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CRIMINAL LAW—PRESUMPTIONS—ABROGATION OF TRIAL BY JURY—County Court of Ulster County v. Allen, 442 U.S. 140 (1979)

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NOTES

CRIMINAL LAW—PRESUMPTIONS—ABROGATION OF TRIAL BY JURY—*County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

I. FACTS

On March 28, 1973, an automobile was stopped for speeding on the New York State Thruway. The vehicle was occupied by Melvin Lemmon, the driver, Jane Doe, a sixteen-year-old girl seated beside him, and Samuel Allen and Raymond Hardrick, passengers in the back seat. While the car was stopped, one of the officers observed a gun protruding from Ms. Doe's handbag, which was positioned on the floor of the car near the passenger side door. Upon inspection, the handbag was found to contain two guns, a .45 automatic and a .38 revolver.[1]

The four occupants were tried and convicted of illegal possession of the two handguns.[2] The convictions were upheld on appeal by the New York Supreme Court Appellate Division[3] and the New York Court of Appeals.[4] The three male defendants filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The writ was granted and upheld by the United States Court of Appeals for the Second Circuit.[5] The United States Supreme Court granted certiorari.[6]

At issue in this case is the constitutionality of the presumption contained in the statute under which the four were convicted, section 265.15(3) of the New York Penal Law.[7] This statute makes

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1. County Court of Ulster County v. Allen, 442 U.S. 140, 143 (1979).
2. They were acquitted of possession of a machine gun and a pound of heroin found in the trunk of the car, presumably because none of them owned the car nor had a key to the trunk. *Id.* at 144.
3. People v. Lemmon, 49 App. Div. 2d 639, 370 N.Y.S.2d 243 (1975).
4. People v. Lemmon, 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976).
5. Allen v. County Court, Ulster County, 568 F.2d 998 (2d Cir. 1977).
6. County Court of Ulster County v. Allen, 439 U.S. 815 (1978).
7. N.Y. PENAL LAW § 265.15(3) (McKinney 1967):

The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity-knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slingshot is presumptive evidence of its posses-

presence in an automobile found to contain an illegal weapon presumptive evidence of possession by all occupants of the automobile. As interpreted by the New York Court of Appeals, the presumption created by the statute is permissive.[8] Under this interpretation, the jury is allowed, but not required, to find the presumed fact of possession from proof of the basic facts of presence of the guns and persons.[9] The importance of the presumption is that this possibility of possession by all of the car's occupants is commanded to the jury's attention via the judge's instructions. At trial, the prosecution relied upon the presumption to prove its case.[10] In their application for habeas corpus, the defendants contended that the presumption constituted a denial of due process because of its failure to conform to the standards previously adopted by the United States Supreme Court.[11]

II. BACKGROUND

A. *The Functions of Presumptions*

Presumptions developed from the common-law practice of judges' commenting on and interpreting the evidence while instructing the jury.[12] As similar factual situations presented them-

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sion by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances:

(a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein;

(b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or

(c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

8. People v. Lemmon, 40 N.Y.2d 505, 510, 354 N.E.2d 836, 840, 387 N.Y.S.2d 97, 100 (1976).

9. The judge's instruction to the jury reflected this interpretation: "Our Penal Law also provides that the presence in an automobile . . . of any handgun . . . is presumptive evidence of their unlawful possession.

In other words . . . you *may* infer and draw the conclusion that such prohibitive weapon was possessed by each of the defendants who occupied the automobile . . . ." 442 U.S. at 161 (quoting trial transcript at 743) (emphasis added). Were the presumption mandatory, the jurors would have been told that they *must* draw the conclusion unless it was rebutted by evidence to the contrary.

10. Allen v. County Court, Ulster County, 568 F.2d 998, 1000 (2d Cir. 1977).

11. County Court of Ulster County v. Allen, 442 U.S. 140, 146 (1979). For a discussion of the standards, *see* text accompanying notes 30-45 *infra*.

12. McCormick, *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 186 (1938).

selves and the instructions were repeated, these judicial sentiments were hardened into rules of law. Presumptions were eventually created by statute as well.[13] Although originally developed to accord with likelihood and probability, presumptions came to be used for other purposes. Presumptions have been invoked to serve six major functions.[14]

First, they may exclude issues which might not be litigated. A presumption of this nature merely affects the burden to plead an issue. An example would be what is often called the "presumption of sanity." All this may mean is that if a defendant intends to make insanity an issue in the case, he must raise it. The burden of proof remains on the prosecution. There is no effect on the jury's deliberations. Indeed, the jury is not even instructed as to the existence of any presumption. The entire effect is procedural. This type of presumption raises none of the difficulties to be discussed in this note.

