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# County Court of Ulster County v. Allen and Sandstorm v. Montana: The Supreme Court Lends an Ear But Turns Its Face

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# *COUNTY COURT OF ULSTER COUNTY V. ALLEN* AND *SANDSTROM V. MONTANA:* THE SUPREME COURT LENDS AN EAR BUT TURNS ITS FACE

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## INTRODUCTION

Observers of the Burger Court[1] have often noted that the Court has rejected an expansive role for the judiciary in the area of criminal

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1. The terms "Burger Court" and "Warren Court" are, of course, merely convenient shorthand expressions. Numerous changes of personnel occurred during the tenures of both Chief

law.[2] Recent decisions have promoted deference to the expertise of the nonjudicial agencies of the criminal justice system. For example, the Burger Court has generally shown less inclination to police the police. Although the landmark Warren Court decision, *Miranda v. Arizona*,[3] has not been overruled, various limitations have been placed on this prophylactic rule of police interrogations.[4] The pres-

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Justice Warren and Chief Justice Burger. The cases cited in the following notes are meant to be indicative of the very general trends noted in the text. No attempt has been made to compile an exhaustive compendium of Burger Court decisions in criminal law.

2. *See* L. LEVY, AGAINST THE LAW 439 (1974); C. WHITEBREAD, CRIMINAL PROCEDURE 1-12 (1980); Allen, *Foreword—Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & CRIMINOLOGY 391 (1975); Berlow, *Undercutting* Miranda: *The Burger Court Way with Suspects*, 224 THE NATION 498 (1976); Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); George, *From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice*, 12 CRIM. LAW. BULL. 253 (1976); Hartman, *Foreword—The Burger Court—1973 Term: Leaving the Sixties Behind Us*, 65 J. CRIM. L. & CRIMINOLOGY 437 (1974); Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977); Mason, *The Burger Court in Historical Perspective*, 89 POL. SCI. Q. 27 (1974); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

All the above works support the proposition for which they are cited to varying degrees. The commentators show little uniformity, however. *Compare* L. LEVY, *supra*, at 421-41, who argues that the Nixon appointees are advocates for law enforcement's cause who have succeeded in undermining Warren Court precedents, *with* Israel, *supra*, at 1325-26, who contends that "in most areas outside of police practices the Burger Court has tended either to expand upon the Warren Court interpretations or to leave the governing guidelines largely as they stood under Warren Court decisions."

3. 384 U.S. 436 (1966).

4. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291 (1980) ("interrogation" under *Miranda* limited to words or actions reasonably likely to elicit an incriminating response); North Carolina v. Butler, 441 U.S. 369 (1979) (implicit waiver of *Miranda* rights found despite refusal to sign a written waiver form and absence of express oral waiver); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (parolee invited to police station not "in custody"; *Miranda* requirements limited to custodial interrogations); Michigan v. Mosley, 423 U.S. 96 (1975) (second interrogation session upheld after defendant had initially waived his rights); Oregon v. Hass, 420 U.S. 714 (1975) (statements obtained in violation of *Miranda* may be used for impeachment at trial); Michigan v. Tucker, 417 U.S. 433 (1974) (pre-*Miranda* interrogation leading to discovery of witness not suppressible). *But see* Doyle v. Ohio, 426 U.S. 610 (1976) (prosecutor's comment on defendant's silence after arrest and after *Miranda* warning is reversible error). *But see* Jenkins v. Anderson, ___ U.S. ___, 100 S. Ct. 2124 (1980) (*Doyle* limited to post-arrest silence).

Numerous decisions have given the police greater power to search and arrest without a warrant. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976) (warrantless inventory search of impounded automobile upheld); United States v. Santana, 427 U.S. 38 (1976) (doctrine of hot pursuit extended to authorize a warrantless arrest in public place of heroin suspect observed by police officers in the doorway of her home); United States v. Watson, 423 U.S. 411 (1976) (warrantless arrest in public held permissible even though adequate opportunity to procure a warrant); Texas v. White, 423 U.S. 67 (1975) (per curiam) (warrantless search of car at police station following driver's arrest for attempt to pass fraudulent checks upheld); United States v. Robinson, 414 U.S. 218 (1973), *and* Gustafson v. Florida, 414 U.S. 260 (1973) (full search of person incident to traffic arrest upheld); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (warrantless search without probable cause upheld on a consent theory despite failure to show defendants were aware of right to refuse); *cf.* Cardwell v. Lewis, 417 U.S. 583 (1974) (no fourth amendment violation in warrantless seizure of automobile and examination of its exterior at police impoundment area after car had been removed from public parking lot). *But see* Payton

ent Court has limited the application of the exclusionary rule[5] amid intimations of its complete demise by some members of the Court.[6] Further illustrative of the general trend are decisions holding that the procedures and criteria of the decision to grant parole do not implicate the constitutional requirement of due process of law.[7] Recent decisions that have denied constitutional status to issues having a substantial impact on the conditions of an inmate's confinement[8] reflect decreasing judicial activism in the area of prison administration.[9] Fi-

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v. New York, 446 U.S. 969 (1980) (fourth amendment forbids police practice of making warrantless, nonconsensual, nonexigent entries of suspects' homes for the purpose of making "routine" felony arrests); Delaware v. Prouse, 440 U.S. 648 (1979) (fourth amendment forbids random police stops of vehicles on public streets for license and registration checks without reasonable suspicion that some law is being violated); Dunaway v. New York, 442 U.S. 200 (1979) (investigative seizures of suspects for questioning on less than the probable cause necessary to make formal arrests not allowed); Mincey v. Arizona, 437 U.S. 385 (1978) (no "murder scene" exception under the fourth amendment); Michigan v. Tyler, 436 U.S. 499 (1978), *and* Marshall v. Barlows Inc., 436 U.S. 307 (1978) (warrants required for administrative searches).

Several Burger Court cases have given expansive readings to the allowable scope of police intrusion in executing searches and seizures pursuant to judicial warrants. *See, e.g.*, Dalia v. United States, 441 U.S. 238 (1979) (forcible surreptitious entry of private premises for the purpose of installing a listening device permitted even if authority for entry is not spelled out in order permitting electronic eavesdropping); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (fourth amendment does not forbid issuance of warrant to search for criminal evidence reasonably believed to be on premises of third party newspaper even though newspaper is not suspected of involvement in crime). *But see* Ybarra v. Illinois, 444 U.S. 85 (1979) (presence at the scene of a valid fourth amendment search does not justify search).

The Warren Court ruling in United States v. Wade, 388 U.S. 218 (1967), requiring the assistance of counsel at police line-ups, has been largely vitiated by the Burger Court decisions of Kirby v. Illinois, 406 U.S. 682 (1972), and United States v. Ash, 413 U.S. 300 (1973). *Kirby* limited *Wade* to line-ups conducted after a formal charge has been filed. *Ash* held *Wade* inapplicable to noncorporeal identification procedures conducted after indictment. *But see* Moore v. Illinois, 434 U.S. 220 (1977) (*Wade* applies to an initial appearance show-up).

5. *See* Rawlings v. Kentucky, ___ U.S. ___, 100 S. Ct. 2556 (1980); United States v. Salvucci, ___ U.S. ___, 100 S. Ct. 2547 (1980); Michigan v. DeFillippo, 443 U.S. 31 (1979); Rakas v. Illinois, 439 U.S. 128 (1978); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974). *But see* Brown v. Illinois, 422 U.S. 590 (1975).

6. *See* Brewer v. Williams, 430 U.S. 387, 414 n.3 (1977) (Powell, J., concurring); Stone v. Powell, 428 U.S. at 500 (Burger, C.J., concurring), 536 (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 606-12 (1975) (Powell, J., concurring in part). Justice Rehnquist joined in Justice Powell's concurrence in *Brown*.

7. *See* Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979). *But see* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* Moody v. Daggett, 429 U.S. 78 (1976).

8. *See* Procunier v. Martinez, 416 U.S. 396, 405 (1974). *But see* Bounds v. Smith, 430 U.S. 817 (1977); Estelle v. Gamble, 429 U.S. 97 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974). *See also* Procunier v. Navarette, 434 U.S. 555 (1978); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Montayne v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Baxter v. Palmigiano, 425 U.S. 308 (1976); Pell v. Procunier, 417 U.S. 817 (1974).

9. The Court itself has recently commented on this trend. *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979).

nally, federal review of state court decisions through habeas corpus jurisdiction has been markedly reduced.[10]

A corollary of diminished judicial intervention, however, appears to be a heightened concern with the rationality of judicial decisionmaking. Whereas the Warren Court focused on pretrial stages of the criminal process, the current Court seems more interested in directing the attention of the appellate courts to ensuring fairness and accuracy in the courtrooms within their jurisdictions, while rejecting an expansive supervisory role of agencies outside of the judicial sphere.[11]

In the 1978-1979 Supreme Court Term, the Court issued two major decisions on a subject that clearly implicates the rationality of the factfinding process at trial: criminal presumptions. Although the

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10. *Compare* Fay v. Noia, 372 U.S. 391 (1963), *with* Wainwright v. Sykes, 433 U.S. 72 (1977), Stone v. Powell, 428 U.S. 465 (1976), *and* Francis v. Henderson, 425 U.S. 536 (1976). *But see* Braden v. 30th Judicial Circuit Ct., 410 U.S. 484 (1973); Hensley v. Municipal Ct., 411 U.S. 345 (1973). *See also* United States v. MacCollom, 426 U.S. 317 (1976); Ross v. Moffitt, 417 U.S. 600 (1974).

11. One commentator has noted that

> the current Court has been quite zealous in scrutinizing such Sixth Amendment rights as the right to counsel and the right to a jury trial, because these guaranties are viewed as essential to a fair trial, and an accurate determination of guilt. . . . The focus on the trial as the central battleground between the accused and the government represents a substantial departure from the Warren Court's perspective.

C. WHITEBREAD, *supra* note 2, at 5. Professor Whitebread, *id.* at 5 nn.29 & 30, cites the following sixth amendment decisions of the Burger Court in support of his position: Holloway v. Arkansas, 435 U.S. 475 (1978); Ballew v. Georgia, 435 U.S. 223 (1978); Taylor v. Louisiana, 419 U.S. 522 (1975). *See also* Burch v. Louisiana, 441 U.S. 130 (1979); Duren v. Missouri, 439 U.S. 357 (1979); Geders v. United States, 425 U.S. 80 (1976); Faretta v. California, 422 U.S. 806 (1975); Argersinger v. Hamlin, 407 U.S. 25 (1972). *But see* Cuyler v. Sullivan, 446 U.S. 335 (1980); Scott v. Illinois, 440 U.S. 367 (1979). *See also* Baldasar v. Illinois, 446 U.S. 222 (1980) (post-trial constitutional protection).

The focus of the Burger Court on the accuracy of the trial process is perhaps best illustrated by the Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979). Although the Burger Court has been contracting the scope of federal habeas corpus jurisdiction, see note 10 *supra*, *Jackson* held that claims of insufficiency of the evidence are cognizable in habeas petitions. This holding is particularly surprising in light of the fact that it has been black letter law that sufficiency-of-the-evidence claims are not generally available on collateral attack. Prior to *Jackson*, the only exception to this principle was if the habeas petitioner could show that there was *no* evidence to support his conviction. Thompson v. Louisville, 362 U.S. 199 (1960). The doctrine of no review of sufficiency claims was so firmly entrenched that "the *Thompson* decision was viewed as a victory for habeas petitioners," despite the exacting standard that it established. *The Supreme Court 1978-79 Term*, 25 CRIM. L. RPTR. 4137 (1979).

The expansion of the availability of sufficiency-of-the-evidence claims at a time when the issues cognizable on federal habeas are otherwise shrinking is explained by the Court's heightened concern with the rationality of the trial process. In *Jackson*, the Court emphasized that claims of insufficient evidence are "far different" from illegal search and seizure issues. 443 U.S. at 323. Illegal search and seizure issues had been removed from federal habeas corpus jurisdiction where the state court had provided a full and fair hearing because the propriety of police conduct in obtaining the probative evidence was a collateral issue. Stone v. Powell, 428 U.S. 465, 485-86 (1976). In contrast, the *Jackson* Court stated that "[t]he question whether a defendant has been convicted upon adequate evidence is central to the basic question of guilt or innocence." 443 U.S. at 323. In *Jackson*, the Burger Court's concern with the rationality of the trial process outweighed the Court's preference for less expansive federal court supervision.

second decision, *Sandstrom v. Montana*,[12] typifies the recent heightened concern with the rationality of the factfinding process, the other, *County Court of Ulster County v. Allen*,[13] diminishes the significance of *Sandstrom* and presages a withdrawal from appellate review of the rationality of deductive devices.

A presumption, or deductive device,[14] is a legal mechanism that allows or requires the factfinder to assume the existence of a fact when proof of other facts is shown. The fact that must be proved is called the basic fact; the fact that may or must be assumed upon proof of the basic fact is the presumed fact.[15] A conclusive presumption provides that upon proof of the basic fact, the presumed fact must be found and cannot be overcome by rebutting evidence.[16] If the deductive device provides that upon proof of the basic fact, the presumed fact must be found but is subject to rebuttal, the device is commonly known as a mandatory presumption.[17] The opponent of a mandatory presumption is required to meet either a production or a persuasion burden in rebutting the presumption.[18] The party who bears the burden of production, or, as it is sometimes phrased, the "duty of going forward," loses when evidence is nonexistent or inadequate to meet a threshold requirement.[19] The burden of persuasion becomes operative once the production burden is satisfied. The burden of persuasion, alternatively described as the risk of nonpersuasion, informs the members of the jury how to decide the issue if their minds are in doubt. In that situation, the party having the burden of persuasion has failed to satisfy that burden and the issue is to be decided against him.[20]

The term *presumption*, or *permissive presumption*, is sometimes also used to describe a permissive inference.[21] A permissive inference provides that upon proof of the basic fact, the jury is permitted but not required to find the existence of the presumed fact.[22] This

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12. 442 U.S. 510 (1979).

13. 442 U.S. 140 (1979).

14. The term *presumption* is only a general label for a variety of standardized inferential links between two facts or sets of facts.

15. For a compendium of meanings of both civil and criminal presumptions, see Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

16. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 804 (2d ed. 1972) [hereinafter cited as MCCORMICK].

17. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 52 nn.54 & 55 (1972).

18. The distinction between the burden of production and the burden of persuasion is often attributed to J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-59 (1898). *See, e.g.*, MCCORMICK, *supra* note 16, at 783 n.2.

19. *See* J. THAYER, *supra* note 18, at 355. The decision whether the production burden has been met is for the judge. Failure to satisfy the threshold production burden operates in a jury trial to remove the issue from the jury. *See* MCCORMICK, *supra* note 16, at 789-92.

20. *See* MCCORMICK, *supra* note 16, at 793-802.

21. *See id.* at 804 n.31.

22. *See id.* at 804.

Article will refer to all types of presumptions by the neutral term *deductive devices* because whether a device is mandatory or permissive is the ultimate issue to be determined in reviewing many of the cases discussed.

Since the seminal case of *Tot v. United States*,[23] the Supreme Court has reviewed the validity of a deductive device by assessing the inferential leap between the proven or basic fact and the fact presumed to determine the rationality of the connection between the facts. The "rational connection test," elaborated in *Leary v. United States*,[24] requires that the presumed fact must be more likely than not to flow from the basic fact. In *Leary*, and in all cases after *Tot*, the Court had evaded the frequent contention that in a criminal case the connection between facts must satisfy the beyond-a-reasonable-doubt requirement, by finding the link between the basic and presumed fact either so weak as to fail even the rational connection test or so strong as to satisfy a beyond-a-reasonable-doubt standard.[25] In *County Court of Ulster County v. Allen*, the Court finally addressed the question by adopting a dual standard dependent upon the distinction between mandatory presumptions and permissive inferences. Permissive inferences are twice blessed: the inferential link is not subjected to facial review, that is, it is not tested for accuracy in the abstract but only as applied to the facts of a given case;[26] and there need be only a rational connection between basic and presumed facts.[27] Mandatory presumptions, on the other hand, are doubly burdened by the prospect of appellate review because they will be facially examined by a beyond-a-reasonable-doubt standard.[28]

The first section of this Article will examine the divergent approaches of *Allen* and *Sandstrom* and the impact of the two cases on

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23. 319 U.S. 463 (1943).

24. 395 U.S. 6, 36 (1969).

25. *See* Barnes v. United States, 412 U.S. 837, 845, 846 n.11 (1973); Turner v. United States, 396 U.S. 398, 416, 419, 422 (1970); Leary v. United States, 395 U.S. 6, 36 n.64 (1969).

26. See notes 44-61 and accompanying text *infra*.

27. *Allen* retained *Leary's* "more likely than not" gloss on the rational connection test. County Ct. of Ulster County v. Allen, 442 U.S. 140, 165 (1979).

28. This conclusion is less certain than the holding that permissive inferences need only satisfy the more-likely-than-not standard. In dictum the *Allen* Court mentioned the standard of review to be applied to mandatory presumptions: "In the latter situation [referring to cases involving mandatory presumptions], since the prosecution bears the burden of establishing guilt, it may not rest its case entirely upon a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Id.* at 167. An earlier note in the opinion had pointed out that some mandatory presumptions affect a shift in the burden of persuasion while others shift only the burden of production: "To the extent that a presumption imposes an extremely low burden of production,—*e.g.*, being satisfied by 'any' evidence—it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such." *Id.* at 157-58 n.16 (citation omitted). The Court appears to have left open the possibility that facial review and/or a beyond-a-reasonable-doubt standard may not be required for all mandatory presumptions.

the review of deductive devices. The second section will examine *Allen's* claim that it is the progeny of a long line of precedents. The combined impact of *Sandstrom* and *Allen* will be shown to be an increased appellate scrutiny of the type or form of a deductive device with a corresponding decrease in appellate review of the rationality of its content. The third section of the Article will demonstrate that the formalistic result of *Sandstrom* and *Allen* has a coercive impact on jury verdicts that imperils the rationality of the factfinding process. A similar formalistic trend by the Supreme Court in its treatment of affirmative defenses will be examined in the fourth section of the Article and an attempt will be made to understand the imperatives that have led the Court virtually to abandon the review of permissive inferences. Finally, suggestions will be offered for instructing the jury in ways that will accommodate the valid concerns discussed in the fourth section of the Article without unduly prejudicing jury deliberations.

