

A New Standard for Presumptions in Criminal Cases: *Ulster County Court v. Allen*¹—On March 28, 1973, a car containing three adult males and a 16 year old female was stopped for speeding on the New York State Thruway.² When the investigating officer approached the car he observed two large-caliber handguns through the window. The guns were positioned cross-wise in an open handbag which was placed on either the front floor or the front seat of the car, next to the female passenger.³ A search of the car also uncovered a loaded machine gun and over a pound of heroin in the trunk.⁴ All four passengers were tried on charges of possession of the two handguns, the machine gun and the heroin. The four were convicted of possession of the handguns and acquitted on the other charges.⁵

At trial, the four defendants objected to the introduction into evidence of the handguns, the machine gun and the drugs, arguing that the state had not adequately demonstrated a connection between the defendants and the contraband.⁶ The trial court overruled the objection, relying on a New York statute which provides that, with certain exceptions, the presence of a firearm in an automobile is evidence of its illegal possession by all persons then occupying the vehicle.⁷ In his instructions to the jury, the trial judge stated that the jury could presume possession of the guns by all the occupants of the car on the basis of the New York statute.⁸ The instructions made it clear that the jury was free to accept or reject the presumption, and that the presumption would disappear if substantial contradictory evidence were adduced.⁹

¹ 442 U.S. 140 (1979).

² *Id.* at 143.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 144.

⁶ *Id.*

⁷ *Id.* NEW YORK PENAL LAW § 265.15(3) (McKinney 1980) states:

The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, explosive incendiary bomb, gravity knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chukka stick, sandbag, sandclub or slingshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon is found, except under the following circumstances:

(a) if such weapon, instrument or appliance is found upon the person of one of the persons 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.

The three male defendants also moved to dismiss the charges relating to the handguns on the grounds that the statute could not be applied to them. 442 U.S. at 145. The girl admitted that the handbag that the guns were found in was hers. *Id.* at 143. Since under section 3(a) of the law, the presumption doesn't apply if the guns are found "upon the person" of one of the occupants of the car, the male defendants claimed the presumption was inapplicable to them. *Id.* at 145.

⁸ 442 U.S. at 145.

⁹ *Id.* at 161 n.20.

On appeal, the defendants claimed that the statutory presumption had been improperly applied. The statute contains an "on the person" exception which makes the presumption unavailable if the weapon is found on the person of one of the occupants of the automobile.¹⁰ The three male defendants claimed that the presumption was not applicable in this case because the guns were found in the female defendant's pocketbook. The appeal also contained a claim by all four of the defendants that the evidence, apart from the presumption, was insufficient to sustain the convictions, and that the statute was unconstitutional as applied in this case. The convictions were affirmed by the Appellate Division¹¹ and the New York Court of Appeals.¹²

The three adult male defendants¹³ then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that the presumption was unconstitutional both on its face and as applied to their case. The district court issued the writ, holding that the statute was unconstitutional as applied in the case because it was not reasonable to infer possession of the handguns by the male defendants upon proof of the presence of the handguns in the girl's handbag.¹⁴ The Court of Appeals for the Second Circuit affirmed on different grounds, holding that the statute was unconstitutional on its face without considering whether the presumption was constitutional as applied in this case.¹⁵

The Supreme Court granted the State's petition for a writ of certiorari¹⁶ and reversed the decision of the court of appeals. The Court HELD: 1) that the New York statute created a "permissive presumption"¹⁷ which had to be evaluated as applied to the record before the Court;¹⁸ and 2) that a permissive presumption is constitutional if the ultimate fact presumed is "more likely than not to flow from" the basic facts proved by the prosecution.¹⁹

In applying this standard to the presumption involved in *Ulster*, the Court found that there was a "rational connection" between the basic facts proved by the prosecution (the defendants' presence in the automobile and the location of the guns in the car) and the ultimate fact presumed (possession of the guns by the defendants), and that the latter was "more likely than not to flow from" the former.²⁰ The Court concluded, therefore, that the presumption comported with due process.

¹⁰ See note 7 *supra*.

¹¹ *People v. Lemmons*, 49 A.D.2d 639, 370 N.Y.S.2d 243 (App. Div. 1975).

¹² *People v. Lemmons*, 40 N.Y.2d 505, 354 N.E.2d 836 (1976).

¹³ The 16-year old girl received a 5-year probationary sentence and was not a party in the federal court proceedings. *Allen v. County Court, Ulster County*, 568 F.2d 998, 1000 n.2 (2d Cir. 1977).

¹⁴ 442 U.S. at 146.

¹⁵ *Allen v. County Court, Ulster County*, 568 F.2d 998, 1009 (2d Cir. 1977).

¹⁶ 439 U.S. 815 (1978).

¹⁷ A permissive presumption leaves the trier of fact free to accept or reject the fact inferred by the presumption and does not shift the burden of persuasion or production. See text at note 30 *infra*.

¹⁸ 442 U.S. at 162-63.

¹⁹ *Id.* at 167.

²⁰ *Id.* at 165.

Justice Powell, in a dissenting opinion joined by Justices Marshall, Stewart and Brennan, concluded that the presumption was not consistent with the requirements of due process.²¹ While agreeing with the majority that the fact presumed should be required to be "more likely than not to flow" from the facts proved, the dissent stated that due process requires all factual inferences recommended to the jury to be accurate reflections of what history, common sense and experience tell us about the relations between events in our society.²² Applying this test, the dissent would have found the challenged presumption to be unconstitutional because people present in an automobile in which a gun is found are not "more likely than not" to be in possession of that gun.²³

The holding of *Ulster* jeopardizes due process rights guaranteed defendants by previous cases. The use of presumptions in criminal cases implicates due process concerns because of the effect a presumption may have on the prosecution's constitutionally required burden of proof. *In re Winship* held that the due process clause requires the prosecution to prove every fact which constitutes the crime charged beyond a reasonable doubt.²⁴ When a presumption is invoked to aid the prosecution in proving a fact which is an element of the crime charged, it must be tested to ensure that the conclusion it permits follows beyond a reasonable doubt. To satisfy this due process requirement, the *Ulster* Court held that the prosecution could rely on all of the evidence in the record to meet the reasonable doubt standard.²⁵ Therefore, as long as the presumed fact is "more likely than not to flow from" the facts proved by the prosecution and all of the evidence in the case permits a conclusion of the presumed fact beyond a reasonable doubt, the *Ulster* standard holds that the presumption comports with due process. This standard ignores the possibility that the jury may base its finding of the presumed fact on the presumption alone, without considering whether all the facts of the case lead to such a conclusion beyond a reasonable doubt.²⁶ If such is the case, an element of the crime has not been found beyond a reasonable doubt since the *Ulster* standard does not require that the presumed fact flow from the proved fact(s) beyond a reasonable doubt. In this way, the *Ulster* holding jeopardizes the due process rights guaranteed in *Winship*.