Second, a presumption may avoid a procedural impasse where evidence as to the presumed fact is lacking. For example, in a few jurisdictions, when a person has been unexplainedly absent for seven years, death is presumed to take place at the first instant of the eighth year of absence.[15]

Third, a presumption may avoid an impasse due to the impossibility of securing competent evidence. Illustrative are statutes fixing the order of death in common disasters for the purpose of determining rights to inheritance and to insurance benefits.[16]

Fourth, a presumption may serve to produce a result in accord with the preponderance of probability. This is the original function of presumptions, dating back to judges' commenting on the evidence while instructing the jury.

Fifth, one may place the burden of producing evidence upon the party with the greater access to it. This is one reason for the tort doctrine of *res ipsa loquitur*. A defendant is presumptively negligent when the instrumentality of the injury was in his exclusive control.[17]

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13. An early presumption of theft from possession of stolen property is found in the laws of Ine, the King of Wessex, (688-725 A.D.). J. THAYER, PRELIMINARY TREATISE ON THE LAW OF EVIDENCE AT COMMON LAW 327 (1898).

14. Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MTN. L. REV. 34 (1953).

15. Montgomery v. Bevans, 17 F. Cas. 628 (C.C.D. Cal. 1871) (No. 9,735). *See* Annot., 75 A.L.R. 630 (1931).

16. Morgan, *supra* note 14, at 44 (citing Uniform Simultaneous Death Act).

17. *See* Hake v. George Wiedemann Brewing Co., 23 Ohio St. 2d 65, 262 N.E.2d 703 (1970); Byrne v. Boadle, 159 Eng. Rep. 299 (1863).

Sixth, a presumption may be used to achieve a socially desirable result. A child born to a married woman is presumed to be the child of her husband. This presumption serves the societal goal of encouraging parents to support their children.

Some of these functions, while justifiable in a civil context, are inconsistent with the basic purposes of the criminal law. Presumptions creating a substitute for evidence where evidence is unattainable or nonexistent are justifiable in civil cases. The purpose of civil law is to settle controversies between private parties. The value of presumptions is in providing an end to the controversy in a consistent and predictable fashion. The harm of an incorrect result is outweighed by the social good achieved by ending the dispute.

In criminal law, however, such an artificial substitute for evidence would increase the possibility of mistakenly convicting an innocent person while it would lessen the possibility of acquitting the guilty because guilt would be found without evidence. On the contrary, our society has long felt it a greater evil to find guilty and to punish an innocent person than to allow a guilty person to escape.[18] The principle which is the very essence of criminal law is that evidence must be presented to prove the guilt of the accused. Therefore, most criminal law presumptions dealt with by the United States Supreme Court have sought justification because they served functions of rationality or convenience.[19]

B. *Historical Use of Presumptions in Criminal Cases*

Prior to 1911, the United States Supreme Court had not considered the problems of presumptions in any depth. When the matter was raised in a few state criminal cases, the Court dispensed with it quickly, holding that a state legislature had the right to determine what evidence would be accepted in its courts.[20]

In 1911, in the case of *Mobile, Jackson & Kansas City Railroad v. Turnipseed*,[21] a civil action for wrongful death, the Court first expressed the "rational relation" test. A Mississippi statute created a presumption of negligence on the part of a railroad when

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18. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

19. For an explanation of convenience and rationality, *see* text accompanying notes 16-17 *supra*.

20. Adams v. New York, 192 U.S. 585, 599 (1904); Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893).

21. 219 U.S. 35 (1910).

an injury was inflicted due to the railroad's operation.[22] The railroad company contended that this statute violated the due process and the equal protection clauses of the fourteenth amendment. The Court held that in order for a presumption to be constitutional there must be a "rational connection between the fact proved and the ultimate fact presumed. . . ."[23]

Applying this standard, the Court upheld the presumption, stating that "It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation."[24] Thus, rationality was established as a test for the validity of presumptions. Although *Turnipseed* was a civil case, the rational relation test would become important in analyzing the validity of presumptions in criminal cases.

