.1, at 98; Steven P. Smith, Note, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1106-07 (1984).

36. *See* ADAMS & KINCAID, *supra* note 8, § 301.1, at 98.

37. *See supra* text accompanying notes 12-17; *see also* ADAMS & KINCAID, *supra* note 8, § 301.1, at 98.

38. *See* ADAMS & KINCAID, *supra* note 8, § 301.1, at 96; Smith, *supra* note 35, at 1106-07.

39. Johnson v. Board of Adjustment, 239 N.W.2d 873, 887 (Iowa 1976).

procedure's regularity becomes necessary only when its regularity has been challenged.[40]

B. *Policies Underlying Rebuttable Presumptions*

Legal commentators have summarized several policies supporting the use of rebuttable presumptions.[41] To analyze this area effectively, it is important to understand the various rationale that form a historical basis for rebuttable presumptions.[42] Further, a proposed rule of evidence must allow courts to take these underlying policies into account.

The cornerstone for many rebuttable presumptions is probability. A rebuttable presumption will avoid wasted time and effort when the presumed fact is strongly based on logic and common sense. Professor Morgan summarized this rationale by stating: "To save time, it is well for the court to compel the trier of fact to assume the usual and to require the party relying upon the unusual to show that he has at least enough evidence to make its existence reasonably probable."[43] An example of this rational is the rebuttable presumption that "an employee is presumed to be acting within the course of employment while using [the] employer's property."[44] Dean Mason Ladd described this as the "'logical core'" of a rebuttable presumption.[45]

A rebuttable presumption may also serve to avoid a procedural impasse caused by a lack of evidence. An example of this rationale can be found in the Simultaneous Death Act.[46] Without this rebuttable presumption, it would be extremely difficult to unravel the complexities presented when two or more family members die simultaneously.[47]

In some situations, a rebuttable presumption accounts for special access to evidence by one of the parties. This purpose can be illustrated by the presumption that damage to property in the possession of a bailee was due to the

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40. *Id.*; *see also* Millwright v. Romer, 322 N.W.2d 30, 34 (Iowa 1982) (stating the presumption all persons know the law).

41. *See generally* Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 916-31 (1931).

42. Ladd, *supra* note 2, at 279-81; Louisell, *supra* note 21, at 292-96.

43. Morgan, *supra* note 1, at 257-59; *see also* Dyson v. Dyson, 25 N.W.2d 259, 262 (Iowa 1946) (stating presumptions conform to the common experiences of mankind).

44. Ladd, *supra* note 2, at 280.

45. *In re* Estate of Givens, 119 N.W.2d 191, 196 (Iowa 1963) (quoting Mason Ladd, Workshop Outlines submitted at the 86th Annual Meeting of the Iowa State Bar Association (June 1959)).

46. Iowa Code § 633.523 (1993).

47. *See* Carpenter v. Severin, 204 N.W. 448, 452 (Iowa 1925) (facing impasse prior to adoption of Uniform Simultaneous Death Act).

negligence or fault of the bailee.[48] This presumption takes into account the bailee's superior access to the evidence.[49]

Many presumptions exist to further a socially desirable policy. For example, the rebuttable presumption of the legitimacy of a child born in wedlock serves the socially desirable result of legitimizing the child.[50] Other rebuttable presumptions impacting socially desirable policies can be found in civil rights cases[51] and cases involving the presumption of death after an unexplained absence.[52]

Most, if not all, rebuttable presumptions encompass several of these underlying rationale. One example of a rebuttable presumption serving many purposes is the presumption a person is dead after a long absence.[53] This presumption furthers the social policy of allowing family members to continue their affairs with legal certainty.[54] It also accommodates those family members that are not likely to have any specific knowledge of the circumstances surrounding the disappearance.[55] It may be difficult or impossible for family members to find evidence about the disappearance. Finally, this presumption is consistent with common experience.[56]

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48. U.C.C. § 7-403(1)(b) (1992); *see also* STRONG ET AL., *supra* note 6, § 343, at 581. Iowa law does not include this presumption. *See* IOWA CODE § 554.7403(1)(b) (1993); *see also* United States v. Cloverleaf Cold Storage Co., 286 F. Supp. 680, 681-83 (N.D. Iowa 1968).

49. STRONG ET AL., *supra* note 6, § 343, at 581.

50. *In re* Marriage of Schneckloth, 320 N.W.2d 535, 537 (Iowa 1982).

51. *See, e.g.*, Linn Co-op Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981) (discussing prima facie case for employment discrimination).

52. *See* STRONG ET AL., *supra* note 6, § 343, at 581; Francis T. Freeman Jalet, *Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees*, 54 IOWA L. REV. 177, 181-85 (1968).

53. Jalet, *supra* note 52, at 181-85.

54. *Id.* at 181-82.

55. *Id.* at 184-85.

56. *See* Louisell, *supra* note 21, at 292-93. Rebuttable presumptions in employment discrimination cases also encompass several of these underlying rationale. *See, e.g.*, Linn Co-op Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981). This type of presumption is designed to further the social policy of equality in the workplace. *See generally* Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 934 (1993). These rebuttable presumptions also provide a legal mechanism to account for the restricted access to evidence an employee is likely to have. *See id.* Furthermore, a rebuttable presumption that allows a finding of discrimination after a showing of certain extreme types of harassment is, in many cases, strongly based on logic and probability.

Perhaps no other type of rebuttable presumption has been the center of as much controversy as those that deal with employment discrimination. Those who advocate shifting the burden of proof to the defendant once a rebuttable presumption has been established consider this procedural protection to be critical to the enforcement of civil rights legislation. *See* Julius L. Chambers, *Twenty-Five Years of the Civil Rights Act: History and Promise*, 25 WAKE FOREST L. REV. 159, 170-71 (1990). Opponents to shifting the burden of proof assert that this creates a procedural disadvantage to employers that will lead to *de facto* quotas. *See* Rotunda, *supra*, at 925. This area of law is still developing. *See* 42 U.S.C. § 2000 e-2 (m) (West Supp. 1993); St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).

Rebuttable presumptions are often discussed collectively.[57] An examination of the underlying rationale shows, however, each rebuttable presumption was created in response to unique policy considerations and factual circumstances.[58] In reality, this area of law is composed entirely of many individual presumptions. "In a sense, each presumption is a law unto itself,"[59] and the strength of any specific presumption is directly related to the strength of the policies that serve as a foundation for the presumption.[60]

C. *The Effect of Rebuttable Presumptions on Litigation: A Review of the Competing Theories*

The effect of rebuttable presumptions in litigation has been the primary focus of this debate.[61] A rebuttable presumption becomes important at two stages of a trial: first, when one party moves for a directed verdict, and second, when the time comes to instruct the jury.[62]

Two competing theories, the Thayer theory and the Morgan theory, have dominated this debate. The primary differences between the Thayer and Morgan theories concern the amount of evidence necessary to effectively rebut a presumed fact[63] and the effect that rebuttal evidence has on whether the jury may consider the rebuttable presumption. Preoccupation with these theories has arguably limited this discussion and stifled new ideas that do not fall squarely within the framework of either theory. Even though this Article advocates stepping away from these theories, their review provides a necessary background.

One theory is known as the Thayer or "bursting bubble" theory.[64] This theory states a rebuttable presumption will place a burden of *production* on

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57. *See infra* text accompanying notes 153-54.

58. *See supra* text accompanying notes 41-56.

59. Louisell, *supra* note 21, at 296.

60. Breeden v. Weinberger, 493 F.2d 1002, 1006 (4th Cir. 1974). "'[T]he policies underlying a particular presumption govern the measure of persuasion required to escape its effect.'" *Id.* (citing CLEARY ET AL., MCCORMICK ON EVIDENCE § 345, at 829 (2d ed. 1972)).

61. The Oklahoma Court of Appeals described the role of presumptions in litigation as that of "legal lifesavers tossed out by statute or decisional law to litigants foundering helplessly in a jurisprudential sea of injustice." Brown v. Oklahoma Transp. Co., 588 P.2d 595, 601 (Okla. Ct. App. 1978).