To demonstrate the way in which presumptions may threaten the defendant's due process rights,²⁷ this casenote will begin by discussing the types of

²¹ *Id.* at 168 (Powell, J., dissenting).

²² *Id.* at 172 (Powell, J., dissenting).

²³ *Id.* at 173 (Powell, J., dissenting).

²⁴ 397 U.S. 358, 364 (1970); *accord*, *Patterson v. New York*, 432 U.S. 197, 204 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975).

²⁵ 442 U.S. at 167.

²⁶ The probability of this occurring has been recognized by the Court previously. As stated in *Bailey v. Alabama*, 219 U.S. 219 (1911), "[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." *Id.* at 237.

²⁷ In his dissent in *Turner v. United States*, 396 U.S. 398 (1970), Justice Black listed eight of the defendant's constitutional rights which are threatened by the use of presumptions in criminal prosecutions:

1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;

presumptions used in criminal cases and the due process concerns raised by their use. It will then examine cases involving presumptions prior to *Ulster*. The majority and dissenting opinions in *Ulster* will be analyzed next. The final section will contain a discussion of the significance of *Ulster* and the infirmities that remain with the *Ulster* standard. It will be suggested that due process requires that all presumptions which aid the prosecution in proving an element of the crime charged satisfy a beyond a reasonable doubt test on their face before they may be constitutionally employed at trial.

I. THE OPERATION OF PRESUMPTIONS IN CRIMINAL CASES

A. A Working Definition

A presumption is a procedural device used for allocating the burden of producing evidence.²⁸ Generally, a presumption operates by aiding a party in proving a fact (fact A) by proving another fact (fact B). When a party has the burden of proving a fact A it can satisfy this burden if there is an applicable presumption by proving fact B, whereupon fact A is presumed.²⁹ There is no real consensus among courts or commentators concerning the effect of presumptions.³⁰ Courts have employed the device in four ways. First, it has been said that proof of the basic fact (fact B), which leads to a presumption of the presumed fact (fact A), allows the party which has the burden of proof on the issue requiring a finding of fact A to avoid a directed verdict on that issue by proving B, and that this constitutes *prima facie* evidence of A.³¹ The second method requires an instruction to the jury, once proof of fact B has been introduced, that they may infer fact A upon proof of fact B, in addition to

2. The right to be informed of the nature and cause of the accusation against him;

3. The right not to be compelled to be a witness against himself;

4. The right not to be deprived of life, liberty or property without due process of law;

5. The right to be confronted with the witnesses against him;

6. The right to compulsory process for obtaining witnesses for his defense;

7. The right to counsel; and

8. The right to trial by an impartial jury.

Id. at 425 (Black, J., dissenting).

²⁸ See JAMES & HAZARD, *CIVIL PROCEDURE* § 7.9 (2d ed. 1977).

²⁹ See generally C. MCCORMICK, *EVIDENCE* 803-05 (2d ed. 1972) [hereinafter cited as MCCORMICK]; LAFAYE & SCOTT, *CRIMINAL LAW* 146-48 (1972) [hereinafter cited as LAFAYE & SCOTT]. The presumption employed in *Ulster* serves as a good example. See note 7 *supra*. By relying on that statute, it is possible for the prosecution to prove possession of a firearm by an occupant of an automobile just by proving that the defendant was present in the automobile in which the firearm was found. Thus, by proving the defendant's presence in the automobile at the time the firearm was found (fact B), the prosecution can satisfy its burden of proof on the issue of the defendant's possession of the firearm (fact A).

³⁰ One commentator has listed eight different methods in which courts have employed presumptions. See Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953); see also E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 31-32 (1962) [hereinafter cited as MORGAN].

³¹ Note, *The Constitutionality of Statutory Criminal Law Presumptions*, 34 U. CHI. L. REV. 141, 141-42 (1966) [hereinafter cited as Chicago Note]; LAFAYE & SCOTT, *supra* note 29, at 146.

preventing a directed verdict on the issue of fact A. Presumptions employed in these two ways are commonly referred to as permissive presumptions or inferences since they permit, but don't require, a finding of fact A upon proof of fact B. No transfer of the burden of production or persuasion is said to occur with these presumptions.³² Alternatively, the instruction to the jury may require the factfinder to find fact A upon proof of B unless the opposing party produces sufficient evidence to rebut a finding of fact A.³³ This results in a shifting of the burden of production to the party against whom the presumption has been invoked.³⁴ The fourth way presumptions are employed is to shift the burden of persuasion, as well as the burden of production, on the issue of fact A to the opposing party upon proof of fact B.³⁵ These last two types of presumptions are commonly considered to be mandatory because they require a finding of the presumed fact by the jury if the defendant does not meet his burden of proof on that issue.³⁶ Because permissive presumptions do not shift the burden of production or persuasion to the defendant, they are the type most commonly employed in criminal cases; a shift of either of these burdens to the defendant jeopardizes many of the defendant's constitutionally protected rights.³⁷

In order to determine the effect the presumption has on the burden of proof, the judge's instructions to the jury³⁸ must be analyzed.³⁹ An explana-

³² See Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 342-43 (1970) [hereinafter cited as Stanford Note]; MORGAN, *supra* note 30, at 31. Although there may not be a shift in the burden of production, a "permissive presumption" still results in the defendant bearing the risk of non-production. This means that if the defendant fails to produce evidence to rebut the presumption, he runs the risk that the jury will rely on the presumption to make the conclusion which it permits. While the use of such a presumption may not technically increase the defendant's burden of proof, it certainly may aid the prosecution in meeting its burden, and can result in a conviction that could not have been attained without the presumption's aid. See MCCORMICK, *supra* note 29, at 812.

³³ Chicago Note, *supra* note 31, at 141.

³⁴ *Id.* at 142.

³⁵ *Id.*

³⁶ See LAFAYE & SCOTT, *supra* note 29, at 147-48.

³⁷ See Chicago Note, *supra* note 31, at 142; see also MCCORMICK, *supra* note 29, at 331.