The Court, in other cases, developed two other tests, the "comparative convenience" test[25] and the "greater-includes-the-lesser" test.[26] The comparative convenience test required a presumption to be upheld if its function was to shift the burden of producing evidence to the defendant if he had more convenient access to it. The greater-includes-the-lesser test provided that the presumption must be constitutional if the statute establishing the crime was still constitutional when the element of the crime proved by the presumption was deleted from the definition of the statute. For example, in *Ferry v. Ramsay*,[27] a Kansas statute made it unlawful for any bank director to assent to the receipt of deposits when he had knowledge that the bank was insolvent. The law further provided that the fact of insolvency invoked a presumption of knowledge on the part of the director.[28] Justice Holmes held that since it would have been within the legislature's power to impose

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22. In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury.

Id. at 41.

23. *Id.* at 45. Although *Turnipseed* was a civil case, it continues to be cited as authority for the rational relation test in criminal cases.

24. *Id.* at 44.

25. Morrison v. California, 291 U.S. 82 (1934).

26. Ferry v. Ramsey, 277 U.S. 88 (1928).

27. *Id.*

28. *Id.* at 93.

liability without knowledge, it was likewise permissible to take the lesser step of presuming knowledge.[29]

The rational relation test prevailed. In the case of *Tot v. United States*,[30] a criminal case, the Supreme Court expressly rejected the greater-includes-the-lesser test. The Court was concerned only with the constitutionality of the statute as written, not with hypothetical statutes which Congress for whatever reason had chosen not to enact.[31] The comparative convenience test was dismissed as a mere "corollary."[32] By "corollary" the Court apparently meant that, though convenience may be a goal served by a presumption, it alone cannot render a presumption constitutional. *Tot* established the *Turnipseed* rationality test[33] as the controlling factor[34] in determining the constitutionality of presumptions.

Although the Court had recognized the significance of presumptions and appeared to have developed a specific test to determine their constitutionality, significant problems remained. One of these problems was the difficulty and arbitrariness involved in applying the rationality standard, as illustrated by the Court's holdings in two 1965 cases, *United States v. Gainey*[35] and *United States v. Romano*.[36] In these cases, the Court was faced with presumptions created by separate subsections of 26 U.S.C. § 5601.[37] Subsection b(2), at issue in *Gainey*, created a presumption that persons present at the site of an illegal still were guilty of carrying on an illegal distilling operation. The Court found this presumption to be rational and, therefore, constitutionally valid.[38] In *Romano*, subsection b(1) was at issue. This subsection created a presumption of illegal possession of a still from proof of the defendant's presence at the site. This presumption was found to be irrational and unconstitutional.[39] In reaching contrary results in these two almost identical cases, the Court demonstrated that it was engaging in a kind of legal hairsplitting which could result only in confusion.

Further complications developed with the Court's holding in

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29. *Id.* at 94-95.
30. 319 U.S. 463 (1943).
31. *Id.* at 472.
32. *Id.* at 467.
33. *See* text accompanying notes 21-23 *supra*.
34. 319 U.S. at 467-68.
35. 380 U.S. 63 (1965).
36. 382 U.S. 136 (1965).
37. 26 U.S.C. § 5601 b(1), (2) (1976).
38. 380 U.S. at 68-71.
39. 382 U.S. at 141.

In re Winship.[40] This decision was not concerned with presumptions. It dealt with a New York statute which required proof by a preponderance of the evidence in a juvenile proceeding to establish delinquency. The New York Family Court Act[41] defined a juvenile delinquent as a person between seven and sixteen years of age who does any act which, if done by an adult, would constitute a crime. Thus, in practical effect, the juvenile proceeding was a criminal trial. The Court unequivocally held that the Constitution requires a "beyond reasonable doubt" standard of proof as to every element of a crime.[42]

The holding of *Winship* may have impact on the law of presumptions. If a state is prohibited from a general lowering of the standard of proof in criminal cases, it should likewise be prohibited from lowering that standard as to a specific element of the crime charged. Commentators have theorized that if a criminal law presumption is to be constitutionally valid, the fact presumed must follow, beyond a reasonable doubt, from the fact proven.[43] In *County Court of Ulster County v. Allen*,[44] the Court confronted this issue for the first time.[45]

III. *COUNTY COURT OF ULSTER COUNTY V. ALLEN*—THE OPINION

The United States Supreme Court granted certiorari to consider the questions of whether it was proper for the United States Court of Appeals for the Second Circuit to examine the facial constitutionality of the statute, and whether the application of the presumption in this case was constitutional.[46]

The Court[47] held that the Second Circuit had erred by consid-

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40. 397 U.S. 358 (1970).

41. N.Y. FAM. CT. ACT § 712 (McKinney 1975).

42. "Lest there remain any doubt about the constitutional stature of the resonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

43. Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325, 1336 (1979).