62. STRONG ET AL., *supra* note 6, § 344, at 582. There is some dispute concerning whether rebuttable presumptions should have a role in the consideration of a motion for summary judgment. *See generally* Smith, *supra* note 35, at 1101.

63. The rebuttal evidence discussed here is evidence challenging the existence of the presumed fact. This evidence is distinguished from evidence offered to challenge the existence of the basic facts. *See* ADAMS & KINCAID, *supra* note 8, § 301.1, at 98-99. If the basic facts are successfully challenged, a rebuttable presumption never comes into existence. *Id.* If a challenge to the basic facts fails, the rebuttable presumption becomes a part of the case and the challenge must be directed at the presumed fact. *Id.*

64. Although this theory bears the name of Professor James B. Thayer, a great evidentiary scholar, some commentators doubt Professor Thayer would have advocated as strict a rule

the opponent, however, the burden of *persuasion* will not shift.[65] Also, once evidence is introduced to rebut the presumed fact, the Thayer rule requires the rebuttable presumption to disappear from the case.[66] Under this rule, the rebuttable presumption vanishes from the case when evidence is introduced supporting a finding of the nonexistence of the presumed fact.[67]

This theory has often been described using metaphors. One judicial opinion described rebuttable presumptions under this rule as "bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."[68] Another commentator described them as "Maeterlinick's male bee, having functioned they disappear."[69]

The competing theory, referred to as the Morgan theory, states that a rebuttable presumption will shift both the burdens of *production and persuasion* to the opposing party.[70] The Morgan rule requires the party opposing a rebuttable presumption to sustain a burden of persuasion in addition to a burden of production.[71] By shifting the burden of persuasion, the Morgan rule accords more strength to a rebuttable presumption than the Thayer rule.[72] Furthermore, under the Morgan theory, a rebuttable presumption will not "disappear" from the case if evidence is introduced to rebut the presumption.[73] Some consider the extra strength the Morgan rule accords to a

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as the one that bears his name. *See* Broun, *supra* note 2, at 701 n.23; Alfred L. Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 406-08 (1956). Criticism of this theory, therefore, is not intended as criticism of Professor Thayer's scholarship.

65. *See* STRONG ET AL., *supra* note 6, § 344, at 582-83.

66. *Id.* at 583.

67. *See id.*

68. Mockowik v. Kansas City, St. J. & C.B. R.R., 94 S.W. 256, 262 (Mo. 1906).

69. Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 314 (1920). Dean Mason Ladd described rebuttable presumptions under the Thayer rule with this prose:

> A presumption is like the poppy seed
> You seize the flower and the bloom is shed
> Or like the snow fall on the river
> A moment seen and then gone forever

Ladd, *supra* note 2, at 282.

70. STRONG ET AL., *supra* note 6, § 344, at 586-87.

71. *Id.* at 586.

72. *See id.* at 586-87.

73. *Id.* at 587.

presumption to be this rule's primary strength,[74] and others consider it to be the rule's principal flaw.[75]

The conflict between the Thayer and Morgan theories present two closely related, yet distinct, issues. One issue concerns whether the rebuttable presumption shifts the burden of persuasion, or only creates a lesser burden of production.[76] The other issue is whether a rebuttable presumption is, in itself, evidence to be considered by the finder of fact, or whether it disappears in the face of contrary evidence.[77]

The Thayer and Morgan rules treat the relationship between the burden of persuasion and a rebuttable presumption in opposite fashions. Under the Thayer rule, there is no relationship between the burden of persuasion and a rebuttable presumption because the burden of persuasion never shifts.[78] This view, which attempts to separate the legal concepts of a rebuttable presumption and the burden of persuasion, is contrary to a significant body of law that recognizes the relationship between these concepts. For example, in *Lavine v. Milne*,[79] the Supreme Court acknowledged the relationship between a rebuttable presumption and the burden of proof, stating: "Despite the rebuttable presumption aura that the [provision involved] radiates, it merely makes absolutely clear the fact that the applicant bears the burden of proof on this issue . . . ."[80] In contrast to the Thayer rule, the

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74. "If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words . . . or the reception in evidence of a writing." Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 82 (1933); *see also* Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937) (stating the bursting bubble theory accords presumptions too "slight and evanescent" an effect).

75. *See* Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 230 (1953) (stating this theory would make any evidence, however weak, the basis upon which a case could be decided).

76. *See infra* text accompanying notes 77-83.

77. *See generally* McBaine, *supra* note 2; *see also infra* text accompanying notes 84-88.

78. *See* STRONG ET AL., *supra* note 6, § 344, at 582-83.

79. Lavine v. Milne, 424 U.S. 577 (1976).

80. *Id.* at 584; *see generally* Roger B. Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151 (1972). Iowa case law also recognizes the relationship between a presumption and the burden of proof. In *In re* Marriage of Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982), the court stated: "Although [the presumption of legitimacy of a child born in wedlock] is theoretically merely an aid to the party with the burden to prove paternity, its practical effect is to place the burden of proving nonpaternity on the putative father."

An opinion of the Iowa Court of Appeals illustrates the relationship between allocating the burden of persuasion and rebutting certain presumptions. Schmal v. Minnesota Mut. Life Ins. Co., 432 N.W.2d 695 (Iowa Ct. App. 1988), dealt with the recovery of life insurance proceeds, and the dispute concerned whether the insured had committed suicide or been killed in an accident. *Id.* at 696. The defendant moved for summary judgment and supported that motion with several affidavits from medical experts concluding the death was a suicide. *Id.* The plaintiff responded with affidavits suggesting the death was accidental because the insured had been hunting and had not been depressed. *Id.* The district court granted the defendant's motion for summary judgment, and the court of appeals reversed. *Id.* The court of appeals included a para-

Morgan theory would place a burden of persuasion on an opposing party once a rebuttable presumption had been established.[81]

Iowa case law demonstrates the differences between these theories. Iowa law has followed both positions, sometimes using a rebuttable presumption to shift the burden of persuasion,[82] and other times finding that introducing any evidence to the contrary will cause the rebuttable presumption to disappear.[83]

The arguments concerning whether a rebuttable presumption is, in itself, evidence have followed the same course. Under the Thayer rule, a rebuttable presumption cannot be evidence, because evidence, once introduced, does not vanish from a case. In contrast, the Morgan rule gives more strength to a rebuttable presumption because it does not disappear in the face of rebuttal evidence. Even under the Morgan theory, however, it is conceptually difficult to characterize a rebuttable presumption as "evidence" in and of itself. Attempts to characterize a rebuttable presumption as "evidence" serve to prevent a rebuttable presumption from disappearing in the face of rebuttal evidence.[84] A rule of evidence clarifying the use of rebuttable presumptions would, as a practical matter, make the dispute over whether a rebuttable presumption is evidence meaningless.

Many scholars have rejected the notion a rebuttable presumption may, in and of itself, be considered evidence.[85] Other commentators consider the Thayer view to be overly concerned with theoretical issues that pose no real threat to the use of rebuttable presumptions in the courtroom.[86] Iowa law can

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graph of dicta with unclear implications, stating: "Under Iowa law there is a presumption against suicide as a form of death. Even if defendant was able to establish the absence of any genuine issue of material fact, this presumption creates an additional burden on the defendant." *Id.* at 697.

81. STRONG ET AL., *supra* note 6, § 344, at 586-87.

82. *In re* Chad, 318 N.W.2d 213, 219 (Iowa 1982) (holding clear and convincing evidence is necessary to rebut the presumption a child's best interest is served by the custody of natural parents).

83. Hron v. Ryan, 164 N.W.2d 815, 818 (Iowa 1969) (holding the presumption a person maintains the same home of record when inducted into the military is rebutted by any evidence).