³⁸ When a presumption applies to an issue in a case, the judge generally includes in his instructions to the jury an explanation of the effect the presumption has on the determination of that issue. A good example of the court's role in implementing a relevant presumption is given in the ALI MODEL PENAL CODE, Tentative Draft No. 4:

(5) When the code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences (a) when there is evidence of the facts which give use to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and (b) when the issue of the existence of the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving use to the presumption as sufficient evidence of the presumed fact.

ALI MODEL PENAL CODE §1.13(5) (Tent. Draft No. 4, 1955). The manner in which a judge explains a presumption's effect to the jury varies. A common method of invoking a statutory presumption is to incorporate verbatim the statute containing the pre-

tion to the jurors that they are free to accept or reject a presumption's inference upon proof of the basic fact, and that there need not be any affirmative proof to rebut the presumption's inference in order to reject it, makes the permissive nature of the presumption clear and does not result in a shift of the burden of production.⁴⁰ By contrast, an instruction which merely states that proof of the basic fact is sufficient evidence to permit a conclusion of the presumed fact unless the defendant produces sufficient evidence to rebut the presumption requires the defendant to persuade the jury as to his innocence on the issue in addition to producing evidence to rebut the presumption. Accordingly, the burdens of persuasion and production are shifted.⁴¹ Finally, an instruction which *requires* the jury to make a finding of the presumed fact upon proof of the basic fact has a conclusive effect which makes it impossible for the defendant to rebut the presumption.⁴² Thus, the decision of the effect of the presumption on the burden of proof is a crucial element in determining whether a defendant's constitutionally protected rights have been violated.

B. Defendant's Rights Threatened by the Use of Presumptions

The use of a presumption permits a conclusion of a fact A upon proof of another fact B. Permitting such a conclusion without direct proof of fact A potentially abridges a defendant's constitutionally protected rights.⁴³ First, the presumption weakens the "presumption of innocence"⁴⁴ as to fact A with

sumption into the jury instructions, *see, e.g.*, *United States v. Romano*, 382 U.S. 136, 138 (1965); *Griego v. United States*, 298 F.2d 845 (10th Cir. 1962), or else the judge will instruct the jury on the inference which the statute calls for in his own words, *see, e.g.*, *Ulster County Court v. Allen*, 442 U.S. 140, 160-61 nn.19-20 (1979). For a general discussion of proper methods of instructing the jury, *see* Morgan, *Instructing the Jury Upon Presumptions and the Burden of Proof*, 47 HARV. L. REV. 59 (1933).

³⁹ *Ulster County Court v. Allen*, 442 U.S. 140, 157-59 n.16 (1979); *see also* *Sandstrom v. Montana*, 442 U.S. 510 (1979). When determining the type of presumption involved, the test is how a juror reasonably could have interpreted the jury instruction on the presumption, and it is the province of the appellate court to determine how the jury might have understood the instructions. *Sandstrom*, 442 U.S. at 519.

⁴⁰ *See, e.g.*, *Ulster County Court v. Allen*, 442 U.S. 140, 160-63 (1979).

⁴¹ *See* Chicago Note, *supra* note 31, at 142. The determination of the effect the presumption has had on the burden of production and persuasion is crucial to the determination of the effect the presumption has had on the prosecution's required burden of proof at trial.

⁴² *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

⁴³ In his dissent in *Turner* Justice Black listed eight of the defendant's constitutional rights that are threatened by the use of presumptions. 442 U.S. at 425 (Black, J., dissenting); *see* note 27 *supra*. For a discussion of the merits of Justice Black's position, *see* Fuller & Ulrich, *An Analysis of the Constitutionality of Statutory Presumptions that Lessen the Burden of the Prosecution*, 25 U. MIAMI L. REV. 420 (1971) [hereinafter cited as Fuller & Ulrich]; *see generally* Comment, *Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct*, 18 U.C.L.A. L. REV. 157, 164-81 (1970) [hereinafter cited as Comment]; Stanford Note, *supra* note 32, at 347-52.

⁴⁴ The "presumption of innocence" is not a presumption at all, but is just another way of stating the rule that the prosecution has the burden of proving the crime charged beyond a reasonable doubt. *See* McCORMICK, *supra* note 34, at 829-30.

which the defendant begins the trial.⁴⁵ Second, because the presumption allows a finding of fact A without direct proof of fact A, the defendant is arguably deprived of his right to confront the witnesses against him.⁴⁶ In effect, the evidence on which the presumption's conclusion is based was presented either in the legislatures or during caselaw development. This infringes the defendant's right to a jury trial to the extent that the jury is basing their findings not on evidence that has been put before them, but on the conclusion made by a legislature or the courts. The prosecution has not been forced to produce evidence on the point and the defendant has not been given an opportunity to discredit that evidence.

Because a presumption aids the prosecution in proving a fact in the case without requiring direct proof of that fact, it results in an effective lightening of the prosecution's burden of proof and transfers some of that burden to the defendant. As the persuasive weight of the presumption increases, it relieves the prosecution of its obligation to prove every element of the crime charged. As the presumption shifts the burden of proof to the defendant, it may trammel on the defendant's right not to testify, since his own testimony may be his only available means to rebut the presumption.⁴⁷ As the magnitude of the shift in the burden of proof increases, the threat of these infringements of the defendant's constitutional rights grows and the use of presumptions becomes more suspect.

C. Reasons for the Creation of Presumptions

It may be asked why a device that imperils constitutionally protected rights is needed to alter the allocation of the burden of proof during a trial. There are a number of justifications given for the creation of presumptions.⁴⁸ They save the cost and time of proving the same relationship between similar events in every case, and provide a more uniform result.⁴⁹ In addition, they serve as a general aid in law enforcement.⁵⁰ Presumptions also may be created to correct an imbalance resulting from one party's superior access to proof.⁵¹ While these reasons express the aid they give to pros-

⁴⁵ Some commentators have expressed the opinion that the practical effect of the introduction of a presumption is to destroy the presumption of innocence regarding the presumed fact without introducing any direct evidence proving the presumed fact. See Ashford & Rissinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 176 (1969) [hereinafter cited as Ashford & Rissinger].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See generally Fuller & Ulrich, *supra* note 43, at 427-28; McCORMICK, *supra* note 29, at 806-11; MORGAN, *supra* note 30, at 32-34.

⁴⁹ Fuller & Ulrich, *supra* note 43, at 427.