44. 442 U.S. 140 (1979). *See* text accompanying notes 1-11 *supra*.

45. The Court alluded to this issue but declined to decide it in Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); and Leary v. United States, 395 U.S. 6 (1969).

46. 442 U.S. at 147. For a procedural history, *see* text accompanying notes 3-6 *supra*.

47. Justice Stevens wrote the Court's opinion. Justice Powell, joined by Justices Brennan, Stewart, and Marshall, dissented.

ering the statute on its face.[48] Facial attacks consider all possible applications of the statute including hypothetical situations. The Second Circuit had interpreted the rational relation test to mean that the presumed fact must flow more likely than not from the proven fact in common experience, without regard to any particulars of the instant case. The Second Circuit had considered several hypothetical situations and concluded that it could *not* be said that presence in an automobile containing an illegal weapon meant, in more cases than not, that each person present had possession of the weapon.[49]

The Supreme Court explained that the federal courts are courts of limited jurisdiction and, therefore, have a duty to avoid deciding unnecessary questions.[50] Hence, with the limited exception for statutes broadly prohibiting speech protected by the first amendment, a party may not assert that a statute would be in violation of the rights of others in hypothetical situations.[51] The Court held that the Second Circuit's application of the more likely than not test was wrong and that the proper analysis should be whether, in light of all the circumstances of the case, it was rational for the jury to make the inference suggested by the statute.[52]

The Court then analyzed the facts in their entirety and found that since the two handguns were too large to fit completely into Ms. Doe's handbag, they may have been thrust there at the last minute, that such heavy weapons are unlikely to be possessed by a sixteen-year-old girl, and that it was more likely that she relied for protection on the knife found on her person. If, as was reasonable, the jury rejected the notion that the guns were in Ms. Doe's sole possession, then the Court said the case was tantamount to one where the guns were lying unconcealed in plain view of all the occupants. In such a case a jury would be rational in inferring possession of the guns by all occupants of the car.[53]

The Court rejected the argument that the standard for determining the constitutional validity of a presumption should be beyond a reasonable doubt.[54] Since this was a permissive presumption, the jury was free to reject it if, on the basis of all the evi-

48. 442 U.S. at 163.
49. 568 F.2d at 1006-07.
50. 442 U.S. at 154-55.
51. *Id.*
52. *Id.* at 161-62.
53. *Id.* at 164-65.
54. *Id.* at 166-67.

dence, it was not satisfied that guilt had been proven beyond a reasonable doubt. The Court likened the presumption to a piece of relevant evidence which need not independently prove the case.[55]

It was crucial to the Court's determination of both the facial validity issue and the reasonable doubt issue that the presumption was permissive. Had the presumption been mandatory, the facial attack would have been permitted and the reasonable doubt standard required.[56]

The dissenting opinion disapproved of the different standards prescribed by the majority for facial attacks on permissive, as opposed to mandatory, presumptions.[57] The dissent observed that the jury instruction in this case authorized the jury to find possession on the basis of the presumption alone even if it rejected all other evidence bearing on the issue.[58] The jury may *not* have found it unlikely that the guns were in Ms. Doe's sole possession. Contrary to whether the majority believed it reasonable, the jury may *not* have found that the case was "tantamount to one in which the guns were lying on the floor or seat of the car in plain view of the three other occupants of the automobile."[59] In short, had the presumption not been given, the jury may not have returned guilty verdicts. For this reason, the dissent agrees with the Second Circuit that the presumption's rationality must be examined apart from any other factors in the case.

Examining the presumption in this way, the dissent found that it is not "more likely than not" that an occupant of a car is in possession of any illegal weapon found in that car.[60] The inference without more is plainly irrational.[61] Because the dissent arrived at this conclusion, it was unnecessary to consider the reasonable doubt standard.[62]

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55. "There is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted." *Id.*

56. *Id.* at 159-60, 167. *See* Sandstrom v. Montana, 442 U.S. 510 (1979).

57. 442 U.S. at 176-77 (Powell, J., dissenting). Because the dissenters would have reversed based on a more likely than not standard, they found it unnecessary to consider the reasonable doubt issue.

58. *Id.* at 175-76 (Powell, J., dissenting).

59. *Id.* at 175 n.7 (quoting majority at 164). *See* text accompanying note 53 *supra*.

60. 442 U.S. at 174.

61. *Id.* at 176.

62. *Id.* at 169 n.2.