## I. *County Court of Ulster County v. Allen*[29] and *Sandstrom v. Montana*[30]

*County Court of Ulster County v. Allen* dealt with a New York statute providing that the presence of a firearm or another of several enumerated types of weapons in an automobile is "presumptive evidence of its possession by all persons occupying such automobile."[31] Three adult males and a sixteen-year-old female, referred to by the pseudonym of Jane Doe, were jointly tried and convicted of charges that they illegally possessed two loaded handguns. The handguns were found stuffed into Jane Doe's open handbag, which was located

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29. 442 U.S. 140 (1979).

30. 442 U.S. 510 (1979).

31. The full statutory section provides:

> The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession 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.

N.Y. PENAL LAW § 265.15(3) (McKinney 1979). Another statutory section, N.Y. PENAL LAW § 265.20 (McKinney 1979) contains statutory exceptions for weapons present due to certain military, law enforcement, recreational, and commercial purposes.

on either the front floor or the front seat of the car on the passenger side.[32] The four defendants were acquitted of charges of illegal possession of a loaded machine gun and over a pound of heroin found in the locked trunk of the car.[33]

At trial, the state introduced as evidence the objects seized from the car. All four defendants objected that the state had not demonstrated an adequate evidentiary connection between the four defendants and the contraband. The trial court overruled the objection on the basis of the statutory "presumption."[34] Aside from the evidence of the seized objects, the state's case consisted principally of the testimony of the two arresting officers who had stopped the car to issue a speeding citation. One of the officers testified that he had observed in "open view" a portion of a .45-caliber automatic pistol protruding from the open purse in the car. In securing the gun, he observed a second handgun, a .38-caliber revolver, in the same handbag.[35] Following the arrest, the heroin and the loaded machine gun were discovered in the locked trunk of the car.[36] At the close of the evidence, the judge instructed the jury that the state had relied upon the testimony of the two arresting officers and the presumption "to establish the unlawful possession of the weapons."[37] The jury was also instructed as follows:

> 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 a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found* [*sic*]. 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.[38]

The convictions of Samuel Allen and his two adult codefendants were affirmed by the New York Appellate Division[39] and the New

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32. The Supreme Court stated that "[t]he evidence would have allowed the jury to conclude either that the handbag was on the front floor or front seat." 442 U.S. at 163 n.25. Both the Second Circuit and the New York Court of Appeals had found that the handbag was on the floor. *See* Allen v. County Ct., 568 F.2d 998, 1000 (2d Cir. 1977); People v. Lemmons, 40 N.Y.2d 505, 508-09, 354 N.E.2d 836, 838-39, 387 N.Y.S.2d 97, 99 (1976).

33. A statutory deductive device similar to that for weapons was created for controlled substances by N.Y. PENAL LAW § 220.25(1) (McKinney 1979).

34. 442 U.S. at 144-45.

35. *Id.* at 143 n.2.

36. *Id.* at 143-44. *See also id.* at 155 n.14.

37. *Id.* at 160-61 n.19.

38. *Id.* at 161 n.20 (emphasis added).

39. The New York Appellate Division affirmed without opinion. People v. Lemmons, 49 A.D.2d 639, 370 N.Y.S.2d 243 (1975).

York Court of Appeals,[40] but the United States District Court for the Southern District of New York granted these defendants' petition for a writ of habeas corpus.[41] The United States Court of Appeals for the Second Circuit affirmed,[42] holding that the statutory "presumption" was unconstitutional on its face because the "presumption obviously sweeps within its compass (1) many occupants who may not know they are riding with a gun (which may be out of their sight), and (2) many who may be aware of the presence of the gun but [are] not permitted access to it."[43]

In a 5-4 majority opinion written by Justice Stevens, the Supreme Court chastised the court of appeals for testing the fairness of the statutory inference in "hypothetical situations,"[44] stating that a party lacked standing to challenge the constitutionality of statutes as applied to third parties.[45] In the majority's view, whether the defendants had standing to raise the arguments found decisive by the court of appeals depended on the type of presumption involved in the case.[46] The Court stated that a mandatory presumption must be examined on its face[47] since the jury is required to find the presumed fact upon proof of the basic fact at least until the defendant

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40. People v. Lemmons, 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976). The New York Court of Appeals summarily rejected appellant's constitutional attack after reviewing the evidence concerning the location of the handguns. The court of appeals held that sufficient evidence had been presented to create a question for the jury, that the court could not "conclude that as a matter of law the presumption was inapplicable," *id.* at 512, 354 N.E.2d at 841, 387 N.Y.S.2d at 102, and that there was sufficient evidence to support the conviction.

41. Allen v. County Ct., 76 Civ. 4794 (S.D.N.Y. April 19, 1977), *reprinted in* Petitioner's Brief for Certiorari at 33a-36a. "Jane Doe," who was adjudicated a youthful offender and given a sentence of five years probation, did not join in the habeas corpus petition. *See* Allen v. County Ct. of Ulster County, 568 F.2d 998, 1000 n.2 (2d Cir. 1977). The district court issued the writ on the grounds that the appellants had not deliberately bypassed their federal claim, a holding that the Court of Appeals for the Second Circuit did not address, and that the mere presence of the guns in the handbag could not reasonably give rise to the inference of possession by the other three occupants of the car.

42. Allen v. County Ct. of Ulster County, 568 F.2d 998 (2d Cir. 1977).

43. *Id.* at 1007. The court of appeals added:

> Nothing about a gun, which may be only a few inches in length (e.g., a Baretta or Derringer) and concealed under a seat, in a glove compartment or beyond the reach of all but one of the car's occupants, assures that its presence is known to occupants who may be hitchhikers or other casual passengers, much less that they have any dominion or control over it.

*Id.*

44. 442 U.S. at 155. The Court first rejected the contention that the district court lacked jurisdiction to consider the habeas corpus petition on the merits under 28 U.S.C. § 2254 because the New York court's affirmance of the conviction was based on an adequate state procedural ground. *Id.* at 147-54.

45. The Court noted that the limited exception to the standing requirement for statutes broadly prohibiting free speech protected by the first amendment "has no application to a statute that enhances the legal risks associated with riding in vehicles containing dangerous weapons." *Id.* at 155.

46. *Id.* at 156.

47. By "facial review" the Court meant that the deductive device is tested for accuracy in isolation from the facts of the case by considering it in possible or hypothetical fact situations.

produces "some evidence to rebut the presumed connection between the two facts."[48] In the absence of rebutting evidence, the jury may not reject a mandatory presumption. In contrast, a permissive inference was found not to be as troublesome since it merely allows, but does not require, the jury to find the presumed fact upon proof of the basic fact. Thus there is no shift in the burden of production or persuasion.[49] The *Allen* majority stated that the due process requirement of proof beyond a reasonable doubt is imperiled only if there is no rational way that the jury could draw the inference offered by the statute[50] *under the facts of the case*.[51] If the presumption is only an inference or a permissive presumption, as the Court most frequently referred to it, a defendant must demonstrate its invalidity as applied to him.[52]

The Court claimed that it had previously undertaken a facial validity analysis only in cases involving mandatory presumptions,[53] citing *Tot v. United States*,[54] *Leary v. United States*,[55] *United States v. Romano*,[56] and the first of two deductive devices considered in *Turner v. United States*.[57] In contrast, the Court stated that when reviewing permissive inferences such as those at issue in *Barnes v. United States*[58] and *United States v. Gainey*[59] and the second of the deductive devices considered in *Turner*,[60] it had determined their validity in the context of the particular facts of each case.[61]

Within this analytic framework, the *Allen* majority had little trouble in reversing the Second Circuit and upholding the validity of the "statutory permissive presumption." The jury instructions made it clear that the "presumption" was only a "permissive inference" that could be ignored by the jury even in the absence of rebuttal evidence.[62] As applied to the facts of the case, the permissive inference of possession of the weapons from proof of their presence in the au-

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48. *Id.* at 157.
49. See notes 14-22 and accompanying text *supra*.
50. Inferences and presumptions may also be judicially created. *See, e.g.*, Barnes v. United States, 412 U.S. 838, 839-40 (1973). In fact, deductive devices were originally made by judges through the common law. However, the legislative branch now dominates the creation of these devices. *See* Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 59 (1977).
51. 442 U.S. at 157.
52. *Id.*
53. *Id.* at 157-59.
54. 319 U.S. 463 (1943).
55. 395 U.S. 6 (1969).
56. 382 U.S. 136 (1965).
57. 396 U.S. 398, 408-18 (1970).
58. 412 U.S. 837 (1973).
59. 380 U.S. 63 (1965).
60. 396 U.S. at 419-24.
61. 442 U.S. at 157.
62. *Id.* at 160-62.

tomobile satisfied the rational connection test.[63] Although the two handguns were in Jane Doe's purse, the Court noted that she was a sixteen-year-old girl in the presence of three adult men.[64] The guns were too large to be concealed in the purse, causing it to bulge open. Because the purse was in easy reach of the driver and "even perhaps of the other two respondents who were riding in the rear seat," it was reasonable to infer that "Jane Doe was not the only person able to exercise dominion" over the weapons contained in the purse.[65]

Justice Powell, writing for the four dissenters, found no recognition in the Court's prior decisions of a bright line distinguishing mandatory and permissive presumptions.[66] Justice Powell argued that the facial rationality of the permissive inference in *Allen* must be determined because the inference authorized the jury to reach its verdict even if it disbelieved all the prosecution's evidence except for the proof of presence of the weapons in the car.[67] By sustaining the convictions because of the existence of sufficient evidence, the majority was applying an "unarticulated harmless error" analysis, since the jury might have relied solely on the statutory inference that the dissent labeled "plainly irrational."[68]

Two weeks after the *Allen* decision, the Court decided a second major case involving criminal presumptions: *Sandstrom v. Montana*.[69] David Sandstrom had confessed to the killing with which he was charged. At trial, the defense sought only to prove that Sandstrom was guilty of a lesser crime than "deliberate homicide."[70] The defense presented evidence that the defendant had a personality disorder which, aggravated by alcohol consumption, precluded the possibility that he had acted "purposely or knowingly," as required by the statutory definition of deliberate homicide.[71] Over defense objection, the trial court granted the prosecution's request to instruct the jury that "[t]he law presumes that a person intends the ordinary con-

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63. *Id.* at 163-65.

64. *Id.* at 163-64.

65. *Id.* at 163. The jury was instructed that "possession" could be actual or constructive, but that even constructive possession required intent and ability to retain control or dominion over the articles possessed. *Id.* at 161-62 n.21.

66. *Id.* at 170 n.3 (Powell, J., dissenting).

67. *Id.* at 175-76.

68. *Id.* at 177.

69. 442 U.S. 510 (1979). *Allen* was decided on June 4, 1979. The *Sandstrom* decision was issued on June 18, 1979.

70. 442 U.S. at 512.

71. *Id.* The Montana criminal homicide statute provides: "(1) A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being. (2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide." MONT. REV. CODES ANN. § 45-5-101 (1979). Except as provided elsewhere in the statute, criminal homicide is deliberate homicide if "(a) it is committed purposely or knowingly . . . ." MONT. REV. CODES ANN. § 45-5-102 (1979).

sequences of his voluntary acts."[72] The jury found the defendant guilty of deliberate homicide. In affirming his conviction, the Montana Supreme Court denied Sandstrom's contention that the presumptive intent instruction violated due process by shifting the burden of proof to the defendant on an essential element of the crime.[73] The Montana court reasoned that the effect of the presumption was to shift to the defendant only the burden of producing *some* evidence that he did not intend the ordinary consequences of his voluntary acts. Such a shift in the burden of production was not a violation of the fourteenth amendment so long as the instruction did not alter the state's burden to persuade the factfinder that the homicide was committed "purposely or knowingly."[74]

The United States Supreme Court reversed, despite its recognition that the Montana Supreme Court is the final arbiter of the presumption under Montana law, and without reaching the question of the constitutionality of a device having the production-shifting impact described by the Montana court. Whatever the intended impact, the Montana court was "not the final authority on the interpretation which a jury could have given the instruction."[75] Although some jurors may have interpreted the instruction as permissive or as having the intended effect described by the Montana court, the possibility that a juror might have interpreted the statute in one of two other ways was enough to require reversal.[76] A reasonable juror might have interpreted the instruction as a command to find intent upon proof of a voluntary act.[77] Alternatively, a juror might have felt required to make such a finding unless the defendant proved the contrary by a quantum of proof far greater than "some evidence."[78] These possible interpretations describe, respectively, a conclusive presumption and a mandatory presumption shifting the burden of persuasion. *Sandstrom* held that either of these devices would violate due process.[79]

The pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion. The same analysis was used to reject an alternative theory urged by the state to salvage the constitu-

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72. *See* 442 U.S. at 513. The *Sandstrom* Court observed that numerous state and lower federal courts had held that the giving of instructions similar to the one at issue invalidated a criminal conviction. *Id.* at 514.

73. State v. Sandstrom, 176 Mont. 492, ___, 580 P.2d 106, 109 (1978).

74. *Id.* at ___, 580 P.2d at 109.

75. 442 U.S. at 516-17.

76. *Id.* at 517.

77. *Id.*

78. *Id.*

79. *Id.* at 524.

tionality of its presumptive intent instruction. The state argued that when the jury was instructed that a person intends the ordinary consequences of his voluntary acts, it could have interpreted "intends" to refer only to the defendant's purpose.[80] Since deliberate homicide could be committed purposely *or* knowingly, the jury could have convicted the defendant for his knowledge without reliance on the tainted presumption which, under this interpretation, was relevant only to purpose.[81] The Court's response to this argument was, "[E]ven if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do."[82] Because criminal verdicts are general and provide no clue as to how the jury reached its decision, the mere *possibility* that an unconstitutional means was used to arrive at the verdict requires reversal.[83]

The ultimate holdings of *Allen* and *Sandstrom* do not clash.[84] The primary concern of the unanimous *Sandstrom* Court was with the instruction's propensity to mislead the jury into regarding the presumption as conclusive or as shifting the burden of persuasion. Had the *Sandstrom* Court been satisfied that the instruction to the jury could only be interpreted as permissive, as the Court was satisfied in *Allen*, there is no indication that any constitutional defect would have remained. Under *Allen* the inference would not have been examined on its face for the rationality of the connection between the basic and presumed fact so long as there was sufficient evidence to support the verdict.[85] In fact, Justice Rehnquist, joined by the Chief Justice, stated in a brief concurring opinion that if the *Sandstrom* instruction had "'merely described a permissive inference' . . . it could not conceivably have run afoul of the [Constitution]."[86]

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80. *Id.* at 525. Montana juries were not provided with a definition of "intends." *Id.*

81. *Id.*

82. *Id.* at 526.

83. *Id.*

84. Particularly in its tacit approval of permissive inferences, *Sandstrom* appears to be perfectly harmonious with *Allen*. In fact, *Allen* is cited with approval several times in Justice Brennan's opinion for the unanimous Court. *Id.* at 514, 519, 519-20 n.9, 526. Yet several aspects of the Court's approach to the deductive device in *Sandstrom* are at odds with the *Allen* Court's treatment of, for example, curative instructions, see note 206 and accompanying text *infra*, sufficiency of the evidence, see note 85 and accompanying text *infra*, and the possibility of error, see note 215 *infra*.

85. The *Sandstrom* Court reached its holding despite finding sufficient evidence in the record to support the verdict, 442 U.S. at 521, because it recognized a possibility that the jury felt compelled by the presumption to find the requisite intent merely upon proof of a voluntary act. *Id.* at 525-26. In contrast, the *Allen* majority found the existence of sufficient evidence of possession to be a reason to assume that the jury rationally applied the permitted inference. This assumption ignores the *Allen* dissenters' argument that the jury may have reached its verdict by relying on the presumption while rejecting or ignoring the evidence. See notes 210-12 and accompanying text *infra*.

86. *Id.* at 527 (Rehnquist, J., concurring, quoting the majority opinion, *id.* at 514).

*Sandstrom*, however, demonstrates the Court's heightened sensitivity to the way a presumptive device sounds to the ear of the juror. This emphasis is appropriate because it is the factfinder who must apply the presumptive device following a typically cursory instruction as to its use, no matter how many volumes of appellate exegesis follow. In the words of Justice Frankfurter: "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials."[87] But *Sandstrom's* fairminded concern that presumptive devices must not mislead juries has a hollow ring in light of the earlier *Allen* opinion. The concern for fairness ends with *Sandstrom's* insistence on clarity so that the jury will not be misled as to the *type* of inferential device involved. If the instruction to the jury clearly conveys the concept of a permissive inference, the *Allen* analysis results in an abandonment of meaningful review of the permissive inference except as applied. Applied review under *Allen* consists only of a review of the sufficiency of the evidence,[88] traditionally a minimal level of scrutiny.[89]

The faith of the *Allen* majority seems to be that juries will weigh independently the validity of a particular permissive inference. The thesis pursued in this Article is that permissive inference instructions have a substantial potential to interfere with that independent judgment and thus to compromise the rationality of jury verdicts.[90] Before considering the potential impact of permissive inferences, however, the next section of the Article will examine the *Allen* Court's claim that its holding follows a long line of precedents that have drawn a sharp distinction between permissive inferences and mandatory presumptions. This examination will demonstrate that the *Allen* majority has fabricated a revisionist history to support its novel exemption of permissive inferences from facial review.

## II. FROM *TOT* TO *BARNES*: *ALLEN'S* REVISIONIST HISTORY

### A. Tot v. United States[91]

*Tot* involved a statute that made it unlawful for a person who had been convicted of a crime of violence to transport a weapon in in-

87. Bollenbach v. United States, 326 U.S. 607, 614 (1946).

88. County Ct. of Ulster County v. Allen, 442 U.S. 140, 157, 167 (1979).

89. The standard of review for sufficiency-of-the-evidence claims is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); *see* Johnson v. Louisiana, 406 U.S. 356, 362 (1972). This standard implies that the evidence will be viewed in the light most favorable to the prosecution. *See generally* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 467 (1969 & Supp. 1978). Not surprisingly, convictions are rarely reversed on sufficiency-of-the-evidence grounds. *See* Jackson v. Virginia, 443 U.S. at 317 n.10.