⁵⁰ *Id.*

⁵¹ McCORMICK, *supra* note 29, at 806-07. A good example of this type of presumption is the presumption of carrying on bootlegging from proof of presence at an illegal still. Because of the secrecy that surrounds the bootlegging trade, it is very difficult to get proof of the nature of somebody's involvement at the still, while it is rational to presume they are somehow engaged in the operation. See, e.g., *United States v. Gainey*, 380 U.S. 63, 67 (1965) (upholding such a statute).

ecutors, their creation generally reflects a different justification, a judgment of probability. Most presumptions reflect a conclusion by judges or legislators that proof of fact B renders the existence of fact A so probable that it is sensible and time-saving to assume the truth of fact A until the adversary disproves it.⁵²

Presumptions may serve another purpose which benefits defendants as well as prosecutors. Through the use of presumptions, legislators are more willing to define crimes narrowly, realizing that prosecutors can rely on presumptions to prove commission of the described crime. This practice gives the defendant the opportunity to rebut the evidence indicating criminal activity and, thereby, avoid criminal liability. If the legislature were prohibited from enacting presumptions, it might be less willing to define crimes narrowly. The legislature might prefer not to place a heavy burden of proof on the prosecution if the prosecution cannot rely on presumptions, and instead might create more general crimes by making the basic facts crimes themselves.⁵³ This change would enlarge the class of persons who would be convicted by the number who would have been able to rebut the presumptions. In this way, presumptions can provide defenses to the accused that might not be available under the foreseeable alternative.⁵⁴ By providing these "defenses," legislators can define a crime broadly enough to encompass activities harmful to the society while enabling those whose activities are not harmful to rebut the inference of criminality created by the presumption.⁵⁵

II. THE DEVELOPMENT OF THE TEST FOR PRESUMPTIONS

The origin of the current standard used for testing presumptions in criminal cases can be traced to *Tot v. United States*.⁵⁶ *Tot* involved a statute⁵⁷ which presumed from a prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition that (1) the article was received by him in interstate or foreign commerce, and (2) such receipt occurred subsequent to July 30, 1938, the effective date of the statute. In reviewing

⁵² McCormick, *supra* note 34, at 807.

⁵³ Fuller & Ulrich, *supra* note 43, at 428-29. This type of reasoning was the basis for one of the early standards developed by the Court to test presumptions which was rejected in *Tot v. United States*, 319 U.S. 463 (1943). See note 58 *infra* and accompanying text. The "greater includes the lesser" standard provided that a statutory presumption was constitutional if the legislature had the power to make the basic fact, which led to the inference of the elemental fact, a crime itself. See *Ferry v. Ramsay*, 277 U.S. 88 (1928).

⁵⁴ Fuller & Ulrich, *supra* note 40, at 429.

⁵⁵ *Id.* A good example is the bootlegging statute enacted by Congress. This statute creates a presumption of "carrying on" the business of the illegal production of liquor upon proof of "unexplained presence" at the still, 26 U.S.C. § 5601(b) (1976). This device enabled Congress to include everyone participating in the illegal operation and still give those who had wandered onto the scene an opportunity to prove their innocence. The use of this device is admittedly preferable if the alternative is to make presence itself a crime.

⁵⁶ 319 U.S. 463 (1943).

⁵⁷ 15 U.S.C. § 902(f) (1964).

the statute, the Supreme Court held that there must be a rational connection between the fact proved and the fact presumed,⁵⁸ and emphasized that the connection made by the presumption must be one that follows in common experience.⁵⁹ The test used by the Court made no reference to the specific facts of the case, but instead examined the conclusion made by the statute and found that it could not be rationally supported by any argument drawn from experience.⁶⁰ The government sought to support the presumption by showing that, in most states, laws required those acquiring firearms either to make a record of the transaction resulting in the acquisition or to register ownership. The Court, however, rejected the government's argument, stating that the presumption did not follow rationally because a number of states had no such laws, and that, in any event, it could not be presumed that a firearm had been lawfully acquired or that it had not been transferred interstate prior to the adoption of state regulation.⁶¹ *Tot* did not specify the type of presumption to which its "rational connection" test applies. The opinion mentioned all four types of presumptions and thus left ambiguity to be resolved in future decisions.⁶² The presumption in *Tot* appears to have shifted the burden of producing evidence, but not the burden of persuasion, to the defendant.⁶³ It permitted the jury to rely on the presumption alone once the basic facts were proved, but didn't require such reliance. If the defendant failed to produce any evidence to rebut this presumption, he ran the risk that the jury would

⁵⁸ 319 U.S. at 467-68. Before the issuance of *Tot* there were two other tests which were also considered applicable. The "greater includes the lesser" test ruled that a statutory presumption was permissible if the legislature had the power to make the fact proved which triggered the presumption a crime itself. See *Ferry v. Ramsay*, 277 U.S. 88, 94 (1928). This theory was rejected by the *Tot* Court. 319 U.S. at 472. *Tot* also reduced to a corollary the "comparative convenience" test. *Id.* at 469. This standard tested a presumption by looking at the comparative convenience for the defense and prosecution of producing evidence, and permitted the burden of producing evidence to be shifted to the defense if there was "a manifest disparity in convenience of proof and opportunity for knowledge." *Morrison v. California*, 291 U.S. 82, 91 (1934).

⁵⁹ 319 U.S. at 467-68. The opinion stated:

a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience . . . where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.

Id. (citations omitted).

⁶⁰ *Id.* at 468.

⁶¹ *Id.* Similarly, the Court found no basis for the inference from mere possession that the firearm had been acquired subsequent to the effective date of the statute, or for the inference of procurement or purchase of ammunition in interstate commerce from proof of its possession. *Id.*

⁶² See Chicago Note, *supra* note 31, at 144-46; see also Note, *Tot v. United States: Constitutional Restrictions on Statutory Presumptions*, 56 HARV. L. REV. 1324 (1943).

⁶³ The Court described the effect the presumption had on the burden of proof: "the statute in question . . . leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence." 319 U.S. at 469.

rely on the presumption in making their decision. If this occurred, the prosecution would have succeeded in proving the fact inferred by the presumption without producing any direct evidence on that point.

The Court's main concern in *Tot* was that the prosecution be put to its proof. The opinion stated that it is incumbent upon the prosecution to produce evidence at trial sufficient to support a verdict.⁶⁴ Although it admitted that the prosecution may be aided by a presumption created by the legislature that is based on evidence not presented to the jury, the Court required that the inference be supported by the circumstances of life, as we know them, before a verdict could be based on it.⁶⁵ A logical reading of the holding in *Tot* appears to be that due process requires a presumption to be rationally supported by sufficient empirical evidence to fulfill the prosecution's burden of proof before the jury may be permitted to rely on it to convict.