IV. CRITICISM

After *Winship*[63] established that the prosecution had the burden of proving every element of a crime beyond a reasonable doubt, the appropriate standard for determining the constitutional validity of a presumption was called into question. The crucial issue is whether a presumption must be true beyond a reasonable doubt if an element of the crime is to be proven by use of the presumption. To resolve this question, the Court established a distinction between mandatory and permissive presumptions. Henceforth, a mandatory presumption must meet the beyond reasonable doubt test.[64] A permissive presumption need only be true more likely than not.[65]

This distinction between permissive and mandatory presumptions is ill-founded. Although the dissent did not reach this issue, the conclusion that the more likely than not standard is insufficient flows logically from its analysis of the facial question. The dissent observed that the jury may have found possession based on no evidence other than the presumption. If this were the case, the standard of proof required by *Winship* has not been met unless the presumption is true beyond a reasonable doubt. Contrary to the majority's characterization, a presumption is not just one more piece of evidence "on which the prosecution is entitled to rely as one not-necessarily-sufficient part of its proof. . . ."[66] The jury is instructed that the presumption is *sufficient* to establish unlawful possession.[67] At a minimum, therefore, the Court should establish the beyond a reasonable doubt test as the standard for determining the constitutional validity of all criminal presumptions.

V. PROPOSAL—ELIMINATE CRIMINAL LAW PRESUMPTIONS

Even if the Court were to go so far as to say that all presumptions must meet the beyond a reasonable doubt standard, important problems would remain. Central to our system of justice, and guaranteed by the Constitution, is the right to trial by jury.[68] This guarantee must mean more than having a small group of people go through the formality of listening to a presentation before pronounc-

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63. 397 U.S. at 358.
64. 442 U.S. at 166-67.
65. *Id.*
66. *Id.* at 166.
67. *See* note 9 *supra*.
68. U.S. CONST. art. III, § 2 and amends. VI & XIV. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

ing the accused guilty. In particular, it must mean that the jury should be left to wrestle with the difficult concepts involved in the words "beyond a reasonable doubt" before reaching a conclusion. A judge could not instruct a jury "you may find the accused guilty, and we will let the appellate court decide whether there is proof beyond a reasonable doubt." The effect of a presumption may be to do exactly that as to a given element of the crime. Jury instructions are often long and complex.[69] Adrift in a sea of vague concepts

69. In *Allen*, the instructions to the jury included the following:

[Y]ou are the exclusive judge of all the questions of fact in this case. That means that you are the sole judges as to the weight to be given to the evidence and to the weight and probative value to be given to the testimony of each particular witness and to the credibility of any witness.

. . . . . .

Under our law, every defendant in a criminal trial starts the trial with the presumption in his favor that he is innocent, and this presumption follows him throughout the entire trial and remains with him until such time as you, by your verdict find him or her guilty beyond a reasonable doubt or innocent of the charge. If you find him or her not guilty, then, of course, this presumption ripens into an established fact. On the other hand, if you find him or her guilty then this presumption has been overcome and is destroyed.

. . . . . .

It is your duty to consider all the testimony in this case, to weigh it carefully and assess the credit to be given to a witness by his apparent intention to speak the truth and by the accuracy of his memory to reconcile, if possible, conflicting statements as to material facts and in such ways to try and get at the truth and to reach a verdict upon the evidence.

. . . . . .

As so defined, possession means actual physical possession, just as having the drugs or weapons in one's hand, in one's home or other place under one's exclusive control, or constructive possession which may exist without personal dominion over the drugs or weapons but with the intent and ability to retain such control or dominion.

. . . . . .

Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

In other words, these presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw conclusions that such prohibitive weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.

. . . . . .

To establish the unlawful possession of the weapons, again the People relied upon the presumption and, in addition thereto, the testimony of Anderson and Lemmons who testified in their case in chief.

. . . . . .

such as possession and reasonable doubt, the New York statute gives the jury one compass upon which it may rely. It is told that the law equates presence with possession. It is far too likely that the jury will quickly grasp the presumption and, by clinging to it, avoid the task of grappling with the complexities of possession and reasonable doubt. Even if the presumption is then found by an appellate court to meet the beyond a reasonable doubt standard, the accused's right to a jury determination has been abridged.