90. See Part III *infra*.

91. 319 U.S. 463 (1943).

terstate commerce. Possession of a weapon by a person who had been convicted of a crime of violence was presumptive evidence that the person had transported the weapon in interstate commerce.[92]

In evaluating the deductive device, the *Tot* Court insisted that there must be a "rational connection" between the basic fact and the presumed fact,[93] and established this standard as the "controlling" method of review of deductive devices in criminal cases.[94] Prior to *Tot*, one of the tests used to determine the constitutionality of a deductive device was derived from the majority opinion of Justice Holmes in *Ferry v. Ramsey*,[95] a civil case. The Holmes standard, known as "the greater includes the lesser," ignored the fact presumed and merely questioned whether it would be constitutional to impose liability (or culpability) on the basis of the basic fact alone. Because the legislature had the power to make liability hinge upon proof of the basic fact, a party found liable or a defendant found culpable could not complain if the legislature, instead of exercising this "greater" power, had taken the "lesser" steps of requiring the prosecution to prove an additional element but allowing or requiring the element to be found upon proof of another fact.[96] In adopting the rational connection test, the *Tot* Court rejected this line of argument without dealing with the power of its logic.[97]

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92. Act of June 30, 1938, ch. 850, § 2, 52 Stat. 1250 (repealed 1968), provided:
(F) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, *and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act* (emphasis added).

93. 319 U.S. at 467.

94. *Id.*

95. 277 U.S. 88 (1928). *Ferry* involved suits by depositors against directors of a Kansas bank under a state statute that made it unlawful for a director to assent to deposits with knowledge of the bank's insolvency. Actual knowledge was not required; a director was deemed to have knowledge of the bank's financial condition by virtue of his affirmative duty to be familiar with the financial condition of the bank. *Id.* at 93.

96. *Id.* at 94.

97. The government in *Tot* argued that the greater includes the lesser in urging that the constitutionality of the statutory presumption should be sustained. According to the government, the congressional power to regulate interstate trafficking in firearms extended far enough to permit a statute that proscribed the possession of all firearms, including those not transported in interstate commerce, by persons convicted of crimes of violence. Since Congress had taken the intermediate step of prohibiting only firearms transported in interstate commerce, while making possession "presumptive evidence" of such transportation, the presumption should be sustained. If Congress had used its "greater power," Tot would not have had the opportunity to exculpate himself by proving that his gun was not transported in interstate commerce. Rejecting this line of argument, the Court stated simply that "Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of various states of firearms . . . ." 319 U.S. at 472. For further discussion of the Holmes doctrine, see notes 277-80 and accompanying text *infra*.

Although the greater-includes-the-lesser analysis was rejected by *Tot*, a second standard, "comparative convenience," was not discarded completely, but was relegated to a "corollary" of

*Tot* was cited by the *Allen* majority as a case where a mandatory presumption was tested for facial validity.[98] *Tot* clearly tested the validity of the statutory deductive device on its face.[99] The Court, however, took no consistent stance on the nature of the device and in no way indicated that this factor would have the slightest bearing on its analysis. The statute in question referred to "presumptive evidence" and the Court called the device a "presumption," but in one passage of *Tot* the Court indicated that the device operates only as a permissive inference: "[T]he statute in question . . . *leaves the jury free to act* on the presumption alone once the specific facts are proved."[100] A paragraph later, however, the Court's description of how the deductive device operates sounds like a mandatory presumption: "If the presumption warrants conviction unless the defendant comes forward with evidence in explanation [permissive inference because conviction is warranted but not required?] and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted [mandatory presumption shifting the burden of persuasion?]. . . ."[101] The instructions to the jury,[102] also ambigu-

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the "controlling" rational connection test. 319 U.S. at 467. See also note 189 *infra*. The comparative convenience test had been enunciated by Justice Cardozo a decade before *Tot* in Morrison v. California, 291 U.S. 82 (1934). Like the greater-includes-the-lesser standard, the comparative convenience test was not concerned with the inferential relationship between the parts of a deductive device. Under this test, a deductive device would be allowed if it was "fair" to permit the state to bolster its case with such a device because of a "manifest disparity in convenience of proof and opportunity for knowledge." *Id.* at 91. The reduction of comparative convenience to a "corollary" in *Tot* seemed to be based upon the difficulty of placing limits on the doctrine. 319 U.S. at 469-70.

98. County Ct. of Ulster County v. Allen, 442 U.S. 140, 157-59 (1979).

99. The Court examined various state laws and found that some states had gun registration laws and some did not. The Court added that

> [a]side from the fact that a number of states have no such laws, there is no presumption that a firearm must have been lawfully acquired or that it was not transferred interstate prior to the adoption of state regulation. Even less basis exists for the inference from mere possession that acquisition occurred subsequent to the effective date of the statute [15 U.S.C. § 902(f)] July [June] 30, 1938.

319 U.S. at 468. It was noted that the federal statute also referred to possession of ammunition but no state law addressed that issue. Based on these general considerations, the Court concluded that the statutory device failed the rational connection test. *Id.* In reaching this conclusion, the Court made no reference to the particular facts in Tot's case.

100. 319 U.S. at 469 (emphasis added).

101. *Id.* at 470.

102. The trial judge instructed as follows:

> [O]rdinarily there would be no presumption similar to the one in this case. The burden is on the United States, as I stated, to prove its case beyond a reasonable doubt; that burden does not shift. But by such, if there is a presumption that this gun having been found in the possession of the defendant was transported or shipped in interstate or foreign commerce, if you find that he obtained the same subsequent to June the 30th 1938 [the effective date of the legislation].

Record at 41, Tot v. United States, 319 U.S. 463 (1943). The first two sentences convey the thought that the presumptive device does not shift the burden of persuasion. The third sentence is incomprehensible. The *Tot* trial court also put the following question to the jury: "Does the testimony which has been offered on behalf of the defendant . . . meet that presumption and cause you to have a reasonable doubt as to whether or not the gun was transported or

ous, were not even mentioned in the *Tot* opinion, although jury instructions are a crucial indicator of how a deductive device operates.

Neither the jury instructions nor the Court's discussion, therefore, established the nature of the statutory device in question. Whatever type of deductive device was involved in *Tot*, it is apparent that the Court did not regard that question as a threshold requirement that determined the nature and quantum of evidence used in deciding whether the "rational connection" test had been met.

### B. United States v. Gainey[103]

It was more than twenty years before the Supreme Court issued another major decision on the validity of a deductive device. The Court still used the rational connection analysis of *Tot* in its 1965 decision in *United States v. Gainey* and again the following term in *United States v. Romano*.[104] The two cases provide an interesting insight into the application of the rational connection test since the *Gainey* device was upheld and the *Romano* device was declared unconstitutional, although both involved similar deductive devices embodied in companion statutes in the Internal Revenue Code.[105]

The statutory device in *Gainey* provided that proof of presence at an illegal still "shall be deemed sufficient evidence to authorize conviction" for the offense of "carrying on" the business of an illegal still unless the defendant satisfactorily explained his presence at the still.[106] The Court of Appeals for the Fifth Circuit had reversed

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shipped in interstate or foreign commerce?" *Id.* at 41-42. This passage again confirms that there is no shift in the burden of persuasion since the defendant need only raise a "reasonable doubt." The query as to whether the defendant's evidence *meets* the presumption suggests a mandatory presumption shifting the burden of production. However, since Tot had presented evidence, *see* Tot v. United States, 319 U.S. 463, 465 (1943), perhaps the trial judge meant only that the jury should consider evidence offered by the defense in deciding whether to accept a permissive inference.

103. 380 U.S. 63 (1965).

104. 382 U.S. 136 (1965).

105. *Compare* 26 U.S.C. § 5601(a)(4) (1976) *and* 26 U.S.C. § 5601(b) (1976), *construed in Gainey*, 380 U.S. at 65, *with* 26 U.S.C. § 5601(a)(1) (1976) *and* Act of September 2, 1958, Pub. L. No. 85-859, § 201, 72 Stat. 1398 (repealed in 1976), *construed in Romano*, 382 U.S. at 144. See also notes 120-25 and accompanying text *infra*.

106. Act of September 2, 1958, Pub. L. No. 85-859, § 201, 72 Stat. 1398 [current version at 26 U.S.C. § 5601(b) (1976)]. Gainey had also been convicted of violating 26 U.S.C. § 5601(a)(1) (1976) (possession, custody or control of a set up, unregistered still and distilling apparatus). *See* 380 U.S. at 64. Conviction under this section also was "authorized" upon proof of presence at the still. Act of September 2, Pub. L. No. 85-859, § 201, 72 Stat. 1398 (repealed 1976). This statutory device was not reviewed in *Gainey*, but it was examined and declared unconstitutional in *Romano* the following term. See notes 120-25 and accompanying text *infra*. The device was not reviewed by the *Gainey* Court because Gainey had been given concurrent sentences and the Court found the conviction under § 5601(a)(4) to be valid. 380 U.S. at 65. Under the concurrent sentence doctrine adhered to by the Court, a reviewing court lacked jurisdiction to consider the constitutionality of a conviction or sentence if the sentence was concurrent to a valid sentence. *See* Hirabayashi v. United States, 320 U.S. 81, 85 (1943). The concurrent sen-

Gainey's convictions on appeal because the statutory device lacked a rational connection between the basic and presumed facts.[107] The Supreme Court reversed, holding that the court of appeals was correct in applying the *Tot* rational connection test, but differing with the result reached by the circuit court.[108]

Writing for the seven-man majority,[109] Justice Stewart advocated greater deference to "the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."[110] The rationality of the statutory "inference," as Justice Stewart consistently referred to it, was viewed "in the context of the broad substantive offense it supports."[111] The statutory section in question described the extremely comprehensive offense of "carrying on" the enterprise of an illegal distillery. Justice Stewart pointed out that previous prosecutions under the statute had brought within its sweep "[s]uppliers, haulers, and a host of other functionaries" as well as those who merely aid and abet the operation.[112] Since even minor functionaries are helping to "carry on" an illegal distillery and since, as "Congress was undoubtably aware," stills are usually located in secluded areas where strangers to the illegal business are unlikely to be found, the connection between presence at the still and carrying on a distillery was found rational.[113]

This analysis of the validity of the statutory "inference" is clearly facial. The *Gainey* Court never mentioned the specific facts of the case in the body of the opinion, relegating them to a footnote.[114] The history of past prosecutions under the statute, the folklore and Congressional findings of the secluded location of stills, and the broad array of functionaries brought within the sweep of the statute are all general considerations. *Gainey* thus fails to support the analytical framework of *Allen*. The *Gainey* Court did emphasize the permissive nature of the statutory device in question, but if the *Allen* thesis were correct, the *Gainey* inference should have been tested by reviewing the sufficiency of the evidence produced at trial. The focus in *Gainey*, however, was on stereotyped facts and not the particular facts of the case.

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tence doctrine was reduced from a jurisdictional rule to one of judicial convenience in Benton v. Maryland, 395 U.S. 784, 787-91 (1969).

107. Barrett v. United States, 322 F.2d 292 (5th Cir. 1963).

108. 380 U.S. at 66-68.

109. Justice Black dissented, 380 U.S. at 74-88, and Justice Douglas dissented in part, *id.* at 71-74.

110. *Id.* at 67.

111. *Id.*

112. *Id.*

113. *Id.* at 67-68.

114. Gainey was driving an old Dodge truck with darkened headlights to the site of a secluded still hidden in a swamp in Dooley County, Georgia. Government agents apprehended him after a brief chase. *Id.* at 64 n.1.

Unlike the trial judge in *Tot* and in several of the other cases that will be considered, the trial judge in *Gainey* made a concerted effort in his instructions to the jury to place the statutory "inference" in perspective in order to protect against its coercive impact on the jury.[115] In characterizing the deductive device as permissive, the *Gainey* majority pointed to the permissive nature of these instructions.[116] The Court's purpose in doing so was not, as *Allen* suggested, to determine the quantum or type of evidence that would be considered to satisfy the rational connection test. The Court had already concluded, several paragraphs before, that the statutory "inference" satisfied the *Tot* standard.[117] The *Gainey* majority emphasized the permissive nature of the instructions to counter the argument of the dissent that the judge's instructions placed undue emphasis on the defendant's decision not to take the stand.[118]

C. United States v. Romano[119]

*United States v. Romano* dealt with a statutory deductive device almost identical to the one in *Gainey*.[120] In *Romano*, however, the

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115. *Id.* at 69-70. Despite the unusual efforts of the trial judge in this case, his statements that "bare presence . . . is not in and of itself enough to make him guilty" and that presence is only "a circumstance to be considered along with other circumstances in the case" were contradicted when the judge explained that the statute provides that proof of presence "shall be deemed sufficient evidence to authorize conviction." Furthermore, if the *Gainey* charge was considered in light of Sandstrom v. Montana, 442 U.S. 510 (1979), the phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury," 380 U.S. at 70, might well be found unconstitutional. A reasonable juror could interpret this language to mean that the defendant *must* produce evidence and that the evidence must do more than raise a reasonable doubt. With *Sandstrom's* heightened sensitivity to such possibilities, see notes 75-83 and accompanying text *supra*, the *Gainey* instruction now might be found unconstitutional since it reasonably could be interpreted as shifting the burden of persuasion to the defendant.

116. 380 U.S. at 70-71.

117. *Id.* at 68.

118. Justice Douglas argued in dissent that the instruction, "unless the defendant by the evidence in the case and by the proven facts and circumstances explains such presence to the satisfaction of the jury," constituted an impermissible comment on a defendant's failure to testify. 380 U.S. at 74. The *Gainey* majority did suggest that the "better practice would be to instruct the jurors that they may draw the inference unless the *evidence* in the case provides a satisfactory explanation for the defendant's presence at the still . . ." (emphasis added). *Id.* at 71 n.7.

119. 382 U.S. 136 (1965).

120. 26 U.S.C. § 5601(a)(1) (1976) provides that any person who "has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a) . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both . . . ." Act of September 2, 1958, Pub. L. No. 85-859, § 201, 72 Stat. 1398 (repealed 1976), provided that:

> Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

same basic fact, presence at an illegal still, "authorized" a narrower finding of presumed fact, "possession, custody and . . . control" of an illegal still.[121] In his opinion for a unanimous Court,[122] Justice White pointed out that this narrower presumption made the *Romano* case "markedly different"[123] from *Gainey*. Without reference to the specific facts of the case, the Court concluded:

> Presence at an operating still is sufficient evidence to prove the charge of "carrying on" because anyone present at the site is very probably connected with the illegal enterprise. . . . But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession. . . . [A]bsent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—"the inference of the one from proof of the other is arbitrary. . . ."[124]

The only discussion of the evidence was the Court's statement that if the question before it "had been the sufficiency of the evidence . . . , [the] conviction would [have been] sustained."[125]

The *Romano* Court commented only briefly on the jury instructions, referring specifically to the instruction that presence at the still "shall be deemed sufficient evidence to authorize conviction." According to the Court, "[t]his latter instruction *may* have been given considerable weight by the jury; the jury may have disbelieved or disregarded the other evidence of possession and convicted these defendants on the evidence of presence alone."[126]

Does this passage mean, as *Allen* suggests, that the Court regarded the statutory device as a mandatory presumption and for this reason considered its facial validity? Surely if the distinction between mandatory and permissive was of controlling importance, the *Romano* Court would have elaborated on this point instead of making such an oblique reference. Instead, as was true of *Tot* and *Gainey*, the Court was preoccupied by the rationality of finding the presumed fact from the basic fact without regard to the type of deductive device or the particular facts of the case. Furthermore, the quoted passage from *Romano* speaks only to the fact that the jury *may* have relied on the instruction and disregarded the evidence. Not only does this not sound like mandatory language, it simply recognizes a danger inher-

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121. 382 U.S. at 140.

122. Justices Black and Douglas concurred on the basis of their dissents in *Gainey* and Justice Fortas concurred without opinion. 382 U.S. at 144.

123. *Id.* at 140.

124. *Id.* at 141 (citation omitted).

125. *Id.* at 138.

126. *Id.* at 138-39 (emphasis added).

ent in permissive inferences. As the dissent in *Allen* pointed out, since the jury is told that it is permissible to rely on an inference to establish an element of the offense, there is no way of knowing whether this is the means by which the verdict was reached.[127] For this reason, *Romano* examined the statutory device on its face despite the existence of sufficient evidence in the record. *Romano*, like *Sandstrom*, was sensitive to the *possibility* of error and the principle that if there are alternative theories by which the jury could have reached its verdict, the unconstitutionality of any of the theories requires that the conviction be set aside.[128]

D. Leary v. United States[129]

In 1969, the United States Supreme Court reversed the convictions of well-known Harvard professor Dr. Timothy Leary. Leary had been convicted under two federal statutes governing traffic in marihuana, and his convictions had been affirmed by the Court of Appeals for the Fifth Circuit.[130] After reversing one of Leary's convictions for failing to pay a marihuana transfer tax,[131] the Supreme Court considered the constitutionality of a statutory presumption that underlay the second conviction. The statute provided criminal penalties for any person who

> knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law . . . , or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law.[132]

Another provision of the statute established that possession of marihuana was sufficient to authorize conviction unless the defendant explained the possession to the satisfaction of the jury.[133]

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127. 442 U.S. at 175 (Powell, J., dissenting). See also notes 206-12 and accompanying text *infra*.

128. *See* Sandstrom v. Montana, 442 U.S. 510, 526 (1979) (citing Stromberg v. California, 283 U.S. 359 (1931); Leary v. United States, 395 U.S. 6, 31-32 (1969); County Ct. of Ulster County v. Allen, 442 U.S. 140, 159-60 n.17, 175-76 (Powell, J., dissenting) (1979); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395, 408-09 (1947); Bollenbach v. United States, 326 U.S. 611-14 (1946)).

129. 395 U.S. 6 (1969).

130. 383 F.2d 851 (5th Cir. 1967).

131. 395 U.S. at 12-29. The Marihuana Tax Act, ch. 736, 68A Stat. 560 (1954) (repealed 1970), was declared unconstitutional since compliance with the tax statutes would expose Leary to a "'real and appreciable' risk of self-incrimination." 395 U.S. at 16 (citing Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Marchetti v. United States, 390 U.S. 39 (1968)).