84. In the debate over the adoption of Federal Rule of Evidence 301, the House proposed a rule that considered the presumption to be evidence. *See infra* text accompanying note 133. One Congressman described the characterization of a presumption as evidence as an "ill-starred effort to reach a middle ground" between the Thayer and Morgan rules. *Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 23 (1974) (statement of Hon. David W. Dennis of Indiana), *quoted in* Hugh Joseph Beard, Jr., *Title VII and Rule 301: An Analysis of the* Watson *and* Atonio *Decisions*, 23 AKRON L. REV. 105, 119 (1989).

85. *See* McBaine, *supra* note 2, at 549.

86. By definition, where presumptions rest upon logic or inherent probability, the basic facts *are* evidence of the presumed fact. The presumption is a way of quantifying the weight to be given to the basic facts, in the same manner as the partial directed verdict is a device to insure that cogent evidence will be given the only reasonable effect that it can have. The mistake in labeling the presumption as evidence, which may be more a problem in theory than in

again be cited for both propositions; in one instance "presumptions are not evidence,"[87] and in another "a rebuttable presumption of law is itself evidence."[88]

The treatment of rebuttable presumptions may become even more complicated when each of the opposing parties offer evidence supporting conflicting presumptions. Under the Thayer—"bursting bubble"—theory, both presumptions would be disregarded.[89] Under the Morgan theory, the presumption embodying the stronger policy considerations will prevail.[90] The Iowa Supreme Court faced this situation in *Eygabrood v. Gruis*,[91] and followed the Morgan approach, giving effect to the presumption based on the stronger policy.[92]

The differences between the Thayer and Morgan theories can be demonstrated by considering a hypothetical. Assume a tenant in a mobile home park ("Tenant") sues her landlord ("Landlord") for retaliatory eviction under the terms of Iowa Code section 562B.32.[93] Tenant has produced sufficient evidence to establish a rebuttable presumption of retaliatory eviction under the Iowa Code. Assume also, for purposes of this hypothetical, that Iowa law has not defined how this rebuttable presumption should be treated.

Under both theories, if Landlord produces *no* evidence to rebut this presumption, Tenant will prevail as a matter of law.[94] Under the Thayer rule,

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> the reality of the courtroom, is that the presumption is rather a legally sanctioned way of thinking about the evidence—specifically, a way of thinking about the basic facts as evidence of the presumed fact.

Louisell, *supra* note 21, at 315 n.113 (emphasis added).

87. Beggs v. Metropolitan Life Ins. Co., 257 N.W. 445, 446 (Iowa 1934) (stating "presumptions are not evidence"); *see also* Dyson v. Dyson, 25 N.W.2d 259, 262 (Iowa 1946) (stating "presumptions disappear when facts to the contrary appear").

88. Neighbors v. Iowa Elec. Light & Power Co., 175 N.W.2d 97, 102 (Iowa 1970) ("Our court has taken the position that a rebuttable presumption of law is itself evidence."); *see also* Holloway v. Bankers Life Co., 81 N.W.2d 453, 461 (Iowa 1957) (stating presumption against suicide has effect of affirmative evidence).

89. *See* STRONG ET AL., *supra* note 6, § 344, at 584.

90. *Id.*

91. Eygabrood v. Gruis, 79 N.W.2d 215 (Iowa 1956).

92. *Id.* at 217-18; *see also In re* Estate of Weems, 139 N.W.2d 922, 925 (Iowa 1966) (using presumption favoring validity of a latter marriage over former marriage); ADAMS & KINCAID, *supra* note 8, § 301.4.

93. For purposes of this hypothetical, the reader is asked to assume this Code section does not provide for the treatment of the rebuttable presumption of retaliatory eviction. Iowa Code § 562B.32 does provide for the treatment of this rebuttable presumption with the following language: "For the purpose of this subsection, 'presumption' means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." IOWA CODE § 562B.32(2) (1993). This was discussed in Hillview Assoc. v. Bloomquist, 440 N.W.2d 867, 871-73 (Iowa 1989). This statute does not, however, state whether the presumption must "disappear" from the case if it is rebutted, or whether it will live on as an inference.

94. As previously discussed, the mandatory finding of the presumed fact when there is no rebuttal evidence distinguishes a rebuttable presumption from an inference. *See supra* text

Landlord has a burden of *producing* evidence. The burden of *persuading* the trier of fact will always remain with Tenant, regardless of the strength of Tenant's rebuttable presumption. Under the Morgan theory, the burden of *persuading* the trier of fact shifts from Tenant to Landlord once Tenant has established a rebuttable presumption. The Morgan theory gives more strength to a rebuttable presumption by shifting the burden of persuasion. This is particularly true if Tenant moves for a directed verdict. Relatively weak evidence produced by the Landlord may be sufficient to survive a directed verdict under the Thayer rule, because Landlord has only a burden of production, and the burden of persuasion remains with Tenant. That same evidence may entitle Tenant to a directed verdict under the Morgan theory because, under that theory, the burden of persuasion shifts to the Landlord.

If Landlord produces evidence sufficient to meet the rebuttable presumption, the Thayer and Morgan theories dictate very different treatment of the rebuttable presumption established by Tenant. Under the Thayer theory, the rebuttable presumption "vanishes" from the case. Arguably, this means the finder of fact cannot consider Tenant's rebuttable presumption. Under the Morgan theory, the rebuttable presumption will not disappear from the case. In making a decision, the trier of fact will consider the relative weight of both parties' evidence in the context of the rebuttable presumption.

The "bursting bubble" aspect of the Thayer rule may significantly weaken a rebuttable presumption. This is particularly true when the rebuttable presumption is based primarily on furthering a social policy rather than on a "core of logic" related to the facts of the case.[95] In *In re Estate of Givens*,[96] the Iowa Supreme Court quoted Dean Mason Ladd and described how a presumption based on logical probability may retain strength in spite of the bursting bubble effect.[97] In that event, the logical force of the basic facts will remain in the case to be considered as an inference by the trier of fact, even though the presumption itself had disappeared.[98] In contrast, the basic facts supporting a rebuttable presumption based primarily on social policy may lack the logical strength to support an inference, regardless of the strength of the social policy.

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accompanying note 19. If the law established an inference for Tenant instead of a rebuttable presumption, a directed verdict at this point would be discretionary, not mandatory. *See supra* text accompanying note 19.

95. "A presumption based on social policy may need an extra boost to ensure that the policy is not overlooked in the face of some explanation by the opponent." Broun, *supra* note 2, at 703.

96. *In re* Estate of Givens, 119 N.W.2d 191 (Iowa 1963).

97. *Id.* at 196 (quoting Mason Ladd, Workshop Outlines submitted at the 86th Annual Meeting of the Iowa State Bar Association (June 1959)).

98. *Id.*

III. DEFINING THE PROBLEM: THE UNWORKABLE STATE OF AFFAIRS IN IOWA

Iowa courts and commentators have objectively recognized this area of law is problematic. For example, it is unclear what burden of production or persuasion will apply to a new rebuttable presumption that has never been considered by the courts. Further, once a party has produced the evidence sufficient to rebut the presumption, it is unclear whether the presumption disappears from the case or whether the trier of fact may consider it as an inference.

Some cases suggest Iowa follows the Morgan rule, and a rebuttable presumption shifts a burden of persuasion to the opposing party.[99] In discussing *In re Lundvall's Estate,*[100] Dean Mason Ladd stated: "Although some other cases had taken the position that the burden of proof shifted to the one against whom the presumption operated to disprove the presumed fact, this is the first case in Iowa which squarely discusses and rejects the Thayer-Wigmore view."[101] Dean Ladd also noted Iowa courts have used rebuttable presumptions as vehicles to create substantive rules of law.[102] In spite of those cases, however, the strength of any claim that Iowa follows the Morgan rule is neutralized by Iowa cases following the Thayer rule.[103] These cases have created an area of law that is in pressing need of clarity.[104]

A considerable amount of the confusion can be traced to three specific areas. First, there has been inconsistent use of the legal terms critical to this area.[105] Second, there do not appear to be any clear standards for determining what burden should be placed on a party opposing a rebuttable presumption of first impression.[106] Finally, it is unclear whether the jury should be able to consider the rebuttable presumption if evidence opposing the presumption is introduced.[107]

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99. *See infra* text accompanying notes 102-14.