After the Court's opinion in *Tot*[70] the only valid functions which a presumption constitutionally may serve are those of establishing a rational relation between basic and presumed facts, especially when the burden can be put on the party with more convenient access. Although convenience by itself is not enough to justify a presumption, convenience may be asserted as one goal achieved by otherwise valid presumptions.[71] The argument for convenience is that if the defendant can more easily prove that the inference recommended by the presumption does not apply to him, the burden should be upon him to do so. According to the convenience theory, then, if Hardrick, one of the *Allen* defendants who was in the back seat, did not have any dominion or control over the guns, at least he knew who did. He was in a better position than the

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> Now, in order to find any of the defendants guilty of the unlawful possession of the weapons, the machine gun, the .45 and the .38, you must be satisfied beyond a reasonable doubt that the defendants possessed the machine gun and the .45 and the .38, possessed it as I defined it to you before.
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> . . . . . .
>
> Accordingly, you would be warranted in returning a verdict of guilt against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you.
>
> . . . . . .
>
> The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by an evidence or lack of evidence in the case.

442 U.S. at 160-62.

70. 319 U.S. 463 (1943). *See* text accompanying notes 30-34 *supra*.

71. Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 180 (1969). *See* text accompanying notes 15-19 *supra*.

prosecution to explain what the relationships of all the occupants were to the guns.

The convenience theory, however, is in conflict not only with the fifth amendment right against self-incrimination but also with the common-law tradition establishing our system of justice as accusatory, not inquisitory.[72] The prosecution must first prove guilt before the defendant can be asked to prove anything. Only when guilt has been proven under the statute should the burden fall upon the defendant to rebut the evidence. In analyzing the constitutional posture of a criminal presumption, therefore, convenience is not an appropriate consideration.

Even if the beyond a reasonable doubt standard is applied, this should not render a presumption valid. If the presumption is true beyond a reasonable doubt, it adds nothing to the trial by its inclusion. Without the presumption, the basic facts may be established since the evidentiary test for relevancy is even less than more likely than not. For example, the federal rule merely requires that the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. . . ."[73] If the basic facts then give rise to a logical inference, the prosecutor remains free to point that out to the jury. If the inference advocated by the prosecutor is itself proof beyond a reasonable doubt, the jury will recognize that and will find the fact true beyond a reasonable doubt. If the inference is not so strong, but has some merit, the jury will attach to it the weight it deserves and will come to the proper conclusion. That is what a jury is for.

The only factor added by a presumption is the jury instruction. The effect of a jury instruction may be to cloak with judicial respectability an inference which the jury may not have reached on its own. Even the Court in *Allen* recognized that a presumption must not undermine the fact finder's responsibility at trial to find the ultimate facts beyond a reasonable doubt on the basis of evidence adduced by the state.[74] Since a presumption cannot enhance

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72. U.S. CONST. amends. V & XIV. *See* Malloy v. Hogan, 378 U.S. 1 (1964); United States v. Gooding, 25 U.S. (12 Wheat.) 460, 471 (1827).

73. FED. R. EVID. 401.

74. 442 U.S. at 156.

a jury's ability to perform its responsibility, it can only be constitutional if it has no effect at all.[75]

In *Allen*, if the instruction on the presumption had not been given, the jury would have been able to consider such factors as the ages of the car's occupants, their positions in the car, and the size and location of the guns. The jury may or may not have concluded, based upon all these factors, that the defendants were guilty of unlawful possession beyond a reasonable doubt. The Supreme Court concluded that the presumption did not interfere with the jury's ability to make a proper analysis. Had the presumption not been given, however, it *could not* have interfered with the jury's analysis.

VI. CONCLUSION

The United States Supreme Court, in *County Court of Ulster County v. Allen*,[76] upheld the convictions of three men for illegal possession of handguns. The men and a sixteen-year-old girl were occupants of a car which police stopped on the New York State Thruway. Two guns were found in the girl's pocketbook. A statutory presumption of possession from proof of presence in the automobile was used to convict the three men. The constitutionality of the presumption was the issue presented to the Court.

In upholding this presumption, the Supreme Court adopted two standards to analyze the constitutional validity of criminal presumptions. A mandatory presumption must be true beyond a reasonable doubt. A permissive presumption need only be true more likely than not. Such a distinction is unjustified since even a permissive presumption may be relied on by the jury to establish guilt.

Even the beyond a reasonable doubt standard should not render presumptions constitutional in criminal cases. Presumptions are an intrusion upon the jury's responsibility to determine guilt beyond a reasonable doubt. Allowing an appellate court to test whether a presumption is true beyond a reasonable doubt should not be a constitutionally permissible substitute for a trial by jury.

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75. For an attempt to quantify the magnitude of the possible harmful effects of presumptions, *see* Ashford & Risinger, *supra* note 71.

76. 442 U.S. at 140.