132. Act of July 18, 1956, ch. 629, § 106, 70 Stat. 570 (repealed 1970).

133. *Id.* Thus, upon proof of possession the jury was "authorized" by the statutory device to find "(1) that the marihuana was imported or brought into the United States illegally; . . . (2)

In an opinion by Justice Harlan for a unanimous Court, the presumption was found to violate due process because of a lack of rational connection between possession and the defendant's knowledge of unlawful importation.[134] The Court found it unnecessary to reach the question whether a beyond-a-reasonable-doubt standard was required in a criminal case where the presumed fact was an essential element of the crime, since the *Leary* presumption did not pass the more-likely-than-not standard.[135] The Court acknowledged the deference shown by *Gainey* for the empirical judgments of Congress.[136] The Court was far less deferential to Congress than it had been in *Gainey*, however. The Court stated that the "legislative record does not supply an adequate basis" to test the statutory device and that it would not limit itself to data available at the time of the statute's enactment in 1956.[137] Further defining the rational connection test, Justice Harlan stated that it was necessary to find with "substantial assurance that at least a majority of marihuana possessors have learned of the foreign origin of their marihuana" before the presump-

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that the defendant knew of the unlawful importation;" and (3) that the importation was done with intent to defraud the United States. *See* 395 U.S. at 37 & n.65. Leary had not attacked the rationality of the third presumed fact in his Petition for Certiorari. For this reason, the Court did not consider the rationality of finding a presumed intent to defraud from proof of presence. The Court also did not directly reach the validity of the first presumed fact, illegal importation, because of the Court's conclusion that possession was insufficiently probative of the second presumed fact, knowledge of unlawful importation. *See id.* at 37 n.65. However, "in view of the paucity of direct evidence as to the beliefs of marihuana smokers generally about the source of their marihuana," the Court considered the level of imported marihuana in the United States as a first step in its analysis of the question of knowledge of importation. *Id.* at 39. The Court concluded that the data surveyed warranted the conclusion "that most domestically consumed marihuana comes from abroad." *Id.* at 44.

134. Before reaching this conclusion, the Court disposed of the government's contention that it was unnecessary to assess the validity of the deductive device because Leary's own testimony provided a sufficient basis for conviction. *Id.* at 31-32. Leary had testified that he had obtained the marihuana in New York and had taken it with him on an intended vacation to Mexico. *Id.* at 30. After crossing the International Bridge between the United States and Mexico at Laredo, Texas, Leary was apparently denied entry by Mexican customs officials. *Id.* at 10. The marihuana in his possession was discovered by an American customs agent upon Leary's return to the United States. *Id.* The Government argued that the jury could have convicted Leary based on his own admission that he had brought marihuana into the United States from Mexico. The Court reached the issue of facial validity of the deductive device even though it acknowledged that the jury's verdict might have been based on Leary's testimony, stating: "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Id.* at 31-32. See note 128 *supra* and the cases cited therein.

135. 395 U.S. at 36 n.64.

136. *Id.* at 38 (citing United States v. Gainey, 380 U.S. 63, 67 (1965)).

137. 395 U.S. at 38. The Court also noted that "a statute based on a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist." *Id.* at 38 n.68 (citations omitted). Leary had presented evidence at his trial that "marihuana will grow anywhere in the United States and that some actually is grown here." *Id.* at 37. His attempt to introduce further evidence on the amount of domestically grown marihuana was rebuffed by the trial court as irrelevant. *Id.* at 37 n.66.

tion could be sustained.[138] Justice Harlan proceeded to cull information on his own from a lengthy list of books, studies, and government reports that demonstrated that there is a likelihood that a significant percentage of domestically consumed marihuana is grown in the United States. After reviewing these materials, the Court announced that it was unable "to estimate even roughly the proportion of marihuana possessors who have learned . . . the origin of their marihuana," and the presumption was declared invalid.[139] The Court's extensive survey of the literature concerning marihuana use, traffic, and customs, its discussion about whether a *majority* of users know of the drug's origin, and its resolute refusal to consider the facts of the case (including whether the defendant, who had just returned from Mexico, might know better than a majority of users the origin of the marihuana that he possessed) all demonstrate convincingly that the deductive device was tested on its face.

It is again less clear what type of deductive device was construed. Although Justice Harlan usually referred to the device in question as a "presumption,"[140] he made no mention of the jury's freedom to reject it or duty to follow it. The lack of any explicit discussion of the type of deductive device makes it unlikely that this could have been regarded as a crucial threshold question determining the method of review, as *Allen* suggests.[141] The instructions to the jury, which were only briefly noted by the *Leary* Court,[142] are not helpful in determining the type of device since they merely track or paraphrase the language of the statute. The key words of the statute are the same as in *Gainey* and *Romano*, including the pivotal word "authorize" and the concluding words "unless the defendant explains to the satisfaction of the jury."[143] The use of "authorize" does not make the mandatory nature of the presumption self-evident since the ordinary definition of "authorize" denotes a power to act, rather than a command.[144]

Assuming that the *Allen* Court was correct in labeling the deductive device in *Leary* as a mandatory presumption, the decision does not support *Allen*. As a presumption, the device should be tested facially according to *Allen*, and *Leary* clearly involves this type of analysis. But all of the devices in the cases discussed thus far were examined facially, and no distinction was made based upon the type

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138. *Id.* at 52.

139. *Id.*

140. At one point, Justice Harlan referred to the "presumption to permit an inference of knowledge." *Id.* at 32 n.55.

141. *See* County Ct. of Ulster County v. Allen, 442 U.S. at 156.

142. 395 U.S. at 31 n.52; *see* Appendix of Record 97a-98a, 103a-104a.

143. See notes 106-20 and accompanying text *supra*.

144. Webster's New International Dictionary 146-47 (unabridged) (Merriam-Webster 1976) defines "authorize" as follows: "to endorse, empower, or permit by or as if by some recognized or proper authority . . . : sanction . . . : justify."

of deductive device involved. *Allen* breaks new ground in exempting permissive inferences from facial review, an innovation that finds no support in the cases cited by the *Allen* majority.

### E. Turner v. United States [145]

One term after *Leary*, the Supreme Court considered two statutory deductive devices contained in different sections of the federal narcotics laws. Because the defendant in *Turner v. United States* was found to have both heroin and cocaine in his possession, the case required the Court to wade through an extensive literature concerning traffic and use of these drugs in a similar fashion to the foray of the *Leary* Court into the folkways of marihuana use.

Turner was convicted on two counts of receiving, concealing, or facilitating the transportation or concealment of narcotic drugs known to have been illegally imported. One count was based upon the heroin and one count based upon the cocaine that Turner possessed.[146] The statute used a deductive device with wording similar to that of the statutes involved in *Leary*, *Romano*, and *Gainey* to authorize conviction upon proof of possession unless the defendant satisfactorily explained his possession.[147] The Court upheld the validity of the deductive device as it related to Turner's possession of heroin because no heroin is made in the United States.[148] The device was found invalid as it related to cocaine since large quantities of cocaine are produced in this country, and Turner's conviction on this count was reversed.[149]

The *Allen* majority labeled the device a mandatory presumption [150] despite the fact that *Turner* stated that the jury was informed that the

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145. 396 U.S. 398 (1969).

146. The statute under which Turner was convicted provided in part that:

> whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . . .

Act of July 18, 1956, ch. 629, § 105, 70 Stat. 570 (repealed 1970).

147. The statute provided: "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." *Id.* At trial, the government alleged "that Turner had knowingly possessed heroin" and cocaine. 396 U.S. at 405. The government relied on the statutory device quoted above to establish (1) knowingly receiving, concealing, and transporting heroin [cocaine in the other count under the statute] which (2) was illegally imported and which (3) he knew was illegally imported. *Id.*

148. *Id.* at 415-16.

149. *Id.* at 418-19.

150. County Ct. of Ulster County v. Allen, 442 U.S. 140, 157, 158, 161 (1979).

statute did not require the jury to convict once possession was established.[151] The *Allen* majority ignored this clear indication that the Court perceived the deductive device to be permissive because if the *Turner* statute were regarded as a permissive inference, then the statutory devices with virtually identical wording in *Romano* and *Leary* would also be permissive. But *Romano* and *Leary* clearly tested the deductive devices facially. If it were admitted, in light of *Turner*, that the devices in *Romano* and *Leary* were regarded as permissive inferences, insofar as the Court was concerned with the question at all, the pretense of *Allen* evolving from a line of precedents would be undermined.

The irony of *Allen's* categorization of this device as a mandatory presumption despite the explicit finding to the contrary is that the *Turner* Court's rational connection analysis contains a suggestion of applied review.[152] Had the *Allen* majority accepted the *Turner* Court's categorization of the device as permissive, therefore, there would have been a colorable claim of some support for *Allen's*

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151. The Court stated that

> [t]he trial judge . . . instructed the jury—as § 174 permits but does not require—that possession of a narcotic drug is sufficient evidence to justify conviction of the crime defined in § 174.
>
> The jury, however, even if it believed Turner had possessed heroin, was not required by the instructions to find him guilty. . . . The jury was obligated by its instructions to assess for itself the probative force of possession and the weight, if any, to be accorded the statutory inference.

396 U.S. at 405-07.

152. The highly empirical general inquiry supported by references to numerous hearings, studies, and findings of congressional committees and executive departments used by the Court in *Turner* is strongly reminiscent of *Leary*. The discussion undertaken by the Court included such topics as the amount of heroin imported, 396 U.S. at 409-16, the possibilities of domestic cultivation of opium poppies from which heroin is made, *id.* at 412, 413, and the likelihood of synthetic manufacture of heroin from codeine and morphine, *id.* at 413-16. All of this is clearly a general inquiry divorced from the particular facts of the *Turner* case—what the *Allen* Court called facial review. But *Turner's* analysis of the connection between the basic fact of possession of heroin and knowledge of the imported nature of the substance is not so completely facial. The Court stated that "[i]t may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart." *Id.* at 416. The characterization of Turner as seller or distributor was based on the fact that the defendant possessed the heroin in 275 individually packaged glassine bags. *Id.* at 415, 416 n.30. This reliance on facts keyed to Turner's individual situation led one commentator to conclude that the Court had compromised its practice of an abstract rational connection analysis. *See* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1208 (1979).

This conclusion is tenable, but the reference to the facts of *Turner* can also be seen simply as a non sequitur. Following the remarks concerning Turner as a member of a "class apart," the Court reached the general conclusion that "those who traffic in heroin will inevitably become aware that the product that they deal in is smuggled." 396 U.S. at 417. The Court's conclusion included a discussion of how "users and addicts" inevitably become aware of the source of their heroin, *id.* at 417 n.33, despite the fact that there was no evidence that Turner was either a user or an addict. This further finding would have been unnecessary if the Court's holding depended on Turner's status. Since the Court found the deductive device rational for sellers, distributors, users, and addicts, and since it is hard to imagine anyone trafficking in heroin who is not a member of one of these categories, the analysis is arguably facial despite the reference to Turner's status.

framework of applied review of permissive inferences. The *Allen* majority apparently ignored *Turner's* rare explicit statement of permissiveness because of its desire to cloak its analysis with the mantle of stare decisis.

Turner was also convicted on two counts of violating a statute that made it unlawful to purchase, sell, dispense, or distribute narcotic drugs except in their original stamped packages,[153] one count again based on the heroin found in his possession and one count on the cocaine. The second statute provided that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."[154]

The *Allen* majority categorized this deductive device as a permissive inference.[155] The *Turner* Court did not discuss the impact of the device but referred to it as a "presumption" five times,[156] twice called it a "statutory inference,"[157] and twice said that it "authorize[s] an inference."[158] The trial judge read the statute to the jury without elaboration or explanation of "prima facie."[159] The term *prima facie* is synonymous with "sufficient" in law.[160] Since the statute stated that possession of narcotic drugs *"shall be* prima facie [or sufficient] evidence," the device appears to be mandatory. Unlike the first statute in *Turner,* there is no mere authorization for the jury to regard it as sufficient.

The *Allen* majority apparently classified the statute as a permissive inference without a discernible basis for doing so because the *Turner*

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153. The Narcotic Drugs Tax Act, ch. 736, § 4704, 68A Stat. 550 (1954) (repealed 1970).

154. *Id.*

155. County Ct. of Ulster County v. Allen, 442 U.S. at 157.

156. 396 U.S. at 421, 422, 423, 424.

157. *Id.* at 421, 423.

158. *Id.* at 400, 421.

159. Turner v. United States, 396 U.S. 398 (1969), Record at 18, 24. The question of how the jury would interpret the statute is puzzling since *prima facie evidence* is hardly a household term. If a juror were familiar with the term, it is reasonable to suppose that he would interpret it as meaning "sufficient," since both legal and standard dictionaries define it in this way, *see, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1800 (unabridged) (Merriam-Webster 1976) ("prima facie: at first view; on the first appearance; prima facie: 1) based on immediate impression, apparent; prima facie evidence: evidence sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted"); BLACK'S LAW DICTIONARY 1071 (5th ed. 1979) ("[e]vidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or a group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient . . . .").

One commentator has suggested that the jury's unfamiliarity with the term *prima facie* makes its use preferable to use of a word such as *presumption*, which a juror will more likely interpret according to his independent understanding. Soules, *Presumptions in Criminal Cases*, 20 BAYLOR L. REV. No. 3, 275, 290, 291 (1968). Soules argued that unfamiliarity is a virtue because the jury would be more attentive to the definition which would be provided. Soules also suggested that in common usage, "the verb presumed is understood to mean conclusively presumed." *Id.* at 290.

160. See note 159 *supra.*

Court's analysis of this statute contains a suggestion of applied review. Turner's indictment charged him with *possessing* heroin as well as purchasing, dispensing, and distributing heroin. Possession was not a culpable act under the statute although selling was. Selling was also mistakenly omitted from the instructions to the jury and replaced with possessing.[161] Thus, as read to the jury, the literal instructions seemed to allow the jury to find the illegal presumed fact, possession of heroin, from proof of the basic fact, also possession of heroin.

The error was held harmless. Justice White reasoned that the jury must have believed the evidence on possession in order to have found Turner guilty of any of the prohibited activities—purchasing, dispensing, or distributing heroin in unmarked packages—with which he was charged under Count 2: "Since the only evidence of a violation involving heroin was Turner's possession of the drug, the jury to convict must have believed this evidence."[162] Justice White stated that the packaging of the heroin in individual glassine envelopes was an "indivisible" part of the possession evidence[163] and found that the individual packaging provided solid evidence of distribution.[164] Postulating in this part of the analysis that the jury did not use the deductive device at all, Justice White concluded that "the instruction on the presumption is beside the point, since even if invalid, it was harmless error."[165]

Even making the dubious assumptions that the *Turner* Court regarded the "prima facie" language of the statute as a permissive inference and that this finding was a crucial, albeit unarticulated, prerequisite to the harmless error holding, *Turner* provides little support for the *Allen* majority. Justice White did not stop with the harmless error analysis but went on to evaluate the deductive device on the

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161. 396 U.S. at 421 n.41.

162. *Id.* at 420.

163. Justice White's belief in the indivisibility of the evidence is not entirely justified. The jury could have accepted evidence showing possession but rejected that part of the evidence that showed how the heroin was packaged. The analysis of the *Allen* majority on a similar point is similarly flawed. See notes 209-10 and accompanying text *infra*.

164. 396 U.S. at 420.

Turner was also convicted of a second count under this same statute based upon cocaine in an unstamped tinfoil package found in his possession. But the cocaine was in a sugar mixture amounting to a single package of 14.68 grams. *Id.* at 401. By contrast to the 48.25 grams of individually packaged heroin discovered in Turner's possession, the single package of only 14 grams of cocaine in a sugar mixture did not "so surely demonstrate that Turner was in the process of distributing." *Id.* at 423. The statutory device was declared invalid as to cocaine. Cocaine is legally manufactured in this country (unlike heroin) and amounts sufficient to invalidate the § 174 inference are stolen from legal channels. *Id.* See also note 152 *supra*. Justice White reasoned that "[t]he thief who steals cocaine very probably obtains it from a stamped package." 396 U.S. at 423. The analysis of the statute with respect to the cocaine count, like the alternative holding for the heroin conviction, clearly uses the language of facial review. According to *Allen*, facial examination marks the review of a mandatory presumption. But if this statutory device is mandatory, *Turner's* harmless error analysis for the identically worded device for heroin can provide no support for *Allen's* theory of applied review of a permissive inference.

165. *Id.* at 421.

alternative supposition that evidence of possession was not in itself sufficient proof of distributing heroin. The *Turner* Court stated that the deductive device "would assume critical importance" based on this supposition.[166] The Court held that, although the "bare fact" of possession was far short of "sufficient evidence" to prove dispensing, distributing, or selling if that had been charged, Turner's conviction would still be affirmed because possession was sufficiently probative of purchasing.[167] Justice White found that "most users may be presumed to purchase what they use" even granting that "perhaps a few acquire it by gift and some heroin undoubtedly is stolen."[168] References to the "bare fact" of possession, the discussion of "most users," and the discussion of the various hypothetical means of obtaining heroin is the language of facial validity.

The primary holding may be the harmless error analysis and the facial examination of the statutory device an alternative ground, but the first finding is premised on the assumption that the jury did not use the deductive device at all in order to find possession. Although the *Allen* dissenters criticized the majority for using "an unarticulated harmless error standard,"[169] the *Allen* majority's thesis was far different from the harmless error analysis in *Turner*.

*Allen* seems to have assumed not only use of the inference by the jury but also use of the inference in light of the evidence adduced at trial.[170] In the absence of an assumption of non-use, the *Turner* Court found it necessary to undertake a facial analysis of the inference despite the existence of sufficient evidence in the record. The *Allen* majority started at the other end by finding the existence of sufficient evidence to support the conviction as the basis for not examining a permissive inference on its face.

### F. Barnes v. United States[171]

Prior to *Allen* and *Sandstrom*, the last major decision by the Supreme Court involving a deductive device in a criminal case was *Barnes v. United States*. Unlike the other cases that have been considered, *Barnes* involved a common-law rather than a statutory deductive device, a distinction that made no difference in the Court's method of analysis.[172] Justice Powell's majority opinion again found

166. *Id.*

167. *Id.* at 421-22.

168. *Id.* at 422. The possibility that heroin could be purchased, found, or otherwise obtained in a stamped package was discounted since it was "unlikely that a package containing heroin would ever be legally stamped." *Id.* at 421.

169. County Ct. of Ulster County v. Allen, 442 U.S. at 177 (Powell, J., dissenting).

170. *Id.* at 166 n.29.

171. 412 U.S. 837 (1973).