100. *In re* Lundvall's Estate, 46 N.W.2d 535 (Iowa 1951).

101. Note, *Presumptions in Iowa*, 44 IOWA L. REV. 147, 154 (1958) (quoting MASON LADD, EVIDENCE 824 (2d ed. 1955)); *see also* Dworkin, *supra* note 80, at 1175-76.

102. *See* Ladd, *supra* note 2, at 282-83 (discussing Webber v. Chicago, R.I. & P. R.R., 151 N.W. 852, 858 (Iowa 1915)).

103. *See, e.g.*, Linn Co-op Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981) (en banc) (holding plaintiff retains the burden of proof after making a prima facie case in a sex discrimination case); Dyson v. Dyson, 25 N.W.2d 259, 262 (Iowa 1946) (holding presumptions "disappear" after being rebutted).

104. Liberty Mut. Ins. Co. v. Caterpillar Tractor Co., 353 N.W.2d 854, 859 (Iowa 1984) (noting the conflicting authority regarding presumptions).

105. *See infra* text accompanying notes 110-18.

106. *See* ADAMS & KINCAID, *supra* note 8, § 301.3, at 102.

107. *Id.*

The blurred distinction between a presumption and an inference will hamper any attempt to clarify this area of law.[108] As previously discussed, the distinction between an inference and a rebuttable presumption may be the deciding factor in a case.[109] A rule of evidence dealing with rebuttable presumptions and inferences should encourage clarity *and* minimize the consequences of a misapplication of these terms.

A rule of evidence should also provide a framework to determine the appropriate burden necessary to rebut a presumed fact when the burden has not been established by the courts or legislature. Iowa law has established several different burdens to rebut various presumed facts, including any evidence;[110] positive evidence;[111] substantial evidence;[112] a preponderance of the evidence;[113] strong and persuasive evidence;[114] clear and satisfactory proof;[115]

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108. The early treatment of these terms by Iowa courts was summarized in Bridges v. Welzien, 300 N.W. 659 (Iowa 1941):

> While the two words, [presumption and inference] are sometimes used interchangeably, many courts have drawn a distinction between the two. . . . "The line of cleavage in this respect is, at best, a tenuous one, traceable more to the confusing nomenclature on the subject of inferences and presumptions than to any generic distinction."
>
> This court . . . has used the word "inference" more often than the word "presumption." At other times, we have used the phrase "prima facie." . . . Attorneys might quibble over a distinction in the two words, but it is far from likely that this jury did, or any jury would, give any thought to the matter.

Id. at 662 (citations omitted).

For other examples of imprecise terminology in this area, see Paige v. City of Chariton, 252 N.W.2d 433, 437-38 (Iowa 1977) (referring to the rule as a permissive inference but discussing it as a presumption rebuttable by a preponderance of the evidence); Harper v. Cedar Rapids Television Co., 244 N.W.2d 782, 789-91 (Iowa 1976) (stating a presumption rebuttable by substantial evidence is also referred to as an inference); De Bolt v. Daggett, 416 N.W.2d 102, 104 (Iowa Ct. App. 1987) ("This is prima facie proof or creates an inference or presumption the truck was driven with his consent.").

109. *See supra* text accompanying notes 22-27.

110. Hron v. Ryan, 164 N.W.2d 815, 818 (Iowa 1969) (holding any evidence to the contrary rebuts the presumption a person inducted into the military maintains the same home for purpose of civil process). In dealing with the presumption that a letter properly mailed was received, "the addressee's denial he received the letter has been held to justify a finding the presumption has been overcome, *at least under the particular circumstances.*" Roshek Realty Co. v. Roshek Bros. Co., 87 N.W.2d 8, 13 (Iowa 1957) (emphasis added). This language indicates Iowa courts will examine this rebuttable presumption within the context of each case.

111. Hartman v. Norman, 112 N.W.2d 374, 378 (Iowa 1961) (holding proof of car registration in individual's name creates presumption of ownership rebuttable by positive evidence).

112. *In re* Estate of Kiel, 357 N.W.2d 628, 632 (Iowa 1984) (holding the presumption a deposit made in two names creates joint tenancy is rebuttable by substantial evidence); *see also* Harper v. Cedar Rapids Television Co., 244 N.W.2d at 789-91.

113. Paige v. City of Chariton, 252 N.W.2d 433, 437-38 (Iowa 1977) (holding a criminal conviction later reversed is prima facie evidence of probable cause to initiate prosecution).

114. *In re* Estate of Weems, 139 N.W.2d 922, 924 (Iowa 1966) (applying the presumption of a dissolution of a first marriage prior to a second marriage).

115. Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972) (holding the presumption an attorney has authority to make an appearance is rebuttable by clear and satisfactory proof).

clear, strong, and satisfactory evidence;[116] and clear and convincing evidence.[117] Another Iowa case stated: "The cases are clear upon the proposition that the nonexistence of the presumed fact must be conclusively established before [the] presumption can be eliminated."[118]

The different standards found in Iowa law have evolved from the strength of the rationale supporting each specific presumption. The difficulty with this case law is not that there are several different standards. Rather, problems stem from the lack of guidance for determining which standard to apply to a rebuttable presumption of first impression,[119] the imprecise use of important terminology, and the apparent inability to modify existing standards.

Consider what would happen under current Iowa law if the legislature enacted a law that created a "presumption" or "prima facie case," but failed to define clearly how the rebuttable presumption was to be treated. Given the current state of Iowa law, it is unclear exactly how the rebuttable presumption should be treated. The unfortunate result of this void is the judiciary would have no choice but to act as a legislature and assign a particular burden of production or persuasion to the party opposing the presumed fact. In most cases, a court could legitimately justify almost any burden, ranging from a very minimal burden of production to a much heavier burden of persuasion. This decision, made by the judiciary, will dictate the practical strength of any rebuttable presumption created by the legislative and executive branches. The courts would have no alternative but to engage in the very sort of legislative decisionmaking they have often sought to avoid.[120] A rule helping to clarify the use of rebuttable presumptions and providing a

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116. *In re* Marriage of Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982) (holding the presumption of legitimacy of a child born in wedlock is rebuttable by clear, strong, and satisfactory proof).

117. *In re* Chad, 318 N.W.2d 213, 219 (Iowa 1982) (holding the presumption a child's best interests are served by custody of a natural parent is rebuttable by clear and convincing proof).

118. Beggs v. Metropolitan Life Ins. Co., 257 N.W. 445, 446 (Iowa 1934) (holding possession of an insurance policy by an owner raises presumption the policy was validly delivered and in force at or about the date of the policy).

119. *See* ADAMS & KINCAID, *supra* note 8, § 301.3, at 102.

120. If the judiciary is left with unfettered discretion to define the burdens accompanying a presumption created by the legislature, the judiciary is, in effect, usurping legislative powers. In other areas, such as determining the constitutionality of a statute, courts have purposely avoided acting as a legislature. The United States Supreme Court discussed the rationale for judicial deference in Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937):

> This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

Id. at 510. This rationale of judicial difference should also be applied to defining the strength of a particular rebuttable presumption.

starting point for consideration of rebuttable presumptions of first impression would minimize these concerns.

Even when Iowa law defines the burden necessary to rebut a presumption, the effect of rebuttal evidence on a presumption is unclear. Some cases dictate that once rebuttal evidence is introduced, the presumption disappears entirely from the case.[121] Other cases suggest the logical force of the rebuttable presumption should survive as an inference to be considered by the finder of fact.[122] As previously noted, this distinction may be of critical importance to the strength of any individual presumption and the outcome of a particular case.[123] Once again, the judiciary may find itself compelled to act as a legislature and determine whether the basic facts supporting a rebuttable presumption live on as an inference instruction or vanish as "snow fall on the river."[124] A rule of evidence must clarify whether a presumption that has been rebutted lives on as an inference or disappears from the case.