The rational connection test announced in *Tot* was applied in *United States v. Gainey*⁶⁶ and in *United States v. Romano*,⁶⁷ thereby establishing it as the primary test to be applied in testing criminal presumptions.⁶⁸ *Gainey* and *Romano* both involved statutes which presumed involvement in the illegal manufacture of liquor upon proof of the defendant's presence at the still site. The statutes provided that proof of such presence "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury. . . ." ⁶⁹ The trial judge included this language from the statute in his instructions but instructed that proof of presence did not require the jury to convict. The quoted language, the judge instructed, only meant that the jury may convict if all the evidence considered together supported this conclusion.⁷⁰ The jury returned guilty verdicts on the charges of possession, custody or control of a still and on the charges of carrying on

⁶⁴ *Id.* at 466-67.

⁶⁵ *Id.* at 468.

⁶⁶ 380 U.S. 63, 66-67 (1965).

⁶⁷ 382 U.S. 136 (1965).

⁶⁸ In *Romano* the Court said:

The test to be applied to the kind of statutory inference involved in this case is not in dispute. In *Tot v. United States*, [citation omitted] the Court, relying on a line of cases dating from 1910, reaffirmed the limits which the Fifth and Fourteenth Amendments place upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.

Id. at 139.

⁶⁹ 26 U.S.C. § 5601(b)(2) (1964) (amended 1976).

⁷⁰ 380 U.S. at 69-70. This often has been referred to as the "permissive inference" doctrine. The essence of this doctrine is that the statute empowers the judge to decide whether there is sufficient evidence to support a finding of the presumed fact "beyond a reasonable doubt" before submitting the issue to the jury, and therefore does not interfere with his control over the proceedings. Also, as long as the judge still instructs the jury on its responsibility to find each fact "beyond a reasonable doubt," including the fact presumed, use of the presumption does not abridge the defendant's right to a trial by jury. See Note, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 St. Louis U.L.J. 223, 229-33 (1975) [hereinafter cited as St. Louis Note]; Comment, *supra* note 43, at 166-68.

the business of a distiller or rectifier without having given bond as required by law.⁷¹

Upon review, the Supreme Court upheld the statute as creating a permissive inference that authorizes, but does not require a jury to convict solely on evidence of the defendant's presence.⁷² While not specifically stating the presumption's effect, the Court appeared to interpret it to shift the burden of producing evidence to the defendant while leaving the burden of persuasion on the prosecution. The opinion stated that "[e]ven if it found that the defendant had been present at the still, and that his presence remained unexplained, the jury could nonetheless acquit him if it found that the Government had not proved his guilt beyond a reasonable doubt."⁷³ Thus, the jury was free to accept the presumption's inference, but was not required to.

In determining the constitutionality of the presumption, the Court stated that the determination of the constitutionality of the presumption depended "upon the rationality of the connection between the facts proved and the ultimate fact presumed . . .," and that this process was, "by its nature, highly empirical . . ."⁷⁴ Support for the rationality of the presumption's conclusion was found in the legislature's recognition of the secrecy that surrounds the bootlegging industry, and in the likelihood that someone present at a still would be engaged in the broad offense of "carrying on" the enterprise of illegal distillation. The Court noted the weight that should be accorded Congress' capacity "to amass the stuff of actual experience and cull conclusions from it," especially in matters that are not within specialized judicial competence.⁷⁵ By examining the empirical evidentiary basis for the inference made by the presumption in *Gainey*, the Court sought to ensure that the due process concern expressed in *Tot* was satisfied. The rational connection test accomplishes this goal by looking to evidence not presented to the jury which supports the conclusion made by the presumption. In this way the test pur-

⁷¹ 380 U.S. at 64. The Court of Appeals for the Fifth Circuit reversed, and held that neither the presumption of "carrying on" the business of a distiller nor of possession of an illegal still from proof of mere presence had a sufficient material basis to satisfy the due process requirements set out in *Tot*. *Barnett v. United States*, 322 F.2d 292, 300 (5th Cir. 1963). The Supreme Court then granted certiorari. 375 U.S. 962 (1964).

⁷² 380 U.S. at 68. Because the Court found the presumption of "carrying on" the business of distilling to be constitutional, it did not reach the question of the constitutionality of the presumption of possession since the defendant had received concurrent sentences for the two charges. *Id.* at 65.

⁷³ Commentators have expressed the opinion that the practical effect of such an instruction is to shift the burden of persuasion as well as the burden of production. Compare Ashford & Rissinger, *supra* note 45, at 201-02, with St. Louis Note, *supra* note 69, at 231. It should be noted that the transfer in the burden of producing evidence here is not a true shift of that burden since such a shift would require a directed verdict against the defendant if he failed to meet his production burden. A directed verdict would infringe many of the defendant's constitutional rights. What is involved here, then, is a "permissive inference" which permits, but does not require, the jury to find the existence of the presumed fact. See McCORMICK, *supra* note 29, at 804.

⁷⁴ 380 U.S. at 66-67.

⁷⁵ *Id.* at 67.

ports to ensure that the conclusion which the presumption empowers the jury to make has a sufficient factual basis to satisfy constitutional requirements.⁷⁶

Soon after *Gainey* the "rational connection" test was applied to a similar statutory presumption in *United States v. Romano*. The statute in *Romano* presumed possession, custody and control of an illegal still upon proof of presence at the still site.⁷⁷ The Supreme Court struck down the statute, and held that the connection between presence at a still and possession is too tenuous to permit a reasonable inference of guilt.⁷⁸ To judge the rationality of the inference, the Court cited other cases which held that a conviction for possession cannot be based solely on the evidence of presence.⁷⁹ The Court also noted the high probability that someone present at a still is engaged in one of the supply, delivery or operational activities having nothing to do with possession.⁸⁰ In its analysis, the Court was again examining evidence not presented to the jury which supported the presumption to ensure that it was backed by the constitutionally required quantum of proof.