172. *Id.* at 845 n.8. The Court held that the rational connection test was also applicable to common-law deductive devices although such devices presented fewer constitutional problems since they were invoked "only in the discretion of the trial judge." *Id.*

it unnecessary to decide whether the required connection between basic and presumed facts must satisfy a beyond-a-reasonable-doubt requirement since the device in *Barnes* met the reasonable doubt standard.[173]

The device in *Barnes* allowed a finding of knowledge that property was stolen from proof of the defendant's unexplained possession of the property. Justice Powell consistently referred to the device as an inference, and the *Allen* Court also categorized the device in *Barnes* as a permissive inference. It appears that this is a proper categorization, since the jury was told that it was "never required to make this inference."[174] The crucial question is therefore how the inference was analyzed.[175]

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173. *Id.* at 846.

174. *Id.* at 840 n.3. Compared to most of the others that have been considered, the instructions in *Barnes* were a model of clarity:

> Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.
>
> However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property. . . .
>
> If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence.

*Id.*

A single passage in a footnote casts doubt on the reasonable assumption that the *Barnes* majority correctly conceived of the device as a permissive inference:

> It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence. In *Tot v. United States*, 319 U.S. 463 (1943), the Court stated that the burden of going forward may not be freely shifted to the defendant. See also *Leary v. United States*, 395 U.S. 6, 44-45 (1969). *Tot* held, however, that where there is a "rational connection" between the facts proved and the fact presumed or inferred, it is permissible to shift the burden of going forward to the defendant. Where an inference satisfies the reasonable-doubt standard, as in the present case, there will certainly be a rational connection between the fact presumed or inferred (in this case, knowledge) and the facts the Government must prove in order to shift the burden of going forward (possession of recently stolen property).

*Id.* at 846 n.11. Does the Court mean that this common-law device *actually* shifts the burden of production upon proof of the basic fact as the last three sentences of the footnote suggest, or does the "inference" only cause that *practical* effect, as the first part of the footnote suggests? Given the primacy of the word *practical* in the first line, the relatively clear jury instructions in this case, and the Court's consistent references to an inference, the latter seems more likely. But either way, this language presents difficulties for the *Allen* analysis. If in fact the Court means that the common-law "device" shifts the burden of production, the "inference" is actually

The *Barnes* opinion began with a brief review of the development and application of the rational connection test to review deductive devices in *Tot, Gainey, Romano, Turner,* and *Leary*.[176] The Court's focus was on the development of the standard of proof required to connect basic and presumed facts. No reference was made to a permissive/mandatory distinction; rather, the Court was preoccupied with the concepts of "rational connection," "more likely than not," and "reasonable doubt."[177]

Following this legal review, the *Barnes* majority amassed citations from "centuries" of use of the inference of guilty knowledge from unexplained possession of stolen goods. The "longstanding and consistent judicial approval" reflected "accumulated common experience" and provided a "strong indication that the instruction comports with due process."[178] The reference to centuries of common-law use is

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a mandatory presumption contrary to the *Allen* categorization. But if the discussion is of the effect of a permissive inference, *Allen* is also undermined since the language employed is the effect of the device in general, and not of its operation in the particular case.

Moreover, the very ambiguity of the language in the footnote suggests that the *Barnes* Court was not conscious of a mandatory/permissive dichotomy. An "actual" shift in the burden of production or persuasion is what distinguishes a mandatory presumption from a permissive inference. If this distinction made as dramatic a difference to the method of analysis as *Allen* claims, surely the discussion would have clarified whether the Court intended "shift" to refer to only the practical necessity of coming forward with rebutting testimony or to an actual shift. The fact that the *Barnes* opinion was written by Justice Powell, who rejected the mandatory/permissive dichotomy in his dissent in *Allen*, makes it even more unlikely that the analysis in *Barnes* was guided by the principles discerned in it by the *Allen* majority.

175. The *Barnes* opinion acknowledged the coercive impact of permissive inferences that *Allen* totally denied. *See* 412 U.S. at 846 n.11. *Barnes* recognized that even if the government proves only the basic fact of possession, the practical effect of the inference is to influence the defendant to produce an explanation of his possession, "since ordinarily the Government's evidence will not provide an explanation . . . consistent with innocence." *Id.* The Court seems to have been comfortable allowing this inference to operate only because the beyond-a-reasonable-doubt standard was met in *Barnes*. In fact, based on this passage and others of a similar sentiment in the cases that have been considered here, several commentators have suggested that either the Court was moving to, or had already reached *sub silentio*, the conclusion that a beyond-a-reasonable-doubt standard was required to satisfy the rational connection test in criminal cases. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 149 (1972); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 923 n.24; Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 352 (1970); Comment, *Presumptions in the Criminal Law of Louisiana*, 52 TUL. L. REV. 793, 795 (1978); Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B.U.L. REV. 973, 980 (1974). By contrast, *Allen* exempted permissive inferences from *any* review beyond ascertaining whether the evidence in the case supports the rationality of finding the presumed fact, because an inference "places no burden of any kind on the defendant." 442 U.S. at 157.

176. 412 U.S. at 841-43.

177. *Id.* at 843. Notably, the difference in outcome between *Gainey* and *Romano* is explained by the fact that proof of presence is sufficiently probative of "carrying on" the business of a distillery, but too tenuous to permit a finding of "possession, custody, or control" of a distillery. *Id.* at 841, 842. The supposed difference between a permissive inference in *Gainey* versus the mandatory presumption in *Romano*, that *Allen* labeled as the most important reason for the different results, was not mentioned. *See* County Ct. of Ulster County v. Allen, 442 U.S. at 157 n.16. See note 184 *infra*.

178. 412 U.S. at 844.

the parlance of facial validity, far removed from the particular facts of *Barnes*.[179]

To support its theory of applied review, the *Allen* majority cited the following passage from *Barnes*:

> In the present case the challenged instruction only permitted the inference of guilt from *unexplained* possession of recently stolen property. The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen. Cf. *Turner v. United States*, 396 U.S., at 417; *Leary v. United States*, 395 U.S., at 46.[180]

The *Allen* majority apparently seized upon these references to what the "petitioner" possessed and knew and what the "evidence" established as support for its thesis. It is apparent, however, that the above quoted language does not vitiate the conclusion that the *Barnes* Court was reviewing the inference on its face. Although the concluding sentence of the passage refers to "petitioner," that is, Barnes, the meaning of the sentence does not depend upon his identity. It is general considerations of "common sense and experience" that tell us that *one* who has possession of recently stolen property must have been aware of its stolen nature. Nothing about the particulars of *this* petitioner are cited to tell us that. The sentence only particularizes to the extent that the petitioner and the treasury checks are plugged into the general formula.[181] Since this passage occurs near the end of the section of the opinion dealing with the validity of the inference, and since the Court must decide the individual case before it, the reference to the particular petitioner and the evidence in

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179. Justice Brennan, who argued in dissent that the instruction did not meet the due process requirement because "it cannot be said that all or virtually all endorsed United States Treasury checks have been stolen," *id.* at 853 (Brennan, J., dissenting), also employed a facial examination and had no quarrel with the majority's method of review. Justice Marshall joined with the Brennan dissent. Justice Douglas wrote a separate dissent also employing a facial analysis. *Id.* at 848-52.

The passage from the *Barnes* footnote discussed earlier, see note 174 and accompanying text *supra*, also indicates that the review was facial since the discussion focused on the general effect of the inference to cause a defendant to come forward with evidence. If the Court were using an "as applied" analysis, it might well have referred to the strong evidence presented at the *Barnes* trial that caused a "practical" compulsion for rebuttal by the defendant.

180. Barnes v. United States, 412 U.S. at 845 (emphasis in original), *cited in* County Ct. of Ulster County v. Allen, 442 U.S. at 157.

181. The concluding citations to *Leary* and *Turner* are also revealing. The page cited in *Turner* contains the following language: " 'common sense' (*Leary v. United States*, *supra* at 46) tells us that *those* who traffic in heroin will inevitably become aware that the product they deal in is smuggled." Turner v. United States, 396 U.S. 398, 417 (1969) (emphasis added). The portion of *Leary* that is cited discusses whether "common sense" would support the conclusion that "most marihuana possessors" have deduced the origin of their marihuana from awareness of the level of importation. Leary v. United States, 395 U.S. at 46. The facial review of the two cited cases demonstrates that the *Barnes* Court was concerned at this point with whether "common sense" would support the inference in general.

terms of the inference, which was facially reviewed, is not surprising. But it does not mean that the facial review has been converted to "applied review."

Similarly, the first two sentences of the above quoted passage particularize only in applying the general terms of the common-law inference to the particular case. But the finding did not otherwise depend on the particulars. Strong proof had been offered against Barnes: He had opened a checking account using the pseudonym "Clarence Smith" one month before depositing four government checks that were mailed to but never received by the four payees. Each of the four checks bore the apparent endorsement of the payee and a second endorsement by "Clarence Smith." A handwriting expert testified that both endorsements on two of the checks were executed by Barnes.[182]

Nowhere in the discussion of the validity of the inference do any of these facts appear. The passage cited by the *Allen* majority particularizes only to the extent of stating that the case involved the petitioner and stolen treasury checks payable to persons not known to the petitioner. This is hardly surprising since it was the petitioner's conviction for possession of United States Treasury checks that was before the Court. Perhaps the addition of "to persons not known to petitioner" begins to creep into the particular evidence of the case, but it is scant authority for concluding that the inference was reviewed as applied, given the host of other facts more probative of guilt that are not mentioned.[183]

The purpose of the *Allen* majority in reviewing *Gainey*, *Romano*,[184] and the other principal cases involving presumptions was to show that

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182. 412 U.S. at 838-39.

183. The statement that no plausible explanation of possession of the treasury checks was offered, see note 180 and accompanying text *supra*, is also not the equivalent of applied review. The particulars of the implausible explanation adduced at trial were not analyzed. The explanation included the claim that Barnes received the checks from salespersons whom he employed but whom he could not name or identify. This staff of employees purportedly sold furniture for him door to door. Barnes also claimed that he had received the checks with the payees' endorsements and that no records were kept of the furniture orders because they were written on scratch paper that was not retained. 412 U.S. at 839.

184. The *Allen* opinion discussed *Gainey* and *Romano* in greater detail than any of the other cases included in its historical review. *See* 442 U.S. at 157 n.16. Its unsatisfactory analysis of the two cases is representative of the generally insubstantial foundation upon which it attempted to erect its two-tiered structure of review of deductive devices. The difference in outcome between *Gainey* and *Romano* was attributed in part to the difference in scope of the two statutes. But "of perhaps greater importance," according to the *Allen* majority, was the difference in the instructions given to the jury in the two cases. *Id.* The *Allen* majority stated that

> in *Gainey*, the judge had explained that the presumption was permissive; it did not require the jury to convict the defendant even if it was convinced that he was present at the site. On the contrary, the instructions made it clear that presence was only "'a circumstance to be considered along with all the other circumstances in the case.'" . . . In *Romano*, the trial judge told the jury that the defendant's pres-

*Allen* was the inevitable outgrowth of a long line of cases. In fact, however, the cases cited by *Allen* demonstrate that all deductive devices, whether mandatory or permissive, were tested facially. Although it was often not clear whether the deductive device under review was regarded as a permissive inference or a mandatory presumption, this fact only underscores the Court's lack of consciousness of the distinction made crucial by *Allen*.

## III. Permissive Inferences and Rational Jury Verdicts

Justice Stevens's claim that *Allen* was the natural outgrowth of *Tot*, *Gainey*, *Romano*, *Leary*, *Turner*, and *Barnes* is ironic in light of the frequent observation that the Court had subjected deductive devices to increasingly stricter scrutiny prior to *Allen*. Numerous academic commentators, in parsing the opinions from *Tot* to *Barnes*, saw the Court moving toward a beyond-a-reasonable-doubt standard in applying the rational connection test.[185] The Court was notably less deferential to the congressional factual determination underlying the deductive devices in the later cases of *Turner* and *Leary* than had been true in *Gainey*.[186] *Leary* placed the burden of persuasion on the government to demonstrate the rationality of the deductive devices at trial and on appeal in contrast to the practice of federal courts of appeal that had uniformly upheld the deductive device struck down in *Leary*.[187] Although *Tot* had stated that the comparative convenience test remained a "corollary" of the rational connection

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> ence at the still "'shall be deemed sufficient evidence to authorize conviction.'" . . . Although there was other evidence of guilt, that instruction authorized conviction even if the jury disbelieved all of the testimony except the proof of presence at the site.

*Id.*

According to Justice Stevens, the words spoken by the judge in *Romano* that tainted the verdict and made facial consideration of the statutory device necessary were that presence "shall be deemed sufficient evidence to authorize conviction." These were the exact words that were also read to the jury in *Gainey* from a nearly identical statute. It is true that the judge in *Gainey* made a herculean attempt to minimize the coercive impact of the statutory "inference," but the message was not as clear as the *Allen* majority maintained because the jury was also given the "shall be deemed sufficient evidence" language of the statute. Justice Stevens might have found better support for his thesis if he had focused on other parts of the jury charge in *Romano*. Prior to instructing the jury about the specific deductive device involved in the case, the judge told the jury that an inference "is a deduction which reason and common sense lead the jury to draw . . . " but a presumption was defined "as a conclusion which the law *requires* the jury to make, *or permits* them to make from the particular facts, in the absence of convincing testimony to the contrary." United States v. Romano, 382 U.S. 136 (1965), Record at 95 (emphasis added). The judge then instructed the jury on the specific device involved simply by reciting the statute including its title: "Presumptions—Unregistered Stills." *Id.* Justice Stevens did not cite these confusing directions, perhaps because the *Romano* Court made no reference to them.

185. See note 175 *supra*.

186. *See* Note, *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 106, 107 (1969).

187. *See id.* at 107-08 and cases cited therein at 108 n.21.

188. Tot v. United States, 319 U.S. 463, 467 (1943).

test,[188] *Leary* held that *Tot* had "implicitly abandoned" comparative convenience.[189]

Had *Allen* not intervened, *Sandstrom* would have been another significant step in keeping with the general trend. The primacy that *Sandstrom* properly gives to how a juror *might* interpret an instruction was a position urged by several pre-*Sandstrom* commentators who favored the more restrictive attitude toward presumptions. As one such commentator put it, "[i]f the jury is instructed in ambiguous terms regarding the burden of the opponent of a presumption, it makes little sense for a court to assess the validity of the device in light of the burden which it was theoretically intended to affect."[190] In fact, *Sandstrom* might well call for the invalidation of the deductive devices that were sustained in *Gainey* and *Turner* since the "unless satisfactorily explained by the defendants" language reasonably could be interpreted to require the defendant to raise more than a reasonable doubt to satisfy the jury.[191]

*Sandstrom* has already had a significant impact in causing convictions to be vacated in several jurisdictions.[192] Furthermore, inasmuch as *Sandstrom* does not appear to be susceptible to a harmless

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189. Leary v. United States, 395 U.S. 6, 45 (1969). The government made the comparative convenience argument that the marihuana statute in *Leary*, see notes 131-33 and accompanying text *supra*, "put every marihuana smoker on notice that he must be prepared to show that any marihuana in his possession was not illegally imported." *Id.* at 44-45. The government argued that "it is not unfair to require him [the defendant] to adduce evidence on this point" since the possessor is "the person most likely to know the marihuana's origin." *Id.* The government pointed out that this approach had been taken in the pre-*Tot* presumption case of Yee Hem v. United States, 268 U.S. 178 (1925), where the Court had stated: "Legitimate possession [of opium] . . . is so highly improbable that . . . you [the defendant] must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation." *Id.* at 184, *quoted in* 395 U.S. at 44. *Leary* rejected this argument, and required the government to show, with substantial assurance, that the presumed fact was more likely than not to follow from the basic fact, even though the defendant had better access to the facts. 395 U.S. at 45-46.

190. Comment, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?* 19 ST. LOUIS U.L.J. 223, 226 (1974). *See also* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 201-03 (1969); Note, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 150 (1966).

191. See note 115 *supra*.

192. *See, e.g.*, Hammontree v. Phelps, 605 F.2d 1371, 1373 (5th Cir. 1979); United States v. Ariza-Ibarra, 605 F.2d 1216, 1228 (1st Cir. 1979); Dreske v. Wisconsin Dept. of Health & Social Servs., 483 F. Supp. 783, 787 (E.D. Wis. 1980); Dlugash v. New York, 476 F. Supp. 921, 924 (E.D.N.Y. 1979); Holloway v. McElroy, 474 F. Supp. 1363, 1366 (M.D. Ga. 1979). *But see* United States *ex rel.* Swimley v. Nesbitt, 608 F.2d 1130, 1133 (7th Cir. 1979); United States v. Davis, 608 F.2d 698, 699 (6th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); Gagne v. Meachum, 602 F.2d 471, 473 (1st Cir. 1979), *cert. denied*, 444 U.S. 992 (1980); Jacks v. Duckworth, 486 F. Supp. 1366, 1373 (N.D. Ind. 1980); United States *ex. rel.* Collins v. Crist, 473 F. Supp. 1354, 1357 (D. Mont. 1979); McInerney v. Berman, 473 F. Supp. 187, 190 (D. Mass. 1979).

error analysis[193] or to merely prospective application,[194] the significance of *Sandstrom* cannot be doubted. Yet in the long run, *Allen* greatly diminishes *Sandstrom*. The *Sandstrom* decision left open the possibility that a mandatory presumption that shifts the burden of production, but not the burden of persuasion, might be able to survive a constitutional challenge.[195] Yet legislatures and courts will be unlikely to draft mandatory presumptions shifting the burden of production since such a device will be subjected to a facial review measured by a beyond-a-reasonable-doubt standard. The ready alternative is the permissive inference. Under *Allen*, inferences will not be reviewed at all if the presumed fact passes the traditionally minimal scrutiny of sufficiency of the evidence. Few drafters of deductive devices will leave the tranquil shallows of a permissive inference to enter the comparatively treacherous waters of a mandatory presumption shifting the burden of production. If this prediction is correct, the result will be that the Court will gradually withdraw from the business of reviewing the facial rationality of deductive devices because all such devices will be drafted as permissive inferences. This diminished scrutiny is disturbing, because as the next section of this Article will argue, the dangers inherent in deductive devices do not only implicate the burden of production and persuasion issues that concerned the *Allen* majority.[196] Deductive devices also imperil another due process value: ensuring the nonarbitrary and rational nature of the decisionmaking.