Finally, the question of whether a rebuttable presumption is, in itself, evidence is unclear under Iowa law. Some cases hold a rebuttable presumption, in itself, is to be considered as evidence.[125] On the other hand, other cases can be cited for the proposition "presumptions are not evidence."[126] The distinction of whether presumptions are "evidence" would be rendered academic by a rule of evidence sufficiently clarifying their use.

This discussion has attempted to describe the "thicket" that has overtaken rebuttable presumptions in Iowa. Without question, a great deal of the tangled brush must be cut away. It would be a grave mistake, however, to discard every portion of substantive law addressing rebuttable presumptions. One particular theme has remained constant and must be salvaged: Iowa courts prefer to consider the relative strength of rebuttable presumptions on an individual basis.

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121. Dyson v. Dyson, 25 N.W.2d 259, 262 (Iowa 1946) (stating "presumptions disappear when facts to the contrary appear").

122. *See* Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 168-69 (Iowa 1983) (Schultz, J., concurring in part and dissenting in part) (stating inference is not destroyed, but instead produces a fact issue). This opinion illustrates some of the difficulties presented by applying rebuttable presumptions to civil rights cases. As a general proposition, Iowa case law makes it clear the plaintiff in a civil rights case maintains the burden of persuasion throughout the entire case. *See* Trobaugh v. Hy-Vee Food Stores, 392 N.W.2d 154 (Iowa 1986). Once the plaintiff establishes a prima facie case, or a rebuttable presumption, only a burden of production shifts to the defendant. *Id.* at 156. Once the defendant produces this evidence, "the presumption of discrimination drops from the case." *Id.* There is some disagreement concerning the effect of a presumption that "drops" from a case. The question raised by the *Woodbury County* dissent of whether the evidence submitted to establish the presumption of discrimination disappears from the case or remains to be considered as an inference by the finder of fact is unanswered.

123. *See supra* text accompanying notes 22-27.

124. *See* Ladd, *supra* note 2, at 282.

125. Neighbors v. Iowa Elec. Light & Power Co., 175 N.W.2d 97, 102 (Iowa 1970).

126. Beggs v. Metropolitan Life Ins. Co., 257 N.W. 445, 446 (Iowa 1934).

IV. EVALUATION OF THE TREATMENT OF REBUTTABLE PRESUMPTIONS IN OTHER JURISDICTIONS

A. *The Shortcomings of Federal Rule of Evidence 301*

The dispute between the Thayer and Morgan rules was amplified during the proceedings to adopt Federal Rule of Evidence 301.[127] Both views had their advocates and opponents. In the end, the rule adopted cannot be described accurately as embodying a pure form of either theory. It is helpful to examine Federal Rule of Evidence 301 when considering how Iowa can best address rebuttable presumptions.

In the debate surrounding the adoption of Federal Rule 301, the Advisory Committee[128] proposed a rule that would place a burden of persuasion on a party opposing a rebuttable presumption.[129] The United States Supreme Court adopted the view of the Advisory Committee and advocated the Morgan theory in its proposal to Congress.[130] The Advisory Committee's proposed rule provided: "In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[131] The Uniform Rules of Evidence also embodied the Morgan theory.[132]

The House version of Rule 301 differed somewhat from that of the Advisory Committee. The House version would not shift the burden of persuasion, but would consider the rebuttable presumption "sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact."[133] In other words, a rebuttable presumption would be "evidence" that would not disappear from the case once rebutted.

These proposals, which gave a rebuttable presumption more strength than the "bursting bubble" theory, were ultimately rejected. The Senate adopted language closer to the Thayer viewpoint, which had been embodied

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127. *See* Hugh Joseph Beard, Jr., *Title VII and Rule 301: An Analysis of the* Watson *and* Atonio *Decisions*, 23 AKRON L. REV. 105, 116-26 (1989) (detailing the debate surrounding the adoption of Federal Rule of Evidence 301).

128. The Supreme Court appointed this Advisory Committee to formulate rules of evidence for the federal courts. *Id.* at 116.

129. FED. R. EVID. 301 advisory committee's note, *available in* 56 F.R.D. 183, 208 (1972) (effective July 1, 1973).

130. *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 208-11 (1972) (effective July 1, 1973).

131. *Id.*

132. UNIFORM R. EVID. 14 (1953). For the current version of this rule see UNIFORM R. EVID. 301 (1974).

133. H.R. REP. NO. 650, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7080-81.

in the Model Rules of Evidence.[134] In the end, the Senate version prevailed. Federal Rule of Evidence 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[135]

At first glance, this rule appears to represent the Thayer viewpoint because establishing a rebuttable presumption will not shift the burden of persuasion. The rule is unclear, however, concerning the effect of rebuttal evidence on challenges to an established presumption. The Conference Committee note to Rule 301 provides:

> If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from [the] proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.[136]

This language allows a court to choose whether a rebuttable presumption will "burst" and be dismissed from the case, or live on as an inference instruction to the jury.

The adoption of Federal Rule of Evidence 301 has not clarified this area of law. In fact, some commentators have argued this rule has caused more confusion than it has resolved.[137] Some of this uncertainty is caused by the rule's lack of direction concerning a presumption that has been effectively rebutted.[138] As previously discussed, this ambiguity allows courts to choose whether or not to adhere to the strict Thayer rule, which requires a presumption to disappear from the case. On occasion, courts have added to the

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134. S. REP. NO. 1277, 93d Cong., 1st Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7055; MODEL CODE OF EVIDENCE RULE 704(1) (1942).

135. FED. R. EVID. 301.

136. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7099.

137. "[T]he dominant response to Rule 301 has been either to ignore it or apparently to misapply it." Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and A Proposal for Reform*, 76 NW. U. L. REV. 892, 894, 904-07 (1982); *see also* Ladd, *supra* note 2, at 293 ("For good reasons, Federal Rule of Evidence 301 has been regarded as unsatisfactory.").

138. *See* Ladd, *supra* note 2, at 285. *Compare* Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790, 795 n.3 (5th Cir. 1977) ("The Federal Rules of Evidence also reject this 'bursting bubble' theory of presumptions."), *cert. denied*, 435 U.S. 924 (1978) *with* Legille v. Dann, 544 F.2d 1, 6-7 (D.C. Cir. 1976) (concluding Rule 301 embodied a "bursting bubble" theory).

confusion by avoiding or ignoring Rule 301's clear mandate that a rebuttable presumption does not alter the burden of persuasion.[139]

Some of the problems with Rule 301 stem from the debate that surrounded the rule's adoption. Because the Advisory Committee's proposal for Rule 301 was rejected, the Comments of the Advisory Committee are in direct conflict with the rule.[140] The notes of the Senate Committee and the Conference Committee have been criticized for failing to provide sufficient guidance for the implementation of Rule 301.[141]

Despite these problem areas, the primary shortcoming of Rule 301 is its attempt to superimpose an identical standard on all types of rebuttable presumptions. As previously discussed, each rebuttable presumption is based on considerations unique to a specific type of dispute. Courts have recognized this and resisted the generic treatment of rebuttable presumptions dictated by Rule 301.[142]

The difficulties with Rule 301 were demonstrated in *Panduit Corp. v. All States Manufacturing Co.*[143] In *Panduit Corp.*, the Federal Circuit dealt with an issue concerning the disqualification of a law firm based on that firm's previous representation of an adverse party.[144] The decision of whether to disqualify the firm centered on a presumption of shared confidences within a law firm.[145]

The court stated a presumption places "upon the opposing party the burden of establishing the nonexistence of that fact."[146] The court cited the notes of the Advisory Committee and *McCormick on Evidence* for support,[147] both of which support the Morgan theory and are at odds with Rule 301. The opinion further stated the "burden on the opposing party, however, is limited to the *production* of evidence. The burden of *persuasion* of the existence of the presumed fact remains throughout on the party invoking the presumption."[148] For this proposition, the court cited the notes of the Senate

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139. For example, in United States v. Ahrens, 530 F.2d 781 (8th Cir. 1976), the court apparently ignored Rule 301 and followed the Morgan theory, which places a burden of persuasion upon the party opposing a presumption. *Id.* at 786 n.8. In Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982), the court used its discretion to "determine the most reasonable placement of the burden of proof of reliance" based on the circumstances of each particular case. *Id.* at 188-89. The court stated: "Such a flexible approach avoids the potential problems of a broad judicial pronouncement of a precept governing reliance." *Id.*

140. Louisell, *supra* note 21, at 282.

141. *Id.*

142. *See* Broun, *supra* note 2, at 705.