The *Romano* opinion does not specify what effect the presumption had on the allocation of the burden of proof, but it did state that the instruction made it possible for the jury to disbelieve or disregard other evidence of possession and convict the defendants based solely on the evidence of presence.⁸¹ Therefore, although there was ample evidence in addition to presence at the still to support the charge of possession, the Court tested the presumption assuming that the jury had relied on it alone in reaching its conclusion.⁸² By doing this, the Court made it clear that the weight of the

⁷⁶ The Court in *Gainey* also dealt with two other constitutional claims. It had been argued that use of the presumption of "carrying on" the business of an illegal distillery impinged upon the trial judge's power over the judicial proceeding, and that it abridged the defendant's right to a trial by jury. In dealing with the first claim, the Court stated that since the statute leaves it within the trial judge's discretion whether to submit the case to the jury when the only evidence is of presence, this did not interfere with the judge's responsibility to withhold a case from the jury when the evidence is insufficient as a matter of law to support a conviction. *Id.* at 68. The Court's response to the second claim noted that since the presumption did not prevent the jury from being properly instructed as to reasonable doubt, it did not interfere with the jury's proper role as fact finders. *Id.* at 68-69. See note 70 *supra*. Although these subsidiary holdings reflect the Court's awareness of these constitutional claims, they aren't the primary concerns which the "rational connection" is intended to protect. They appear to have come in response to Justice Black's contention in dissent that the presumption violated several constitutional provisions. See *id.* at 74-88; see also Chicago Note, *supra* note 31, at 149-50.

⁷⁷ *United States v. Romano*, 382 U.S. 136, 137 (1965), citing 26 U.S.C. § 5601(a)(1) (1970) (amended 1976).

⁷⁸ 382 U.S. at 141.

⁷⁹ *Id.* at 141.

⁸⁰ *Id.*

⁸¹ *Id.* at 138-39. The trial court, in instructing the jury, read verbatim the applicable provisions of the statute which provided, in part, that presence of the defendant at the site of an illegal still "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury. . . ." *Id.* at 137, citing 26 U.S.C. § 5601(b)(1) (1970) (amended 1976).

⁸² See note 81 *supra* and text at note 69 *supra*.

supporting evidence in the case should not be considered in reviewing a presumption which authorizes the jury to base a conviction solely on the presumption's inference.

The trial courts' instructions in *Romano* and *Gainey* were virtually the same, except that the *Gainey* court made it clear that the jury should reject the presumption's inference if all the evidence considered together did not support this conclusion. Although it can be argued that this omission from the instructions in *Romano* resulted in a greater shift in the burden of proof,⁸³ the Court did not choose this ground to distinguish the two cases. Instead, the *Romano* opinion pointed to the firm rational foundation for the inference made by the presumption in *Gainey*, as compared to the lack of support for the presumption's inference in *Romano*.⁸⁴ It was that lack of evidentiary support in light of common experience that rendered the presumption infirm in *Romano*, not the shift in the burden of proof.

The rational connection standard was further developed in *Leary v. United States*.⁸⁵ The challenged statute in *Leary* presumed the defendant's knowledge of the illegal importation of marijuana upon proof of his possession, and provided that proof of "such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."⁸⁶ The jury was instructed that it could convict relying on the presumption's inference of knowledge,⁸⁷ and it found the defendant guilty. On review, the Supreme Court reversed the defendant's conviction, and held that a criminal statutory presumption must be regarded as unconstitutional unless it can be said with substantial assurance that the pre-

⁸³ See *Ulster County Court v. Allen*, 442 U.S. 140, 157-59 n.16 (1979); but see note 72 *supra*.

⁸⁴ The Court's language is instructive in showing the type of reasoning used to analyze these presumptions:

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. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. . . . 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. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt

382 U.S. at 141.

⁸⁵ 395 U.S. 6 (1969).

⁸⁶ 21 U.S.C. § 176(a) (1964) (repealed 1970).

⁸⁷ 395 U.S. at 32 n.55. Again, the Court did not specify what effect the presumption had on the burden of proof. The language of the opinion seems to indicate that the presumption permitted, but did not require, a conviction if possession was proved and the defendant introduced no evidence to rebut the inference of knowledge. This theoretically would cause a shift in the burden of producing evidence, but would leave the burden of persuasion on the prosecution. The practical effect of such a presumption, however, is likely to shift both burdens. See note 73 *supra*.

sumed fact is "more likely than not to flow" from the proved fact on which it is made to depend.⁸⁸

In reviewing the presumption, the Court reiterated the view expressed in *Romano* that the presumption must be tested assuming that the jury convicted relying on the presumption at face value and examining direct or circumstantial data to determine whether the presumption is rationally valid.⁸⁹ Upon review of this data, the Court found the inference invalid since there was not a sufficient rational connection between the fact proved and the fact presumed.⁹⁰ The Court, however, went beyond its conclusion that there was not a sufficient rational connection for the presumption to satisfy the "more likely than not" test. The Court noted that since the presumption that a person possessing marijuana would know it to be illegally imported did not satisfy the "more likely than not" standard, there was no requirement to consider whether the truth of the presumed fact must also be inferable from the truth of the proven fact "beyond a reasonable doubt."⁹¹ This was the first indication by the Court that the beyond a reasonable doubt test may be required in testing presumptions. Although this statement by the Court did establish the boundaries within which the test for presumptions must lie, it created considerable confusion by leaving the question whether presumptions must satisfy the "reasonable doubt" standard to future cases.

After *Leary*, the applicable standard remained the "more likely than not-rational connection" test. The relevance of the Court's discussion of the "reasonable doubt" standard in *Leary* remained unresolved. In both *Turner v. United States*⁹² and *Barnes v. United States*⁹³ the Court refrained from deciding whether criminal presumptions must satisfy the "reasonable doubt" standard when they are invoked concerning a fact, proof of which is required for conviction. In *Turner* the Court considered two statutory presumptions which authorized the inference of knowledge of illegal importation from proof of the defendant's possession of heroin and cocaine.⁹⁴ The Court tested the presumptions by looking to factual data on the importation of heroin and cocaine, similar to the analysis in *Leary*, and by looking to the lessons of com-

⁸⁸ 395 U.S. at 36.

⁸⁹ *Id.* at 37-38. The Court began this analysis by noting the deference that must be paid to Congress' conclusions. The Court concluded, however, that since the legislative record did not supply an adequate basis upon which to judge the soundness of the presumption it was necessary to consult all of the available evidence which showed the percentage of marijuana imported and marijuana users' knowledge of importation. *Id.* at 38-39. This analysis marked the first time since *Tot* that the Court had expanded its empirical analysis to include outside factual data to supplement the knowledge culled from general knowledge and experience. See *McCormick*, *supra* note 34, at 814-15.

⁹⁰ 395 U.S. at 52.

⁹¹ *Id.* at 36 n.64.

⁹² 396 U.S. 398 (1970).

⁹³ 412 U.S. 837 (1973).