### A. *Jury Reliance on Deductive Devices*

With a permissive inference, even if the defendant produces no evidence to rebut the existence of the presumed fact, whether the fact has been "proved" is an issue to be resolved by the jury. The

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193. *See* Note, *Presumptive Intent Jury Instructions After Sandstrom*, 1980 WIS. L. REV. 366, 381-89 [hereinafter cited as Note, *Presumptive Intent*]. This Note argues convincingly that the "overwhelming untainted evidence" harmless error standard is inapplicable to an instruction found defective on *Sandstrom* grounds. Since a jury can rely on a deductive device to reach a verdict while rejecting or failing to consider evidence presented at trial, "a reviewing court has no recourse to other, untainted evidence." *Id.* at 387. *But see* Krezminski v. Perini, 614 F.2d 121, 125-26 (6th Cir. 1980); Mason v. Balkcom, 487 F. Supp. 554, 559 (M.D. Ga. 1980).

194. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the Court held that where the major purpose of a constitutional rule is to protect the factfinding process, neither good-faith reliance nor severe impact on the administration of justice can prevent retroactive application. *Hankerson* held Mullaney v. Wilbur, 421 U.S. 684 (1975), see notes 230-45 and accompanying text *infra*, to be retroactive. Since *Sandstrom* implements *Mullaney's* due process concerns with shifts in the burden of persuasion in the context of jury instructions, it appears that *Sandstrom* also must be given retroactive application. *See* Note, *Presumptive Intent*, *supra* note 193, at 382 n.70, and the cases cited therein.

195. *Sandstrom* made it clear that a mandatory presumption shifting the burden of persuasion or a conclusive presumption is unconstitutional. 442 U.S. at 524.

196. County Ct. of Ulster County v. Allen, 442 U.S. at 157, 166-67.

jury should be instructed both that it need not accept the inference and that the burden of persuasion remains with the prosecution to prove the presumed fact beyond a reasonable doubt. The *Allen* majority saw no reason to subject a permissive inference to facial review for this reason.

Permissive inferences, however, imperil the rationality of factfinding. Although the jury is not required to credit the inference, it is told that it may do so. If the inference is irrational, the jury may nevertheless rely on it as sufficient to find guilt. Consider the following hypothetical inference: Under our penal law upon proof that the defendant caused a death on Friday, you may draw the inference that the defendant committed an intentional homicide. Under *Allen*, once the court was assured that the jury instruction clearly communicated only a permissive inference, the court would assume that the jury had made reasonable use of the inference if there was sufficient evidence in the record demonstrating the defendant's intentional Friday homicide.[197] There is no principled basis under *Allen* to strike down a conviction obtained following this instruction so long as the trial court record will pass the traditionally minimal scrutiny of sufficiency of the evidence.[198] Thus, irrational verdicts would be sustained under the *Allen* analysis if there was sufficient evidence in the record to support the finding of the fact presumed, even though the jury may have reached its verdict based upon the inference alone while ignoring or rejecting the evidence.

*Allen's* abandonment of the facial rational connection test for permissive inferences,[199] therefore, sanctions the possibility of arbitrariness, the possibility that the jury will reach a verdict without reference to the evidence produced at trial. The evidence adduced at trial may or may not influence the jury's decision to credit the inference. Thus, it is possible that the evidence in the record, used *post hoc* by

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197. The common experience that may lead a jury to reject this particular inference may not be available in other circumstances. See notes 221-24 and accompanying text *infra*.

198. See note 197 and accompanying text *supra*.

199. The abandonment of the rational connection test is disturbing not because it was a satisfactory basis of review, but because *Allen's* retreat from the test sanctions the withdrawal of any meaningful review of permissive inferences. Professor Nesson of Harvard University has persuasively argued that the rational connection test was misconceived. *See generally* Nesson, *supra* note 152. Professor Nesson contended that permissive inferences are simply at odds with jury decisionmaking under the reasonable doubt standard because inferences provide an abstract formula that may be credited as a sufficient basis for a determination of guilt. "Permissive inferences thus permit juries to avoid assessing the myriad facts which make specific cases unique." *Id.* at 1192. Professor Nesson argued that unless the probability of an abstract presumed fact following from proof of an abstract basic fact is 100%, inferences undercut the proper function of the jury to weigh the unique facts of each case. *See id.* at 1191. Professor Nesson's proposal was that permissive inferences must be modified so that an abstract formula no longer provides a *sufficient* basis for guilt. So long as the inference instruction merely alerts the jury that the basic fact is deemed "highly probative of guilt," it does not subvert the purpose of jury decisionmaking under the reasonable doubt standard. *Id.* at 1222-23.

an appellate court to support the rationality of finding the presumed fact, was irrelevant to how the jury reached its verdict. In the specific context of the *Allen* facts, once the jury accepted the undisputed testimony that the two handguns were in the car occupied by the four defendants, the jury may have reached its ultimate decision that all four occupants of the car possessed the two handguns solely because the judge informed them that "[o]ur penal law" provides that you may infer upon proof of presence of weapons in an automobile that the weapons were possessed by each of the defendants who occupied it.[200] Some or all of the *Allen* jurors might have reached their decisions in this way while simply ignoring or even rejecting such evidence as the location of the guns in the car. Justice Stevens's scolding of the Second Circuit for testing the inference in a hypothetical situation[201] simply ignored the fact that inferences permit decisionmaking based upon a generalization regardless of the facts.[202] The refusal of the *Allen* majority to recognize this possible impact is revealed in its statement that "[t]here 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."[203]

A piece of relevant evidence only tends to prove guilt, but under *Allen* a jury may be instructed that a permissive inference is *sufficient* to find guilt or an essential element of guilt. There is no way of knowing whether the jury has tested the inference against the evidence at trial. Although the *Allen* majority hypothesized how the jury could have used the evidence at trial to make a reasonable application of the inference, its reconstruction was less than convincing. Four people were found to possess[204] two guns which were "perhaps" within the easy reach of the men in the back seat,[205] even though this was not a conspiratorial crime and no evidence of an agreement of joint or nonsimultaneous possession among the four was introduced.

But more fundamentally, the fact that an appellate court can construct a reasonable application of the inference grounded in the evidence does not mean that this is the way that the jury reached its decision. Even if the instructions on the statutory device in *Allen* could not be reasonably interpreted as conclusive or as shifting the

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200. See note 38 and accompanying text *supra*.
201. 442 U.S. at 155-56 & nn.14 & 15.
202. See note 199 *supra*.
203. 442 U.S. at 167.
204. The New York statute defined possession as having actual dominion and control or intent and ability to retain such control or dominion. *See id.* at 161 n.21, 164-65.
205. 442 U.S. at 163.

burden of persuasion,[206] the other jury instructions do not suggest that the jury must test the inference against the evidence in order to reach its decision. The *Allen* dissenters recognized the possibility that the inference authorized conviction even if the jury disbelieved all the prosecution's evidence except for proof of presence in the automobile.[207] The majority relied, however, on the jury's acquittal of the defendants on the charges of possession of the heroin and weapons found in the trunk, despite another presumption that applied to that contraband.[208] To the majority, the split verdict indicated the jury's independent evaluation of the evidence. The Court argued further that

> if the jury rejected the testimony describing where the guns were found, it would necessarily also have rejected the only evidence in the record proving that the guns were found in the car. The conclusion that the jury attached significance to the particular location of the handguns follows inexorably from the acquittal on the charge of possession of the machinegun and heroin in the trunk.[209]

This rebuttal prompted the dissenters to accuse the majority of applying an "unarticulated harmless-error standard."[210] In fact,

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206. In justifying its denial that the jury might have relied on the inference alone without testing it against the other evidence adduced at trial, the *Allen* majority stated that

> [t]he trial judge's instructions make it clear that the presumption was merely a part of the prosecution's case, that it gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal. . . . He [the trial judge] also carefully instructed the jury that there is a mandatory presumption of innocence in favor of the defendants that controls unless it, as the exclusive trier of fact, is satisfied beyond a reasonable doubt that the defendants possessed the handguns . . . .

442 U.S. at 160-61. The *Sandstrom* decision contains a refutation of this line of reasoning. In a footnote the *Sandstrom* Court stated that

> [t]he potential for these interpretations of the presumption [as being conclusive or mandatory, burden shifting] was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. For example, if the presumption were viewed as conclusive, the jury could have believed that although intent must be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt.

442 U.S. at 518 n.7. As in *Sandstrom*, the instruction on the deductive device in *Allen* can be understood as a means by which the prosecution's burden of persuasion is satisfied. *See also* Bollenbach v. United States, 326 U.S. 607, 612 (1946) (misleading error in a specific jury instruction on a vital issue is not cured by prior unexceptional and unilluminating abstract charge).

207. County Ct. of Ulster County v. Allen, 442 U.S. at 175 (Powell, J., dissenting).

208. *Id.* at 162 n.23.

209. *Id.* at 166 n.29.

210. *Id.* at 177 (Powell, J., dissenting).

though, the quotation evidences the majority's refusal to give credence to the possibility that the jury ignored the other evidence adduced at trial in reaching its verdict. The majority's logic fails since a jury is entitled to believe only portions of a witness's testimony. The jury could have believed that the weapons were present in the car but disbelieved the evidence of their location and accessibility. This is particularly true of the evidence of the drugs and the weapons found in the locked trunk, since the evidence showed that the driver had borrowed the car from his brother.[211] Furthermore, although it is true that the acquittal on the two charges relating to the contraband in the trunk obviously demonstrates that the jury did not use the statutory inference to convict for those two charges, the implications of this action remain ambiguous. The Chief Justice noted in a short concurrence that the jury "had reached what was obviously a compromise verdict in the case."[212] It might have been necessary to convince jurors inclined to acquit that the judge had instructed that "our penal law" permits the *Allen* statutory inference in order to muster the votes needed for the compromise convictions envisioned by Justice Burger. This speculation is offered not because it must have happened, but because it underscores the ambiguity of a general verdict in a criminal case. The *Allen* majority's speculation that the jury reached its verdict without sole, untested reliance on the inference is not a reliable basis for its decision.

### B. *Coercive Permission*

Any deductive device, whether mandatory or permissive, has pernicious possibilities because it presents to the jury an easy solution to its task. If the facts and the instructions are difficult or confusing, an inference is an attractive invitation offered by twin authority figures, the trial judge and "the law."[213] Unfortunately, no major studies of juries have examined the impact of the deductive device instruction.[214] The Supreme Court itself has recognized, however, that "[t]he normal assumption is that the jury will follow the statute and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes."[215] Ignoring the au-

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211. *Id.* at 144 n.3.

212. *Id.* at 167 (Burger, C.J., concurring).

213. *Cf.* United States v. Gainey, 380 U.S. 63, 72 (1965) (Douglas, J., dissenting in part).

214. *See generally* Davis, Bray, & Holt, *The Empirical Study of Decision Processes in Juries: A Critical Review*, in LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 326-61 (J. TAPP & F. LEVINE eds. 1977).

215. Bailey v. Alabama, 219 U.S. 219, 237 (1911). *Sandstrom* is consistent with *Bailey*. In *Sandstrom*, the state had argued that its instruction was not unconstitutional because the jury could have found that the homicide was committed knowingly or purposely and that the presumptive intent instruction went only to purpose. 442 U.S. at 525. The Court rejected this

thoritative force of the presumption as it is presented to the jury, the *Allen* majority simply assumed that the presumptively rational fact-finder will make a reasonable application of a permissive inference based on the evidence at trial. In other areas involving independent evaluations of evidence, the Court has not been willing to make such assumptions. In *Jackson v. Denno*,[216] the Supreme Court invalidated a jury instruction in which the jury received a confession but was instructed that it could consider it only if it found the confession to be voluntary.[217] Such a procedure was found to be unreliable because it was impossible to tell from a general verdict whether the jury found the confession voluntary or was influenced by the confession despite finding it involuntary. As the Court stated, "[I]t cannot be assumed . . . that the jury reliably found the facts against the accused."[218]

Similarly, in *Bruton v. United States*,[219] although the jury was instructed that a confession of a codefendant implicating Bruton was not to be considered as evidence against Bruton, the Supreme Court held that the admission of the evidence in a joint trial violated due process. The confession in *Bruton* had probative value, and the jury *may* have given it only the weight allowed by the instructions, but the possibility that the jury was unable to separate the codefendant's confession from Bruton's tainted the conviction.[220] *Bruton* is illustrative of the approach taken in any case involving hearsay or other evidence deemed prejudicial. The evidence may have probative value, but the concern that the jury will give it undue weight requires its exclusion. Since a permissive inference is a sufficient basis to find guilt or an essential element of guilt, an inference is often a greater inducement to arbitrariness than a single piece of prejudicial evidence that only tends to prove guilt. Yet, in *Allen*, the Court merely assumed that the jury was uninfluenced by the inference when its application would be irrational given the facts of the case.

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argument, stating that "[w]ith the assistance of the presumption, the latter [purpose] would have been easier to find than the former [knowledge], and there is no reason to believe the jury would have deliberately undertaken the more difficult task." *Id.* at 526 n.13.

216. 378 U.S. 368 (1964).

217. *Id.* at 377, 391.

218. *Id.* at 386-87 (footnote omitted). *But see* Spencer v. Texas, 385 U.S. 554, 568-69 (1967) (Texas recidivist statute upheld under which jury informed of defendant's prior record before reaching a verdict, but told to consider this record only for purposes of sentencing). *But see* Hicks v. Oklahoma, ___ U.S. ___, 100 S. Ct. 2227 (1980). In *Hicks*, a 40-year mandatory sentence under an Oklahoma recidivist statute was affirmed by the Oklahoma Court of Criminal Appeals despite the fact that the statute was later declared unconstitutional. The Oklahoma court reasoned that the defendant had not been prejudiced by the invalid statute because the sentence was within the range of punishment that could have been given without the recidivist statute. The Supreme Court reversed, pointing to the possibility that the recidivist provision might have prejudiced the jury. *Id.* at ___, 100 S. Ct. at 2229.

219. 391 U.S. 123 (1968).

220. *Id.* at 126. *But see* Parker v. Randolph, 442 U.S. 62, 64 (1979) (*Bruton* not extended to cases where codefendants have given interlocking confessions).

The inherently coercive effect of a deductive device may be further increased by the jury's lack of knowledge or experience. While the invitation to find that if it was Friday, then it may be intentional murder, should not be attractive to juries because of the patently arbitrary nature of the inference, with many presumptions the jury will have no basis on which to reject the proffered invitation to find the presumed fact. The deductive devices in *Turner* and *Leary* provide good examples. In order to determine whether the deductive devices in these cases were rational, the Court surveyed an enormous amount of literature and marshalled facts that had not been presented to the jury on such relevant topics as the amount of domestic production of the controlled substances, the possibilities of synthetic production of heroin, and the level of illegal importation. Although such matters may be necessary to make a meaningful evaluation of an inference, an average juror cannot be expected to be knowledgeable about them.

In *Leary*, the defendant's efforts to introduce evidence of the proportion of domestically consumed marihuana which had been grown in the United States were rebuffed by the trial court.[221] This very question was deemed vital by the Supreme Court in assessing the rationality of the deductive device in *Leary*.[222] The arbitrary results of such a system were dramatically highlighted in the case of *United States v. Peeples*.[223] In *Peeples*, the jury was given the same instruction as in *Turner* concerning finding all other elements of guilt from proof of possession of heroin. After deliberating for a while, the jury asked the judge what was the percentage of heroin produced illegally in this country. Since there was no evidence in the record concerning this question, the judge declined to answer.[224] Thus, the *Peeples* jury was denied the very information deemed essential to an evaluation of the rationality of the statutory device in *Turner*. Both cases illustrate the judicial sleight of hand involved in deductive devices. Empirical evidence of a general nature is deemed irrelevant for jury consideration, but this same material becomes crucial to appellate review under the rational connection test. It does not matter that the burden of production or persuasion never shifted on the various elements presumed in *Turner* or *Leary*. If the jury has no way of evaluating the inference and the prosecution provides no evidence on these matters because of reliance on the inference, the jury will have no reason to reject the invitation offered by the instruction. A permissive inference dealing with a technical matter, therefore, can have a more coercive impact on the jury than a mandatory presumption

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221. Leary v. United States, 395 U.S. 6, 37 n.66 (1969).
222. See notes 137-38 and accompanying text *supra*.
223. 377 F.2d 205 (2d Cir. 1967).
224. *Id.* at 208.

shifting the burden of production, at least in jurisdictions where a mandatory presumption is said to disappear, like a bursting bubble in the classic simile, if the opponent of the presumption produces some rebuttal evidence.[225] Thus, a defendant can prevent the instruction from being read to the jury by meeting this small burden.[226] But since the burden of production never shifts with a permissive inference, the jury will hear the instruction no matter how much evidence the defense introduces to demonstrate that there is no basis for finding the presumed fact. The supposedly innocuous permissive inference can be more onerous than a mandatory presumption.

It should not be supposed that trial judges can guard against the possibility of verdicts based on an irrational inference by entering judgments of acquittal either before or after submission of the case to the jury. So long as enough evidence of the basic fact of a permissive inference is presented to make that fact a jury issue, the existence of the presumed fact is necessarily a jury issue as well. Even if the prosecution relies totally on a permissive inference by presenting no evidence of the existence of the presumed fact, the trial judge is not empowered to direct a verdict of acquittal since the inference is a permissible basis for a guilty verdict. For example, in *Allen* the prosecution made no attempt to present evidence of possession of the weapons by any particular individual, aside from proof of presence of the defendants and the weapons in the car. No evidence of an agree-

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225. Thayer and later Wigmore were of the opinion that presumptions should merely shift the burden of production to the opponent of a presumption. Once the judge determined that evidence had been offered by the opponent, the "bubble would burst" and the presumption would fall out of the case. *See* MCCORMICK, *supra* note 16, at 82. In contrast, Morgan and McCormick proposed a view of presumptions which leaves the presumptive hubble intact against de minimis productions of evidence. They criticized the Thayer view for giving too slight an effect to the presumption since it could be defeated by evidence that was inherently incredible. The standard of evidence that must be produced to destroy the presumption under the Morgan-McCormick view is most often labeled as "substantial evidence," but formulations vary widely from one jurisdiction to another. For an in-depth discussion of the contrasting views of presumptions, see Hecht & Pinzler, *Rebutting Presumptions: Order out of Chaos*, 58 B.U.L. REV. 527 (1978); Lents, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEXAS L. REV. 1329 (1974); Mueller, *Instructing the Jury Upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301*, 12 LAND & WATER L. REV. 219 (1977).