143. Panduit Corp. v. All States Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984) (per curiam).

144. *Id.* at 1579-81.

145. *Id.* at 1578-79 (applying Seventh Circuit law).

146. *Id.* at 1579.

147. *Id.* at 1579 n.22.

148. *Id.*

Committee for authority,[149] even though those notes are in conflict with the notes of the Advisory Committee, which the court previously cited as authority.

The *Panduit Corp.* court further stated a presumption is not evidence and a presumed fact will cease to exist if effectively rebutted.[150] In describing the burden of production placed on the party opposing the presumption, the court stated: "If evidence is provided which falls short of meeting the threshold of rebuttal, the presumed fact retains its viability. Hence, the standard to establish the nonexistence of the presumed fact may be critical."[151]

Finally, the opinion offered the following perspective on the proper role of a presumption in litigation:

> Presumptions of fact have been created to assist in certain circumstances where direct proof of a matter is for one reason or another rendered difficult. They arise out of considerations of fairness, public policy, and probability, and are useful devices for allocating the burden of production of evidence between the parties. *However, derived as they are from considerations of fairness and policy, they must not be given mechanical application.* Thus, with each presumption in the chain utilized in this case, we must not lose sight of the Seventh Circuit's view that attorney disqualification as a prophylactic device should not be imposed unless "absolutely necessary." *We must not give undue dignity to a procedural tool and fail to recognize the realities of the particular situation at hand.*[152]

The *Panduit Corp.* opinion is one example of the dilemma caused by the application of Rule 301 to a presumption based on strong policy considerations. Although the language of the opinion attempted to remain faithful to Rule 301, the court left no doubt it based the decision on the underlying strength of the specific presumption involved. The strained application of Rule 301 by the federal courts is a direct result of that rule's collective treatment of rebuttable presumptions. A rule attempting to impose one standard for all rebuttable presumptions ignores the reasons for their existence[153] and the history of their development.[154]

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149. *Id.* at 1579 n.23. *See* S. REP. NO. 1277, 93d Cong., 1st Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7055.

150. Panduit Corp. v. All States Mfg. Co., 744 F.2d 1564, 1579 (Fed. Cir. 1984).

151. *Id.*

152. *Id.* at 1581 (emphasis added).

153. "Because of the various reasons that caused the courts to create them or legislatures to enact them, it is questionable whether all presumptions should be treated alike in the way they operate in legal proceedings." Ladd, *supra* note 2, at 283.

Several commentators share Dean Ladd's view all presumptions should not be treated alike.

> Legal presumptions are not all of the same quality. They were not devised to perform the same function and hence it is arguable that all of them should

Allowing different burdens for different presumptions makes sense when the underlying reasons for the existence of a specific presumption are taken into account. The unrealistic nature of one standard for all presumptions becomes clear when individual presumptions are compared. For example, it is illogical to treat the relatively weak presumption a letter that was properly mailed was received[155] in the same manner as the strong presumption in favor of the legitimacy of a child.[156] Nevertheless, if required to treat all rebuttable presumptions alike, courts will have to ignore the reasons behind any specific presumption and resort to the "mechanical application" of a procedural rule.[157] Furthermore, allowing different burdens of persuasion for different rebuttable presumptions will be workable for members of the bench and bar, who must continually make similar distinctions.[158]

B. *Treatment of Rebuttable Presumptions in the States*

Treatment of rebuttable presumptions in the states has been far from uniform,[159] and no state law stands forth as a model of clarity. Analyzing

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> not have the same tenacity or vitality. . . . Strong reasons exist then for differentiating between the tenacity or vitality that should be accorded to various presumptions . . . .

McBaine, *supra* note 2, at 534; *see generally* Joanne F. Hurley, *The Treatment of Presumptions in Illinois: Adding Insult to Injury?*, 27 DEPAUL L. REV. 793 (1978) (advocating consideration of presumptions on a "presumption-by-presumption" basis).

154. At this point in the analysis, it is helpful to return to early English law. A review of early legal commentators demonstrates all rebuttable presumptions were not intended to receive identical treatment. In *Institutes of the Law of England, or a Commentary upon Littleton*, published in 1628, Lord Coke classified presumptions into three groups: "strong, or exceedingly probable; probable; and light, or rash." McBaine, *supra* note 2, at 522. In 1754 Chief Baron Gilbert restated these categories. *Id.* He differentiated between presumptions that were "violent" and "only probable" and observed that "light and rash presumptions weigh nothing." *Id.* (citing CHIEF BARON GILBERT, THE LAW OF EVIDENCE, BY A LATE LEARNED JUDGE (1754)).

155. *See* Roshek Realty Co. v. Roshek Bros. Co., 87 N.W.2d 8, 13 (Iowa 1957).

156. *See In re* Marriage of Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982).

157. *See, e.g.*, Panduit Corp. v. All States Mfg. Co., 744 F.2d 1564, 1581 (Fed. Cir. 1984).

158. The law and lawyers are accustomed to considering the dictates of the substantive law in determining the initial allocation of the burdens of proof. The task should not be thought too onerous in connection with the operation of presumptions which, after all, simply operate to reallocate those burdens during the course of the trial.

STRONG ET AL., *supra* note 6, § 344, at 589.

159. For a survey of state law see generally 1 GREGORY P. JOSEPH, ET AL., EVIDENCE IN AMERICA, THE FEDERAL RULES IN THE STATES §§ 8.2, 8.3 (1992); *see also* 1 WEINSTEIN & BERGER, *supra* note 2, § 301.

In addition to describing the effects of a rebuttable presumption, some states have attempted a comprehensive listing of specific rebuttable presumptions. *See, e.g.*, OR. R. EVID. 311. The myriad of presumptions found in Iowa law would render any type of comprehensive listing unworkable. Further, an effective framework for dealing with rebuttable presumptions must be flexible enough to allow consideration of presumptions that will develop in the future.

these state rules will serve as a valuable critique of the options available to Iowa.

Thirteen states have adopted the approach of the federal rules,[160] while eleven states have adopted rules embodying the Morgan theory.[161] Four states, including Iowa, have declined to adopt a rule of evidence to govern civil presumptions.[162]

Some states have adopted rules combining the Thayer and Morgan theories.[163] These bifurcated rules provide for certain rebuttable presumptions to shift both the burdens of production and persuasion, while other rebuttable presumptions will shift only the burden of production. Three states, California,[164] Florida,[165] and Hawaii,[166] give greater strength to rebuttable presumptions designed to further a social policy. Under these rules, rebuttable presumptions furthering a social policy will shift the burden of persuasion.[167] Conversely, Kansas[168] and Oklahoma[169] do not base this distinction on public policy. Their rules give more weight to a rebuttable presumption supported by basic facts having "probative value of the existence of the presumed fact."[170] These attempts to combine the Morgan and Thayer

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Tomorrow's advancements in technology and policy concerns will create new presumptions beyond today's legal imagination. Any attempt to codify each specific presumption may complicate the consideration of future presumptions that are not addressed by existing law.

160. 1 JOSEPH, ET AL., *supra* note 159, §§ 8.2, 8.3; *see, e.g.*, COLO. R. EVID. 301; IDAHO R. EVID. 301; MINN. R. EVID. 301.

161. 1 JOSEPH, ET AL., *supra* note 159, §§ 8.2, 8.3; *see, e.g.*, ARK. R. EVID. 301; DEL. R. EVID. 301; WYO. R. EVID. 301.

162. 1 JOSEPH, ET AL., *supra* note 159, § 8.2.