⁹⁴ 21 U.S.C. § 174 (1964) (repealed 1970); 26 U.S.C. § 4704(a) (1964) (repealed 1970). The jury was instructed that possession of a narcotic drug was sufficient evidence to justify conviction of the crime charged, and that the statute permitted, but did not require, such a conclusion. 396 U.S. at 406 n.6.

mon sense. The Court found that as to heroin, the presumption met both the "more likely than not" and "reasonable doubt" standards.⁹⁵ With regard to cocaine, however, the Court held that neither test was satisfied.⁹⁶ In *Barnes* the Court held that the inference of knowledge that goods possessed were stolen from proof of the unexplained possession of stolen goods satisfied the "reasonable doubt" standard, and therefore the "more likely than not" test, and thus accorded with due process.⁹⁷

Neither *Turner* nor *Barnes* did anything to affect the standard set out in *Leary*. Both cases applied the "more likely than not-rational connection" test without making any changes. Thus, when *Ulster* came before the Supreme Court, the applicable test for presumptions which permit an inference of an element of the crime charged was uncertain. Prior cases had clearly established that due process requires that there be a rational connection between the fact proved and the fact presumed, and that the presumed fact be more likely than not to flow from the proved fact. The Court, however, had mentioned in three successive cases that due process also may require that presumptions pass a reasonable test, although the facts of the cases had made it unnecessary for the Court to decide this issue. The relevance of this reasonable doubt test to presumptions therefore had yet to be decided.

Although the applicable test was somewhat in doubt, the analytic procedure employed by the Court had been fairly uniform throughout the cases. The presumptions were examined by assuming that the presumption had been relied on by the jury to convict the defendant, irrespective of the other evidence in the case. Their sufficiency was determined by an empirical examination of relevant factual data or what common knowledge and experience tells us. As long as the trial judge's instructions had permitted the jury to convict by relying on a presumption, the Court tested the presumptions without considering the strength of the other evidence presented to the jury. Thus, when the presumption issue was brought before the Court in *Ulster*, the specific standard to be required was in doubt, but the procedure to be used in analyzing the presumption seemed to be clear.

⁹⁵ 396 U.S. at 417-18, 420.

⁹⁶ *Id.* at 418-19, 422-24.

⁹⁷ 412 U.S. at 846. The Court's language is indicative of the uncertainty over the applicable test:

What has been established by the cases . . . is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard . . . as well as the more likely than not standard, then it clearly comports with due process.

Id. at 843. The jury instructions in *Barnes* made it clear that the inference was permissible: "[Y]ou 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." *Id.* at 840 n.3. The Court stated that the practical effect of the instruction was to shift the burden of going forward with evidence to the defendant and that this is permissible if the "rational connection" test has been satisfied. *Id.* at 846 n.11.

III. *ULSTER COUNTY COURT V. ALLEN*A. *The Opinions*

The *Ulster* opinion began its consideration of the presumption issue by discussing the due process requirements which control the testing of criminal presumptions.⁹⁸ If an evidentiary device is constitutionally valid, the Court stated, it must not undermine the factfinder's responsibility at trial to find the ultimate facts beyond a reasonable doubt.⁹⁹ The validity of the presumption under the due process clause depends on the strength of the connection between the particular basic and presumed facts involved, and on the degree to which the device curtails the factfinder's freedom to assess the evidence introduced at trial independent from the strength of the presumption.¹⁰⁰ Thus, the Court's primary concern in developing the proper test was to ensure that the presumption did not alleviate the prosecution's responsibility to produce sufficient evidence to find each fact beyond a reasonable doubt.

After setting out these due process requirements, the Court discussed how different types of presumptions affect jurors' factfinding freedom. The Court distinguished mandatory and permissive presumptions. According to the Court, a mandatory presumption tells the trier of fact that he or she must find the elemental presumed fact upon proof of the basic fact unless the defendant comes forward with sufficient evidence to rebut the presumed connection between the two facts.¹⁰¹ A permissive presumption or inference, on the other hand, allows—but does not require—the trier of fact to infer the presumed fact from proof of the basic fact and places no burden of proof on the defendant.¹⁰² The Court then reasoned that since a permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the beyond a reasonable doubt standard only if, under the facts of the case, there is no rational way the trier could have made the connection permitted by the inference.¹⁰³

⁹⁸ Before reaching the presumption issue, the Court considered whether the New York courts had rejected the respondents' claim on the basis of an independent and adequate state procedural ground that would bar the federal courts from addressing the issue on habeas corpus. The Court concluded that there was no support in either the law of New York or the history of the litigation for an inference that the New York courts had decided the respondents' constitutional claim on a procedural ground, and that the question of the presumption's constitutionality was therefore properly before the Court. 442 U.S. at 148-49.

⁹⁹ *Id.* at 156. Here the Court is referring to the due process guarantee, recognized in *In re Winship*, 397 U.S. 358 (1970), that requires the prosecution to prove every element of the crime charged beyond a reasonable doubt. *Id.* at 364; *see also* *Mullaney v. Wilbur*, 421 U.S. 684, 702-03 n.31 (1975).

¹⁰⁰ 442 U.S. at 156.

¹⁰¹ *Id.* at 157. The Court divided mandatory presumptions into two classes: presumptions that merely shift the burden of production to the defendant, following satisfaction of which the ultimate burden of persuasion returns to the prosecution; and presumptions that entirely shift the burden of proof to the defendant. The mandatory presumptions examined by our cases have almost uniformly fit into the former subclass.

Id. at 156-58 n.16.

¹⁰² *Id.* at 157. *See* text and notes at notes 39-42 *supra*.

¹⁰³ *Id.*

Thus, according to the Court's reasoning, the beyond a reasonable doubt standard would only come into play when a permissive presumption has been used if the prosecution had not introduced enough evidence to support the conclusion made by the presumption to make it possible for a juror to conclude the presumed fact beyond a reasonable doubt. Therefore, the Court concluded, a permissive presumption must be viewed in light of the facts of the case and the party challenging the presumption must demonstrate its invalidity as applied to him.¹⁰⁴ In contrast, the Court stated in dicta that a mandatory presumption must be tested on its face, divorced from the facts of the case;¹⁰⁵ to uphold such a presumption, the fact proved must be sufficient to support the inference of guilt beyond a reasonable doubt.¹⁰⁶

The Court went on to hold that the appropriate standard for testing permissive presumptions is the "more likely than not" test described in *Leary*.¹⁰⁷ Since the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard in cases involving a permissive presumption, the Court reasoned 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. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.¹⁰⁸

This test, as it was applied in *Ulster*, requires that there be a "rational connection" between the specific basic facts proved by the prosecution in the case and the ultimate fact presumed, and the latter must be found to be "more likely than not to flow from" the former.¹⁰⁹ Once this test is met, the conviction employing the presumption must be upheld unless, under all the facts of the case, there is no rational way the trier of fact could have found the fact inferred by the presumption beyond a reasonable doubt.