226. Professor Nesson has taken issue with the idea that the judge can decline to inform the jury of a presumption. Nesson quotes Judge Learned Hand as stating, "If the trial is properly conducted, the presumption will not be mentioned at all . . . ." *See* Nesson, *supra* note 152, at 1201 n.35 (quoting Alpine Forwarding Co. v. Pennsylvania Ry., 60 F.2d 734, 736 (2d Cir.), *cert. denied*, 287 U.S. 647 (1932)). Nesson states that "[t]he most that can be meant by such statements . . . is that the word 'presumption' should not be used . . . since it is fraught with connotations and will often confuse the jury." Nesson, *supra* note 152, at 1201 n.35.

Professor Nesson's comments overlooked the fact that Judge Hand was sitting in a diversity case applying the law of New York which followed the Thayer view of presumptions. See note 225 *supra*. The Thayer model asserts that the decision whether the production burden is met is for the judge alone. Once the burden is satisfied, the presumption is to drop out of the case. *See* Hecht & Pinzler, *supra* note 225, at 552. *See also* People v. Hemmer, 19 Cal. App. 3d 1052, 1060-63, 97 Cal. Rptr. 516, 521-23 (1971) (instruction to the jury concerning a presumption when evidence has been introduced to rebut it is reversible error).

ment of joint possession by the defendants was offered. Nonetheless, the trial judge denied the defendants' motion for a judgment of acquittal because the prosecution could rely on the inference of possession of weapons upon proof of their presence in the automobile occupied by the defendants.[227] It is not uncommon for the prosecution to rely on an inference rather than to present much or any evidence of the presumed fact because deductive devices are usually created to assist the prosecution in areas where proof is difficult.[228]

Assuming that prima facie evidence of the basic fact and elements not the subject of an inference have been presented, inferences also eliminate the defendant's opportunity for a directed verdict. For this reason, the defendant in *Gainey* argued on appeal that the inference in that case was unconstitutional because it impinged upon the judge's power to direct an acquittal. Unpersuaded, the Court found no curtailment of a trial judge's authority to direct a verdict or to issue a judgment n.o.v.[229]

Yet the Court could not have meant that the trial judge may simply disagree with a valid congressional enactment. Did the Court mean that trial judges are entitled to direct acquittals if they believe that

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227. County Ct. of Ulster County v. Allen, 442 U.S. at 144-45.

228. *See* Nesson, *supra* note 152, at 1187.

229. The Court stated:

> The statute before us deprives the trial judge of none of his normal judicial powers. We do not interpret the provision in the statute that unexplained 'presence . . . shall be deemed sufficient evidence to authorize conviction' as in any way invading the province of the judge's discretion. The language permits the judge to submit a case to the jury on the basis of the accused's presence alone, and to this extent it constitutes congressional recognition that the fact of presence does have probative worth in the determination of guilt.
>
> But where the only evidence is of presence the statute does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment, notwithstanding the verdict. And the Court of Appeals may still review the trial judge's denial of motions for a directed verdict or for a judgment n.o.v.

United States v. Gainey, 380 U.S. 63, 68 (1965). The majority's position on this issue drew a sharp and cogent rebuke from Justice Black in his dissent:

> The Court holds that this statutory command in § 5601(b)(2) is valid, but then for some reason adds that judges are free to ignore it or, after telling juries that they may rely on it, are free to set aside the verdicts of those juries which do. . . . Judges are not usually given such unlimited discretion to disregard valid statutes.

*Id.* at 76 (Black, J., dissenting) (footnote omitted).

One commentator has suggested that the *Gainey* Court may have been moving toward a constitutional doctrine of a mandatory power of judicial acquittal in criminal cases. Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 157, 168 n.40 (1970). The Comment recognized that the passage in *Gainey* is the only authority for such a proposition and that all cases dealing with a motion for acquittal in the federal system are based on Federal Rule of Criminal Procedure 29(a), not constitutional grounds. The Comment also stated that the statutory device in *Gainey* appears to be "a legislative statement that a motion for acquittal under Rule 29(a) must be denied if the basic fact of presence at the illegal still is established." *Id.* If *Gainey* made the power to direct a verdict constitutional, the statutory device involved could only be constitutional if the trial judge were free to disagree with the congressional enactment allowing presence to serve as a sufficient basis for guilt.

proof at trial negated the rationality of the inference as applied in the specific case? This interpretation is only another way of saying that a judge may ignore the statute, since, upon adequate proof of the basic fact, the statutory inference provides a sufficient basis for guilt regardless of the state of the evidence on the presumed fact. For example, suppose that the defense in *Gainey* had presented credible unrebutted evidence that the defendant became separated from a hiking expedition and stumbled onto the site of an illegal still just as federal agents arrived at the scene. The prosecution runs the risk that the jury will believe the defense evidence if no prosecution rebuttal is presented. But the absence of any prosecution rebuttal can provide no basis for a directed verdict of acquittal since by statute it is permissible for the jury to rely on the inference to find that the defendant was "carrying on" a distillery from the proof of his presence at the site.

Although permissive inferences have long diminished a defendant's opportunity for a directed verdict, *Allen* went further by virtually eliminating appellate court review of the rationality of permissive inferences. Under *Allen*, if the formalistic requirement of permissive language is observed, the jury alone determines the rationality of the inference. If a jury does not evaluate the inference but simply relies on it to find a defendant guilty, its decision will escape appellate review so long as a reviewing court can recreate any reasonable hypothesis of guilt from the facts presented at trial. If the appellate courts have virtually no role in assessing the rationality of permissive inferences, the pretense that the trial judge maintains such a duty is now fully undermined.

## IV. Affirmative Defenses and Permissive Inferences

### A. *Formalism in the Treatment of Affirmative Defenses*

#### 1. *Mullaney v. Wilbur*[230]

The formalistic impact of *Allen/Sandstrom* is highly reminiscent of the Court's journey from *Mullaney v. Wilbur* to *Patterson v. New York*.[231] *Mullaney* dealt with Maine's century-old scheme of distinguishing murder from manslaughter. The *Mullaney* jury was instructed that "malice aforethought is an essential and indispensable element of the crime of murder without which the homicide would be manslaughter."[232] The jury was also instructed that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the

230. 421 U.S. 684 (1975).
231. 432 U.S. 197 (1977).
232. 421 U.S. at 686.

defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation."[233]

Mullaney had argued, based on *In re Winship*,[234] that this instruction denied him due process of law by shifting the burden of persuasion to the defendant on the essential element of malice aforethought.[235] In *Winship*, the Court for the first time made explicit that due process required the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime . . . charged."[236] The Maine Supreme Judicial Court rejected the defendant's contention, holding that under state law murder and manslaughter are not distinct crimes, but rather, "different degrees of the single generic offense of felonious homicide."[237] The United States Supreme Court accepted the Maine court's construction of Maine's homicide statute[238] but differed with its conclusion as to its constitutionality.[239] It did not matter that "as a formal matter," the absence of "heat of passion on sudden provocation is not a 'fact necessary to constitute the *crime*' of felonious homicide."[240] By drawing this distinction while refusing to establish the fact beyond a reasonable doubt, the Maine procedures violated due process. Justice Powell for the unanimous Court explained that if *Winship* were limited to those facts that constitute a crime as defined by the state, then the interests that *Winship* sought to protect could be undermined simply by redefining elements of crimes and labeling them "as factors that bear solely on the extent of punishment."[241] The *Mullaney* Court insisted that "*Winship* is concerned with substance rather than this kind of formalism."[242]

*Mullaney* quickly provoked an enormous literature that recognized the wide-ranging implications of the decision.[243] Many commentators heralded *Mullaney* as the end of affirmative defenses and presumptions in the criminal law[244] and several courts reached similar conclusions.[245]

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233. *Id.*
234. 397 U.S. 358 (1970).
235. 421 U.S. at 687.
236. *In re* Winship, 397 U.S. 358, 364 (1970).
237. *See* 421 U.S. at 688.
238. *Id.* at 691.
239. *Id.* at 704.
240. *Id.* at 697.
241. *Id.* at 698.
242. *Id.* at 699.
243. *See, e.g.*, Allen, Mullaney v. Wilbur, *The Supreme Court and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U.L. REV. 775 (1975); Comment, *The Burden of Proof and the Insanity Defense After* Mullaney v. Wilbur, 28 ME. L. REV. 435 (1976). See also note 244 *infra*, and sources cited therein.
244. *See, e.g.*, Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 ARK. L. REV. 429 (1976); Underwood, *The Thumb on the Scales of Justice: Bur-*

2. *Patterson v. New York*[246]

Two terms after *Mullaney* the Supreme Court considered the constitutionality of New York statutes that defined murder in terms of intentionally causing the death of another. The statutory scheme provided that a defendant could escape punishment for murder and be subject only to conviction for manslaughter if he could persuade the jury by a preponderance of the evidence that he had acted under the influence of "extreme emotional disturbance."[247] Extreme emotional disturbance is the functional equivalent of the common-law defense of "in the heat of passion." The new defense was taken almost verbatim from the American Law Institute's Model Penal Code, which had expanded the common-law defense in several ways. Provocation was to be viewed from the defendant's perspective rather than objectively.[248] Furthermore, the provocation no longer had to be immediate as it did under the "in the heat of passion" defense but could include emotional disturbance that lasted for a much longer period of time.[249] New York deviated from the ALI model in one important

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*dens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977); Comment, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171 (1976); Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 64 GEO. L.J. 871 (1976); Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390 (1976); Comment, *Constitutional and Legislative Issues Raised by the Entrapment Defense in Maine*, 29 ME. L. REV. 170 (1977); Note, *Due Process and the Insanity Defense: Examining Shifts in the Burden of Production*, 53 NOTRE DAME LAW. 123 (1977); Comment, *Affirmative Defenses in Ohio After* Mullaney v. Wilbur, 36 OHIO ST. L.J. 828 (1975); Comment, *Mens Rea, Due Process and the Burden of Proving Sanity or Insanity*, 5 PEPPERDINE L. REV. 113 (1977).

245. *See* Hallowell v. Keve, 555 F.2d 103 (3d Cir. 1977); Grace v. Hopper, 425 F. Supp. 1355 (M.D. Ga. 1977), *rev'd*, 566 F.2d 507 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978); Berrier v. Egeler, 428 F. Supp. 750 (E.D. Mich. 1976), *aff'd*, 583 F.2d 515 (6th Cir.), *cert. denied*, 439 U.S. 955 (1978); Gagne v. Meacham, 423 F. Supp. 1177 (D. Mass. 1976); State v. Monroe, 236 N.W.2d 24 (Iowa 1975); Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976); State v. Matheson, 363 A.2d 716 (Me. 1976).

The most common affirmative defense upheld after *Mullaney* but before *Patterson* was the insanity defense. This result was influenced by the concurring opinion of Justice Rehnquist in *Mullaney*, 421 U.S. at 704-06. Justice Rehnquist pointed out that *Mullaney* did not overrule the Court's previous decision in Leland v. Oregon, 343 U.S. 790 (1952). *Leland* upheld the constitutionality of an Oregon statute requiring a defendant to prove the affirmative defense of insanity beyond a reasonable doubt. For decisions following Justice Rehnquist's view, see Buzynski v. Oliver, 538 F.2d 6 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976); Hill v. Lockhart, 516 F.2d 910 (8th Cir. 1975); Shanahan v. United States, 354 A.2d 524 (D.C. 1976); State v. Berry, 324 So. 2d 822 (La.), *cert. denied*, 425 U.S. 954 (1975); State v. Melvin, 341 A.2d 376 (Me. 1975); State v. Bott, 310 Minn. 331, 246 N.W.2d 48 (1976); Guynes v. State, 92 Nev. 693, 558 P.2d 626 (1976).

246. 432 U.S. 197 (1977).

247. N.Y. PENAL LAW § 125.20(2) (MCKINNEY 1975). A corresponding section of the New York law makes "extreme emotional disturbance" an affirmative defense to a charge of murder in the second degree. N.Y. PENAL LAW § 125.25(1)(A) (MCKINNEY 1975).

248. ALI MODEL PENAL CODE § 2.01(3)(1)(b), Proposed Official Draft (1962).

249. *See* Comment, *Affirmative Defenses After* Mullaney v. Wilbur: *New York's Extreme Emotional Disturbance*, 43 BROOKLYN L. REV. 171, 195-96 [hereinafter cited as Comment, *Affirmative Defenses*]. *See also* Patterson v. New York, 432 U.S. at 220 (Powell, J., dissenting).

regard, however: whereas the Model Penal Code required only that the defendant bear the burden of production, New York required that the defendant shoulder the burden of persuasion as well.[250]

Although the scope of New York's extreme-emotional-disturbance defense was broader than Maine's "in the heat of passion" defense, it functioned in the same way as the latter to mitigate murder to manslaughter if the defendant could persuade the jury that he was acting under provocation. One commentator, writing after the Supreme Court grant of certiorari but before the final *Patterson* decision, noted the similarity of the two statutory schemes and stated in the concluding sentence of his article that "[i]t would not be surprising were the Supreme Court to reverse with a one-word opinion—*'Mullaney'*."[251]

The Court proved to be neither so succinct nor so predictable. The majority held that New York had complied with the due process requirements of *Winship* by proving a death, the intent to kill, and causation—every fact necessary to constitute the crime as defined by the state.[252] *Patterson* purported to distinguish, not overrule, *Mullaney*, even though Maine had also proved every element of the single crime of "felonious murder" as defined by its Supreme Judicial Court. The distinction was that in Maine, "malice aforethought and heat of passion on sudden provocation are two inconsistent things."[253] The reference to malice in the statute carried no factual meaning except the absence of provocation.[254] Thus, "malice, in the sense of the absence of provocation, was part of the definition of that crime [murder],"[255] but the state had shifted the burden of persuasion on this element of the crime as defined by the state. This was a violation of due process in *Mullaney*, but New York had defined the basic crime, murder, without reference to the element essential to the affirmative defense.[256]

Writing for a majority of five, Justice White attempted to head off the dissent's criticism that the decision would allow the states to evade the due process requirement of proof beyond a reasonable doubt simply by redefining crimes,[257] with his broad suggestion that "obvious" constitutional constraints limit the states' freedom to define crimes.[258] But since no content was given to these "obvious" limits, Justice Powell was justified in insisting that,

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250. *See* Patterson v. New York, 432 U.S. at 220-21 (Powell J., dissenting). *See also* Comment, *Affirmative Defenses*, *supra* note 249, at 196.

251. Comment, *Affirmative Defenses*, *supra* note 249, at 199.

252. 432 U.S. at 205-06.

253. *Id.* at 213 (citing Mullaney v. Wilbur, 421 U.S. at 686-87).

254. 432 U.S. at 215-16.

255. *Id.* at 216.

256. See text accompanying note 252 *supra*.

257. *See* 432 U.S. at 223-24 (Powell, J., dissenting). Justice Powell, the author of *Mullaney*, was joined in his dissent by Justices Brennan and Marshall.

258. *Id.* at 210.

> [t]he test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense.
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> . . . What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship.[259]

*Patterson* reduces *Mullaney* to a stern warning to the legislative branch to exercise caution in drafting statutory crimes. *Sandstrom* in light of *Allen* cautions drafters to create statutes and jury instructions that invite but do not expressly require juries to find one fact from proof of another. Both *Patterson* and *Allen* teach that adhering to the Court's lessons in draftsmanship will virtually immunize a deductive device or a defense from review.

### B. *The Fear of Inducing Harsher Legislative Reactions*

There is more than a superficial coincidence between the diminution of *Sandstrom* by *Allen* and the evisceration of *Mullaney* by *Patterson*. It is clear that both affirmative defenses and deductive devices impinge upon the beyond-a-reasonable-doubt standard. Consider

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259. *Id.* at 223-24 (Powell, J., dissenting).

A less formalistic interpretation of *Patterson* than Justice Powell's location analysis is possible. Perhaps two differing substantive views of the mitigation of intentional murder by some type of provocation are embodied in the Maine and New York statutes. In New York, provocation in no way robs the actor of an intent to kill. Proof of provocation—extreme emotional disturbance—results in a lesser penalty because a defendant who kills while provoked is deemed less blameworthy than one who kills absent such provocation, even though both killed intentionally. Under the Maine view of the defense, however, the cool-headed deliberation required for murder (malice aforethought) is negated by or inconsistent with actions taken under the influence of great provocation (in the heat of passion). In New York, manslaughter is truly a defensive matter, since the defendant convicted of this lesser charge has violated all the statutory elements of the greater crime. In Maine, the defendant convicted of manslaughter was found not to possess the required mental state for homicide.

The two versions of provocation are similar to the differing views of the defense of entrapment. Under one view, the focus is on the defendant's predisposition to commit the crime. Under the other view, the integrity of law enforcement activity is paramount and the defense is designed to deter the instigation of crime by government officials. Under the latter view, the defense can be made out even though the defendant is guilty of every element of the crime, while the former view is enmeshed with the question of the existence of the requisite mens rea element of a crime. *Compare* the majority opinion in Sorrells v. United States, 287 U.S. 435 (1932), *with* the concurring opinion of Justice Roberts joined by Justices Brandeis and Stone, *id.* at 453. *See also* Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 Harv. C.R.-C.L. L. Rev. 390, 414-18 (1976).

Justice Powell's concern with the ease of evasion of the due process requirement of proof beyond a reasonable doubt remains valid under an interpretation of *Patterson* that gives greater recognition to the substantive differences in the defenses in the two states. Under *Patterson*, legislative or judicial characterization of a defense as unrelated to the required elements of a crime will suffice to eliminate the requirement of prosecution proof beyond a reasonable doubt. For a summary of an argument that such legislative flexibility is desirable, see notes 267-75 and accompanying text *infra*.

some of the ways in which a legislature might lessen the task of prosecution for the crime of rape. The legislature might define rape as nonconsensual intercourse with a woman other than the defendant's wife, but shift the burden of persuasion on the element of consent to the defendant. This shift would clearly violate the strictures of *Mullaney*. But the legislature has been provided with formulas by *Mullaney/Patterson* and *Sandstrom/Allen* to enable it to accomplish the same result without judicial interference. Under *Patterson*, the legislature could simply make intercourse with a person other than a spouse the crime, and, in another section of the statute labeled as an affirmative defense, provide for mitigation or exculpation of the crime upon proof of the consensual nature of the intercourse. *Allen* suggests another alternative: enacting a statutory device providing that upon proof of intercourse the jury may, but need not, find that the act was nonconsensual. If there is evidence in the record from which a jury reasonably could find lack of consent, and if the jury instruction is clearly permissive, a conviction under this statute would also be sustained.