163. 1 *Id.* §§ 8.2, 8.3.

164. CAL. EVID. CODE §§ 603-606 (West 1966).

165. FLA. STAT. ANN. §§ 90.301-.304 (West 1979).

166. HAW. R. EVID. 301, 302.

167. *See* Broun, *supra* note 2, at 703 (criticizing the California approach).

168. KAN. STAT. ANN. §§ 60-413 to -416 (1983). The Kansas rule provides, in pertinent part:

> *Effect of presumptions.* Subject to K.S.A. 60-416, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or ever had been involved.

Id. § 60-414. This rule is subject to the same type of criticism as the rules basing a distinction on public or social policy. *See infra* text accompanying notes 172-76.

169. OKLA. STAT. ANN. tit. 12, §§ 2301-2303 (West 1980).

170. *Id.* § 2303(1).

views into one rule have been criticized because of the complexities involved in categorizing many presumptions.[171]

The Iowa Supreme Court Advisory Committee on Rules of Evidence recommended Iowa adopt a rule of evidence based on the Hawaii rules.[172] As

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171. Attempts to categorize presumptions according to policy considerations have been thoughtful and well-meaning. Unfortunately, they have fallen short of the mark, largely because of the inherent difficulty of the task. Each presumption is created for its own reasons—reasons which are inextricably intertwined with the pertinent substantive law. These substantive considerations have a considerable impact on the procedural effect desirable for a particular presumption. The diversity of the considerations simply defies usable categorization.

STRONG ET AL., *supra* note 6, § 344, at 589. "The line between presumptions based on public policy and those which are not may not be easy to draw." *Id.* at 587. Likewise, the determination of whether a presumption is supported by basic facts that have "probative value" of the presumed fact will be difficult to define clearly.

172. The Committee proposed the following rule:

Rule 301. Definitions.

The following definitions apply under this article:

(1) "Presumption" is (a) a rebuttable assumption of fact, (b) that the law requires to be made, (c) from another fact or group of facts found or otherwise established in the action.

(2) The following are not presumptions under this article.

(a) Conclusive Presumption. The trier of fact is compelled by law to accept an assumption of fact as conclusive, regardless of the strength of the opposing evidence; or

(b) Inference. The trier of fact may logically and reasonably make an assumption from another fact or group of facts found or otherwise established in the action, but is not required to do so; or

(c) Pre-evidentiary assumption. The trier of fact is compelled by law to accept the assumption as either rebuttable or conclusive without regard to any other fact determination.

(3) "Burden of producing evidence" means the obligation of a party to introduce evidence of the existence or nonexistence of a relevant fact sufficient to avoid an adverse peremptory finding on that fact.

(4) "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a relevant fact in the mind of the trier of fact. The burden of proof may require a party to establish the existence or nonexistence of a fact by a preponderance of the evidence or by clear and convincing proof.

Rule 302. Presumptions in Civil Proceedings.

(a) General rule. In all civil proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed either (1) the burden of producing evidence, or (2) the burden of proof.

(b) Inconsistent presumptions. If two presumptions are mutually inconsistent, the presumption applies that is founded upon weightier considerations of policy and logic. If considerations of policy and logic are of equal weight neither presumption applies.

previously discussed, this rule would give greater strength to presumptions based on public policy. The Hawaii rule is based primarily on the California

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(c) Applicability of federal law. In all civil proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Rule 303. Presumptions Imposing Burden of Producing Evidence.

(a) General rule. A presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of producing evidence.

(b) Effect. The effect of a presumption imposing the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case no instruction on presumption shall be given and the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this rule shall be construed to prevent the drawing of any inferences.

Rule 304. Presumptions Imposing Burden of Proof.

(a) General rule. A presumption established to implement a public policy other than, or in addition to, facilitating the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of proof.

(b) Effect. The effect of a presumption imposing the burden of proof is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced sufficient to convince the trier of fact of the nonexistence of the presumed fact.

Except as otherwise provided by law or by these rules, proof by a preponderance of the evidence is necessary and sufficient to rebut a presumption established under this rule.

Rule 305. Prima Facie Evidence.

A statute providing that a fact or a group of facts is prima facie evidence of another fact or is presumptive evidence of another fact establishes a presumption within the meaning of this article unless the statute expressly provides that such evidence is conclusive.

Rule 306. Presumptions in Criminal Proceedings.

(a) Presumptions against the accused. In criminal proceedings the court shall not direct the jury to find a presumed fact against the accused. Presumptions against the accused recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence or presumptive evidence of other facts or of guilt, are to be treated as inferences.

(b) Presumptions against the state. Except as otherwise provided by statute, in criminal proceedings, presumptions against the State, recognized at common law or created by statute, impose on the state either (1) the burden of producing evidence, or (2) the burden of proof.

The text of this recommendation, as well as the Committee's Advisory Notes, can be found in 1 ALLAN D. VESTAL & PHILLIP WILLSON, IOWA PRACTICE § 37:23 (Supp. 1992).

rule.[173] Criticism of rules giving more strength to presumptions based on public policy should be considered before Iowa adopts the Committee's recommendation.

Because most rebuttable presumptions serve several of these underlying reasons, categorization of presumptions on the basis of public or social policy is difficult. One commentator noted: "As the precise ingredients are unsettled, an imaginative trial judge could find some policy to underlie virtually any presumption."[174] Another commentator stated:

> Presumptions embody two discrete orders of value: one concerned with probability or rationality, and within the domain of logic and experience; the other concerned with social policy, and within the domain of value judgment. Special complication results from the fact that any given presumption may conjoin considerations of rationality and policy. In a sense, each presumption is a law unto itself.[175]

Commentators have also criticized the notion that presumptions dealing with certain social goals should be accorded special status.[176] Some social policies may be relatively weak, but under the Hawaii rule all social policies would be accorded more strength than presumptions that do not embody a social policy. On the other hand, some rebuttable presumptions may be based on a very strong rationale that, despite its strength, is not determined to further social policy. A rebuttable presumption that is not designed to further a social policy will be accorded less strength, regardless of the strength of any underlying rationale. This weakness in the California and Hawaii rules should not be incorporated into Iowa law.

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173. Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431, 437 (1980-81).

174. Edwin N. Lowe, Jr., Note, *The California Evidence Code: Presumptions*, 53 CAL. L. REV. 1439, 1447 (1965). That commentator continued:

> Because most presumptions reflect at least some public policy, the classification of presumptions may depend not upon the absence of any policy, but upon the strength of that policy. Such a test will probably be difficult to administer as different judges assess the policy reasons for presumptions and the relative strength of those policies in different ways.

Id. at 1448.

175. *See* Louisell, *supra* note 21, at 296.

176. The fact that the policy giving rise to a presumption is one that is concerned with the resolution of a particular dispute rather than the implementation of broader social goals, does not necessarily mean that the policy is satisfied by the shifting of the burden of producing evidence and that it should disappear when contrary proof is introduced. . . . The inquiry should not be directed to the breadth of the policy but rather to the question whether the policy considerations behind a certain presumption are sufficient to override the policies that tentatively fix the burdens of proof at the pleading stage.

STRONG ET AL., *supra* note 6, § 344, at 587.

Two states, North Carolina[177] and Alaska,[178] have adopted an approach allowing for statutory and case law development of individual presumptions outside the rules of evidence. The North Carolina rule specifically recognizes judicial decisions and statutes may provide for treatment of rebuttable presumptions outside of the rule:

> In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.[179]

This rule gives courts and legislatures the freedom to provide greater strength to specific rebuttable presumptions. It also provides a rebuttable presumption, once met with evidence challenging the presumed fact, will live on as an inference. With such provisions, the North Carolina and Alaska rules specifically prevent a "bursting" of the rebuttable presumption.[180]

The adoption of the North Carolina rule in Iowa would be an improvement over the current state of affairs.[181] The rule proposed by this Article is,

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177. N.C. R. EVID. 301.

178. ALASKA R. EVID. 301.

179. N.C. R. EVID. 301.

180. Broun, *supra* note 2, at 705-06. This provision is an improvement over the federal rule, which makes an inference instruction optional. *Id.*; *see also* Ladd, *supra* note 2, at 292.

181. Dean Kenneth S. Broun also commented favorably on the North Carolina rule, and offered a rule of evidence to deal with rebuttable presumptions. The rule offered by Dean Broun was very influential in drafting the rule proposed in this Article. The text of Dean Broun's rule is:

> Proposed Rule 301. Presumptions in General Civil Actions and Proceedings.
>
> (a) General Rule. The court shall determine whether the term "presumption," whenever it is used in a statute or case law, means an inference, a prima facie case, a conclusive presumption or a presumption. That decision by the court shall be made on the basis of existing and future common law and statutes and will be a reviewable question of law.
>
> (b) Definitions. As used in this Rule:
>
> (1) "Inference" describes the logical tendency of a finding of one fact to prove the existence of another fact. A finding of the first fact

however, intended to take the North Carolina rule one step further and provide additional definitions and guidance.

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need not be sufficient, standing alone, to permit a finding of another fact.

(2) "Prima facie case" describes the situation in which a finding of one fact, standing alone, will permit, but not require, a finding of another fact.

(3) "Conclusive presumption" describes the situation in which a finding of one fact is conclusive proof of the existence of another fact, and evidence of the second fact will not be received.

(4) "Presumption" describes the situation in which a finding of one fact (the basic fact), while not conclusive proof of the existence of another fact (the presumed fact), has a stronger tendency to prove the existence of the presumed fact than a mere "inference" or "prima facie case." Upon such proof of the basic facts as would justify a finding of its presence, a presumption will impose upon the opponent of the presumption one of two burdens: either (A) the burden of going forward with evidence or (B) the burden of persuasion on the issue of the nonexistence of the presumed fact. The court will decide which burden a particular presumption imposes on the basis of existing and future common law and statutes and this decision will be a reviewable question of law.

(c) Procedure if Presumption Imposes a Burden of Going Forward with Evidence. The burden of going forward with evidence will be satisfied by evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If such evidence is not forthcoming, the jury shall be instructed that if it finds the existence of the basic fact it shall also find the existence of the presumed fact. If such evidence is forthcoming, the jury shall be instructed that the proponent has the burden of proving existence of the presumed fact by the measure of proof appropriate in the particular case. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.

(d) Procedure if Presumption imposes Burden of Persuasion. If the opponent is assigned the burden of persuasion on an issue of the nonexistence of the presumed fact, such issue shall be separately submitted, to be passed upon only if the existence of the basic fact is conceded or found, and the jury shall be instructed that, considering all the evidence and giving the basic fact such logical tendency as it has to prove existence of the presumed fact, the opponent has the burden of proving the nonexistence of the presumed fact by such measure of proof as is appropriate in the particular case.

(e) Language of Jury Instructions. All instructions contemplated herein may be given in terms of the relation between the respective facts, without mention of "basic," "presumed," or "presumption."

Broun, *supra* note 2, at 709-10.

V. AN ATTEMPT TO CLEAR THE THICKET: A PROPOSED RULE OF EVIDENCE

This proposed rule is based on the belief that a single rule, statute, or case will not, in itself, resolve the problems existing in this area of law.[182] Rather than discarding decades of substantive law addressing rebuttable presumptions, the rule proposed in this Article recognizes the essential roles of case law and statutes. This rule also rejects the idea all rebuttable presumptions can be effectively categorized based on whether they further a social policy.

This proposal allows courts to consider the distinct nature of a specific rebuttable presumption, and the strength of the rationale supporting that presumption. Within this framework, basic definitions and procedures are provided to encourage the precision that has eluded this area of law. This rule provides a starting point for consideration of rebuttable presumptions of first impression and a mechanism to modify rebuttable presumptions if change is necessary. Finally, this rule makes it clear a rebuttable presumption, once established, will live on as an inference to be considered by the trier of fact.

PROPOSED RULE 301[183]

(a) Whenever a party seeks to establish the existence of one fact by demonstrating a different fact or set of facts, the court shall determine whether the fact or set of facts that are established will create a rebuttable presumption, an inference, a conclusive presumption, or a pre-evidentiary assumption. This decision shall be based on statutory provisions, judicial decisions, and these rules; and will be a reviewable question of law.

(b) As used in this rule:

(i) *Inference* describes the logical tendency of a finding of one fact or set of facts (basic facts) to prove the existence of another fact (inferred fact). A finding of the basic fact may permit a finding of the inferred fact.

(ii) *Conclusive Presumption* describes the situation in which a finding of one fact or set of facts (basic facts) is conclusive proof of the existence of another fact (conclusively presumed fact). Once the basic facts are established, evidence of the nonexistence of the conclusively presumed fact will not be received.

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182. Dean Broun stated: "Rather than attempting to provide a single rule for all presumptions, a task that has proved futile, the draftsmen of future evidence codes should instead provide clear guidelines for the appropriate but various effects a presumption may have on the burdens of proof." *Id.* at 709.

183. This proposal was significantly influenced by the rule proposed by Dean Broun. *See* Broun, *supra* note 2, at 709-10. Section (h), which deals with conflicting presumptions, is based on Uniform Rule of Evidence 301(b).

(iii) *Rebuttable Presumption* describes the situation in which a finding of one fact or set of facts (basic facts), while not conclusive proof of the existence of another fact (presumed fact), has a stronger tendency to prove the existence of the presumed fact than a mere inference.

(iv) *Pre-evidentiary assumption* describes the situation in which the trier of fact is compelled by law to accept the assumption as either rebuttable or conclusive without regard to any other fact determination.

(v) A statute providing that a fact or a group of facts is *prima facie evidence* of another fact or is presumptive evidence of another fact establishes a rebuttable presumption within the meaning of this rule unless the statute expressly provides otherwise.

(c) In order to establish an inference, a rebuttable presumption or a conclusive presumption, the basic facts must be established by a preponderance of the evidence.

(d) The party against whom a rebuttable presumption is directed must sustain a burden of production or persuasion as defined by statutes, judicial decision, or these rules. If a party opposing a rebuttable presumption fails to meet the burden of production or persuasion for a particular rebuttable presumption, the presumed fact must be found to exist.

(e) If there is no statutory or judicial precedent defining a burden of production or persuasion for a particular rebuttable presumption, the opponent must sustain a burden of production of going forward with evidence to rebut or meet the presumed fact, but the rebuttable presumption will not shift a burden of persuasion to the party opposing the presumed fact.[184]

(f) Upon the motion of a party, the court may establish a burden of production or persuasion that is different from standards established by judicial decision or this rule. This decision shall be based on statutory provisions, judicial decisions, and these rules; and will be a reviewable question of law.[185]

(g) When the burden placed on the party opposing the rebuttable presumption has been satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the underlying facts.[186]

(h) When two or more rebuttable presumptions conflict, the presumption that is founded upon stronger considerations of policy and logic

184. This provision is designed to create a starting point for the consideration of rebuttable presumptions of first impression.

185. This language provides the flexibility necessary to consider new types of rebuttable presumptions or to reconsider existing rules.

186. This provision requires an inference instruction and thereby prevents a "bursting" of the rebuttable presumption. The term "underlying facts" is used in place of the term "basic facts" because the consideration of an inference can be made in light of all the evidence produced and is not limited to the basic facts supporting the rebuttable presumption.

> will be applied. If the underlying considerations of policy and logic supporting the conflicting presumptions are equal, neither presumption applies.

VI. CONCLUSION

Rebuttable presumptions and inferences play a critical role in many civil cases, and steps should be taken to clarify their use. The obstacles presented by this task, although significant, do not justify abandoning attempts to clear this "thicket." As a starting point, Iowa should adopt a rule of evidence clarifying the use of rebuttable presumptions and inferences in civil litigation. The rule proposed in this Article creates a framework to deal effectively with rebuttable presumptions, and should be adopted in Iowa.