How can such formalistic distinctions be defended? One motive for such results might be fear that if the Court continued on the path suggested by *Mullaney* and the line of cases from *Tot* to *Barnes* that indicated an increasingly strict review of deductive devices, the result would be to induce the legislature to withdraw mitigating defenses completely. To illustrate by returning to the hypothetical rape statute, the legislature might redefine rape so as to eliminate the element of lack of consent altogether. To meet the objection that this would not constitute rape at all, it might be contended that the crime is fornication, but the penalty is being increased from the present six months to thirty years. Arguments about whether the crime is ordinary fornication or a vicious assault could be directed to the judge at sentencing.[260] Although it may be argued that the possibility of thirty years imprisonment for the act of consensual intercourse would violate the eighth amendment's prohibition of cruel and unusual punishment, the contemporary development of that doctrine does not appear to provide a basis for the judiciary to strike down such a statute. Illustrative of the typical response to an eighth amendment claim of grossly disproportionate punishment is that of the District Court for the Western District of North Carolina in *Perkins v. North Carolina*.[261] The *Perkins* court sustained a sentence of twenty to thirty years imposed for a single act of consensual fellatio because the

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260. Even the most extreme proponents of an expansive reading of *Mullaney* have not suggested that the requirement extends to issues at sentencing. *See, e.g.*, Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1352-53 (1979).

261. 234 F. Supp. 333 (W.D.N.C. 1964).

penalty was within "the astounding statutory limit of 'not less than five nor more than *sixty* years'."[262] *Perkins* is typical not only of the courts' deferential attitude in the application of the eighth amendment,[263] but also of the customary judicial reluctance to police the limits of the substantive criminal law. The courts have regarded procedural matters as well-suited for judicial determination, but the substantive content of the law has largely been left for political determination in the legislative arena.[264]

There are several indications in *Patterson* that the Court retreated from *Mullaney* out of this fear of inducing harsher legislative solutions. The Court pointedly expressed its concern in a footnote:

> There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability". . . . It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system. . . . Carried to its logical extreme, such a reading of *Mullaney* might also, for example, discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony. . . . The Court did not intend *Mullaney* to have such far-reaching effect.[265]

The Court's withdrawal from scrutiny of the content of presumptions and affirmative defenses is more understandable in light of the legislative freedom to define crimes without judicial intervention. Under the hypothetical rape statutes, a defendant given the option of either an affirmative defense or rebutting an inference would at least have the opportunity to escape conviction for rape if he could persuade the jury that there had been consent. Strict requirements forbidding shifts in the burden of proof through the establishment of an affirmative defense or a presumption could lead to legislatures simply eliminating the mitigating defense or the deductive device. Such

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262. *Id.* at 337 (emphasis in original).

263. The possibility of a revitalized disproportionality doctrine under the eighth amendment was raised by Coker v. Georgia, 433 U.S. 584 (1977). In *Coker*, the Court ruled that imposition of the death penalty for the crime of rape violates the prohibition against cruel and unusual punishment. *Id.* at 592. The prospects for revitalization were dimmed last term in Rummel v. Estelle, 445 U.S. 263 (1980), where the Court upheld a mandatory life sentence following conviction under a Texas recidivist statute. The Texas statute mandates a life sentence for the conviction of a felony following conviction for two prior felonies. Although Rummel's three felonies were all nonviolent property crimes which involved money totaling approximately $230, the Court rejected his claim that a life sentence was grossly disproportionate under the eighth amendment. *Id.* at 285. *Coker* was distinguished because of the unique nature of the penalty of death. *Id.* at 272.

264. *Id.* at 274 & n.11.

265. Patterson v. New York, 432 U.S. at 214-15 n.15 (citations omitted). The Court made similar observations at 208-09 and at 209 n.13.

legislative redefinition occurred with the statutes involved in *Leary* and *Turner*. Mere possession of marihuana and a large number of narcotics and drugs were made federal offenses by one comprehensive statute that repealed the former statutes containing the deductive devices construed in *Leary* and *Turner*.[266]

Despite the validity of the Court's concern with inducing harsher legislative reactions, most academic commentators have failed to come to terms with the possibility of unreined legislative redefinition of crimes in advocating the demise of affirmative defenses and presumptions in the criminal law.[267] One exception is Professor John C. Jeffries, Jr., of the University of Virginia, whose work with Professor Peter W. Low was cited in *Patterson*.[268] Professor Jeffries, collaborating with Paul B. Stephan, has pointed out that the difference between an element and a defensive matter is essentially arbitrary, as *Patterson* illustrated. In fact, the difference between elements and defenses had been defined by reference to the procedural effect of whether the state or the defendant bears the burden of production or persuasion.[269] Jeffries and Stephan were critical of the purely procedural interpretation of *Winship* that would require the state to bear the burdens of production and persuasion every time the state drew a distinction affecting the defendant's culpability but would leave the state free to define the elements of a crime as it wished. The proponents of this procedural view of the reasonable doubt requirement often defend their position by citing various horror stories that could occur if the state were freely allowed to shift the burden of proving defenses.[270] For example, one commentator hypothesized a comprehensive statute of "personal attack" to include all homicide and assault offenses. Without a bar against burden-shifting devices, "a legislature could authorize conviction and punishment for that crime on proof of a trivial assault, with the burden on the defendant to establish the mitigating defenses of the victim's survival, his freedom from injury, or the defendant's lack of intent to harm or injure."[271] Jeffries and Stephan cogently argued that a procedural rule forbidding shifting the burden of persuasion is a non sequitur to the prevention of the *substantive* injustice of this type of statute because the hypothetical legislature that would be prevented by such a strict pro-

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266. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. *See also* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L.J. 919, 922-23 (1970).

267. *See* Jeffries & Stephan, *supra* note 260, at 1340 n.40, 1348, 1353.

268. Low & Jeffries, *DICTA: Constitutionalizing the Criminal Law?* Va. L. Weekly (March 25, 1977), *cited in* Patterson v. New York, 432 U.S. at 208, 214-15 n.15.

269. *See* Jeffries & Stephan, *supra* note 260, at 1332.

270. *Id.* at 1357-58.

271. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1324 (1977), *cited in* Jeffries & Stephan, *supra* note 260, at 1357.

cedural rule from making a defense of a fact bearing on culpability could simply eliminate the "defense" as an element.

Proponents of a strict procedural view of the reasonable doubt requirement have assumed that forcing legislative abandonment of burden-shifting defenses and presumptions will result in defenses being retained and expanded despite an absolute requirement that the prosecution must bear the risk of nonpersuasion.[272] Although predicting legislative reaction to a hypothetical procedural rule is necessarily speculative, Jeffries and Stephan recognized that "[t]he best evidence of what legislatures would do if they were forced to abandon the affirmative defense is the catalogue of uses to which that device is currently put."[273] Surveying the practices of thirty-three American states that have recently enacted comprehensive revisions of their penal laws, Jeffries and Stephan discovered that, in general, affirmative defenses were used to offer the defendant an exculpatory route that had not been available at common law.[274] Based on this survey the authors concluded that forbidding the creation of affirmative defenses and presumptions "would thwart legislative reform of the penal law and stifle efforts to undo injustice in the traditional law of crimes."[275] Stephan and Jeffries urged that the "intermediate power" of allowing defenses and presumptions that shift burdens to the defendant should be retained.

Jeffries and Stephan would disapprove of *Allen*.[276] They would argue that it is illogical to treat inferences more stringently than presumptions. According to their analysis, appellate courts should ask: Is the basic fact of a deductive device a sufficient basis to impose criminal liability? If that question is answered affirmatively, then the state should be permitted any of the lesser options of a permissive inference, a mandatory presumption, or an affirmative defense. Jeffries and Stephan thus would champion the re-emergence of Justice Holmes's long-dormant doctrine of the-greater-includes-the-lesser.[277] This analysis has the advantage of forcing the courts to abandon formalistic evasions by developing substantive boundaries within which legislatures are free to experiment with new defenses that may shift the burden of persuasion to the defendant. The for-

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272. *See* Jeffries & Stephan, *supra* note 260, at 1353, 1354.

273. *Id.* at 1354.

274. *Id.* at 1355 nn.83-91. Jeffries and Stephan catalogued some affirmative defenses and the frequency of their appearance as follows: the defense of renunciation for the crime of theft (13 states); reasonable mistake as to age for the crime of statutory rape (9 states); affirmative defenses to felony murder (8 states); reasonable reliance on an official misstatement of law (6 states). *Id.*

275. *Id.* at 1353.

276. Of course, Jeffries and Stephan wrote prior to the decision in *Allen*. The extrapolation of their likely position on *Allen* is based upon their treatment of *Gainey*, *id.* at 1395-97.

277. For a discussion of the greater-includes-the-lesser analysis, which was rejected as a test for the validity of deductive devices in *Tot*, see notes 95-97 and accompanying text *supra*.

malistic determinations that result from the tandems of *Mullaney/Patterson* and *Allen/Sandstrom* merely sanction withdrawal by the courts from meaningful review if all formalities are observed. A meaningful judicial check requires that the courts determine what the "greater power" is, or in other words, what the limits of the substantive criminal law are. Jeffries and Stephan have urged that the Supreme Court begin to define these limits.[278]

Consistent with the doctrine of the-greater-includes-the-lesser, Jeffries and Stephan have urged that "[a]ny functional construction of the reasonable doubt standard, however, will treat presumptions and affirmative defenses the same."[279] Their reasoning is based on the similarity between the two, which the hypothetical rape statutes demonstrate.

Although the Jeffries and Stephan analysis is compelling as applied to affirmative defenses, the analysis does not deal satisfactorily with the propensity of deductive devices to operate beyond the evidence. A legislature may be able to convert the basic fact of a permissive inference into the crime itself or to convert the basic fact into the crime with the defendant having to establish an affirmative defense in order to escape culpability: for example, instead of providing that the crime of carrying on an illegal still may be found upon proof of presence at an illegal still, the legislature may simply create the crime of presence at an illegal still. Alternatively, the legislature could create the crime of presence and also the defense of presence unrelated to carrying on an illegal distillery, which the defendant must prove. There remains, however, a legitimate interest in preventing arbitrary decisions as to guilt, however guilt is defined. The logic of the-greater-includes-the-lesser does not mean that because the state may eliminate a "defense" to a crime, it would also be acceptable to retain the defense but deny the defendant the right to counsel in presenting it. Decisionmaking without counsel could lead to arbitrary results unrelated to the merits of the case. An intelligent, verbally proficient defendant might be able to persuade a jury of the defense, whereas a defendant with an equally meritorious case but less ability might not. Not all attorneys have equal skills, but the law generally assumes some minimal level of expertise to deal with the law's complexities, at least absent gross deviations from reasonable competence. Similarly, a legislature's ability to convert the basic fact of a permissive inference

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278. *See* Jeffries & Stephen, *supra* note 260, at 1365-78. The authors have pointed to the eighth amendment proportionality doctrine, the concept of an *actus rea*, and *mens rea* as "constitutional minima" that can be used to build such an analysis. *Id.*

279. *Id.* at 1338. Other commentators have also taken this position. *See* Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 60 (1977); Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 189 (1969).

into the crime itself should not mean that a legislature should be able, by creating deductive devices, to imperil the independent value of ensuring the nonarbitrary nature of the factfinding process. Deductive devices should be eliminated from the criminal law or modified to eliminate the danger that the jury will decide cases based on generalizations divorced from the facts. The concern with legislative flexibility and the danger of inducing harsh legislative responses can be met by allowing legislatures to turn presumed facts into affirmative defenses. Affirmative defenses do not extend the invitation to arbitrariness inherent in deductive devices because the decision whether a defense to the crime has been proved is grounded in the evidence presented.[280]

If deductive devices are to be retained in any form, they should be phrased so as to avoid the problem of extending the invitation to decide guilt on the basis of a generalization divorced from the facts. Professor Charles Nesson of Harvard University has suggested that jurors could be informed that the basic fact was considered highly probative of the presumed fact, and that it might, when considered together with other evidence, be used to find guilt beyond a reasonable doubt:

> [I]f framed in a manner which does not abstract the predicate fact from its overall circumstantial context, the instruction should be acceptable. An example would be an instruction which informed the jurors that evidence of Gainey's presence at the still was highly probative on the question whether he was operating the still and could, when considered together with other circumstantial evidence which the jurors might credit, warrant a finding of guilt beyond a reasonable doubt. Such formulations of permissive inferences would avoid any explicit authorization to draw a naked inference from predicate to conclusion, and yet would accomplish the legislature's objectives.[281]

Perhaps the most effective way to instruct the jury in a manner which does not "abstract the predicate" is to inform the jury of the facts that formerly resulted in the creation of a deductive device. In other words, the jury should be informed of legislative findings, such as the level of illegally imported drugs in the case of statutes like those in *Leary* and *Turner*. The advantages are that the jury would be given the benefit of the factfinding ability of the legislature, and the prosecution would be relieved of the task of producing evidence

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280. It may appear to an individual defendant that he is in a better position with a deductive device than with an affirmative defense, since the defendant must produce evidence to put an affirmative defense at issue and with some defenses must persuade the jury as to the existence of the defense. *Sandstrom* held that a mandatory presumption shifting the burden of persuasion is unconstitutional. Sandstrom v. Montana, 442 U.S. 510, 524 (1979). From the point of view of structuring an entire system, however, replacing deductive devices with affirmative defenses strengthens the nonarbitrary operation of the decisionmaking process.

281. Nesson, *supra* note 152, at 1223.

in every case of frequently recurring fact situations. The instructions would function as expert testimony but would not authorize conviction based upon the operation of a generalization divorced from the facts of the case. The defendant should be allowed to introduce evidence disputing the legislative facts or evidence showing that once accurate data is now out of date.[282] If it is objected that this method is cumbersome, it should be remembered that the present method allows the legislative findings to be embodied in a single abstract and sometimes ambiguous jury instruction[283] authorizing conviction. Under the approach suggested here, it would no longer be necessary to belabor the question whether the connection between the facts of a deductive device must satisfy a beyond-a-reasonable-doubt standard or a lesser standard. The dismantling of deductive devices into statements of legislative facts results in those facts being considered along with all others adduced at trial. The general standard of beyond-a-reasonable-doubt would guide the jury's deliberations without distinction between legislative and evidentiary facts. Only the method of presentation of the facts would differ.

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282. A possible manner of implementing this system would be to authorize the prosecutor to read the legislative findings to the jury at the close of the state's case just as stipulations are now commonly presented. This method would have two advantages: first, the legislative findings would come from the prosecutor and not the judge; thus, the likelihood that the jury would give the facts undue weight would be reduced. Second, the defense would be alerted to the prosecution's reliance on the legislative findings. If the findings are given in instructions to the jury only after the close of the presentation of evidence by both parties, the jury may be confused by the defense rebuttal to evidence that it has not yet heard.

283. A collateral benefit of the proposal urged here would be to force clarification of the message intended for the jury. For example, until 1977, the State of Wisconsin maintained a presumptive intent jury instruction similar to the one involved in *Sandstrom*: "When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his deliberate acts." Muller v. State, 94 Wis. 2d 450, 469, 289 N.W.2d 570, 580 (1980).

The general proposition that when someone acts, he or she intends the consequences that flow from those actions, is so abstract as to be insusceptible to demonstration in a court of law. Philosophers have debated such questions for centuries in terms that are foreign to the prosaic business of the courts.

The Wisconsin Uniform Jury Instruction Committee, anticipating the due process concerns announced in *Sandstrom*, adopted a substitute instruction two years before the opinion. The new instruction eliminates the vague inferential equation between acts and intention and substitutes a more direct statement that helps the jury understand the difficult problem of determining a subjective mental state from objective evidence:

> "Intent to—must be found as a fact before you can find the defendant guilty of—. You cannot look into a person's mind to find out his/her intent. You may determine such intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate his/her state of mind. You may find intent to—from such statements or conduct. You are the sole judges of the facts and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to—."

Muller v. State, 94 Wis. 2d 450, 470 n.6, 289 N.W.2d 570, 580 n.6 (1980). Asking legislatures to provide facts instead of formulas may induce greater clarity and provide guidance for the jury.

## CONCLUSION

The impact of *Sandstrom* and *Allen* undoubtedly will be to encourage the use of permissive inferences rather than mandatory presumptions. *Sandstrom* will discourage any deviation from permissive language, while *Allen* will exempt the carefully drafted inference from facial appellate review. Although the *Allen* majority fabricated a revisionist history that claimed a long tradition for its treatment of deductive devices, in fact *Allen* reversed decades of decisions in which rationality was the touchstone of the Court's analysis. The withdrawal from meaningful review of the rationality of permissive inferences is also contrary to the Burger Court's recent focus on the rationality of the factfinding process typified by cases like *Sandstrom*.

*Allen's* diminution of *Sandstrom* follows instead another recent tendency of the Court: to resolve difficult questions of the due process requirement of proof beyond a reasonable doubt with simplistic drafting formulas. In this respect, *Allen* and *Sandstrom* echo the formalistic tandem of *Mullaney v. Wilbur* and *Patterson v. New York* in the related area of affirmative defenses. Permissive inferences are enshrined in the criminal law by *Sandstrom* and *Allen* because inferences satisfy the Court's preoccupation with a formalistic prohibition against shifts in the burden of proof.

Although permissive inferences do not shift either a production or a persuasion burden to the defendant, they imperil other due process concerns. By permitting the factfinder to reach a verdict on the basis of a conclusionary formula and by exerting a coercive effect that operates beyond the evidence, permissive inferences can produce arbitrary results in a way that cannot be safeguarded against by a sufficiency-of-the-evidence standard of review. Nonarbitrary decisionmaking would be enhanced if permissive inferences were eliminated from the criminal law. If inferences are retained, the present practice should be reversed so that the jury is informed of the underlying facts that led to the creation of the inference instead of its unsubstantiated and unreviewed conclusion.