In *Ulster* the Court tested the challenged presumption with this standard and found it to be valid. The challenged statute presumed possession of a gun upon proof of the defendants' presence in an automobile where the gun was found.¹¹⁰ The Court analyzed the trial judge's instruction on the presump-

¹⁰⁴ *Id.* In holding that a defendant must demonstrate the invalidity of a permissive presumption as applied to him, the Court was guided by the constitutional principle that "[a] party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights." *Id.* at 154-55.

¹⁰⁵ *Id.* at 159.

¹⁰⁶ *Id.* at 167.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 165. The Court's language in this section of the opinion appears to indicate that, in determining whether the presumed fact is more likely than not to flow from the proved fact of a permissive presumption, one should look at the facts actually proved by the prosecution in the case under review rather than only the fact mentioned in the statute which triggers the presumption. The dissent also reads the majority opinion to say this. See *id.* at 176 (Powell, J., dissenting).

¹¹⁰ See note 7 *supra*.

tion and found that it gave rise to a permissive inference.¹¹¹ Upon reaching this conclusion, the Court looked to the facts of the case and concluded that there was the requisite "rational connection" between the basic facts proved by the prosecution and the ultimate fact presumed, and that the latter was "more likely than not to flow from" the former.¹¹² The Court then noted that the New York Court of Appeals had concluded that the record as a whole was sufficient to support a finding of guilt beyond a reasonable doubt,¹¹³ and thus found that the reasonable doubt test was satisfied.

Justice Powell's dissent argued that the challenged presumption did not satisfy the "more likely than not" test.¹¹⁴ His conclusion was based on the belief that the rationality of the connection made by the presumption must be judged not according to the facts of the particular case, but according to what history, common sense and experience in general tell us about the relation between events in our society.¹¹⁵ The dissent stated that the trial court's instructions had permitted the jury to base a finding of possession solely on proof of presence in the automobile.¹¹⁶ Therefore, the dissent determined, the presumption should have been analyzed assuming the jury had based its conclusion solely on the inference permitted by the presumption, without considering the strength of the other evidence introduced to support the presumption's inference.¹¹⁷ This conclusion marked a significant disagreement with the majority opinion's finding that since the presumption only permitted, and did not require, a finding of the presumed fact upon proof of the basic fact, it had to be examined in light of the facts of the case. The dissent believed that under the majority's analysis, whenever it is determined that an inference is "permissive," the only question is whether, in light of all of the evidence adduced at trial, the inference recommended to the jury is a reasonable one.¹¹⁸ This, according to the dissent, is simply an unarticulated harm-

¹¹¹ 442 U.S. at 160-61. The Court described the permissive effect of the instruction: The 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 . . . and that it could be ignored by the jury even if there was no affirmative proof offered by the defendants in rebuttal. . . . In short, the instructions plainly directed the jury to consider all the circumstances tending to support or contradict the inference that all four occupants of the car had possession of the two loaded handguns and to decide the matter for itself without regard to how much evidence the defendants introduced.

Id.

¹¹² *Id.* at 165.

¹¹³ *Id.* at 167.

¹¹⁴ *Id.* at 168 (Powell, J., dissenting).

¹¹⁵ *Id.* at 172. The dissent traced this rule down through the cases beginning with *Tot* and concluded that this requirement is the foundation of the "rational connection" test. The dissent believed that the majority had only concentrated in testing the presumption on the possibility that the prosecution's burden of proof might be lessened and had ignored this due process requirement. *Id.* at 169-70.

¹¹⁶ *Id.* at 175 n.7.

¹¹⁷ *Id.* at 175-76. The dissent found that in prior cases the distinction between "mandatory" and "permissive" presumptions had no importance in analyzing presumptions in criminal cases. *Id.* at 170 n.3.

¹¹⁸ *Id.* at 177.

less error standard which permits the use of any inference—no matter how irrational in itself—provided that otherwise there is sufficient evidence in the record to support a finding of guilt.¹¹⁹

The dissent applied what it perceived to be the proper rational connection test to the challenged presumption and concluded that people present in automobiles simply are not “more likely than not” possessors of those weapons.¹²⁰ In reaching this conclusion, the dissent noted the general irrationality of the presumption’s conclusion and mentioned prior cases which had refused to permit use of a presumption of possession in other contexts from proof of mere presence.¹²¹ Since it concluded that the presumption of possession of guns was not even “more likely than not to flow from” proof of presence in the car, the dissent found it unnecessary to reach the question whether such a presumption must also follow beyond a reasonable doubt when used to prove an element of the offense.¹²²

B. *The Significance of Ulster*

Ulster has clarified the uncertainty that existed since *Leary* about the constitutional standard presumptions must meet. It is now clear that the fact inferred by a permissive presumption must be found “more likely than not to flow” from the facts proved by the prosecution. Conversely, when testing a mandatory presumption, the fact proved must be sufficient “on its face” to support a finding of the fact presumed “beyond a reasonable doubt.”¹²³ In clearing up this confusion, however, the Court has diluted the effectiveness of the standard. The requirements placed on a presumption by the test developed in *Ulster* depend on the effect the presumption has had on the allocation of the burden of proof.¹²⁴ The test operates by examining the trial judge’s instructions to the jury to determine whether the presumption is mandatory or permissive. If the instruction makes it clear to the jury that they are free to accept or reject the presumption’s inference, and the presumption is thereby considered “permissive,” it must be evaluated as applied to the individual respondents based on the record before the court. In such a case, a presumption which in the abstract makes a weak rational connection may be upheld if the facts of the case lend strong support to the inference authorized by the presumption.

This test ignores the due process requirements that underlie the “rational connection” test. Since presumptions are created on the basis of evidence not presented to the jury, due process requires that there be a minimum rational

¹¹⁹ *Id.*

¹²⁰ *Id.* at 173.

¹²¹ *Id.*

¹²² *Id.* at 169 n.2.

¹²³ Although this was said in dicta, it is likely to be considered authoritative for future cases.

¹²⁴ Powell’s dissent pointed to the undue emphasis placed by the majority on the allocation of the burden of proof: “I do not agree with the Court’s conclusion that the only constitutional difficulty with presumptions lies in the danger of lessening the burden of proof the prosecution must bear.” 442 U.S. at 169 (Powell, J., dissenting).

connection between the facts proved and the fact presumed before the presumption may play a role in the trial.¹²⁵ The cases prior to *Ulster* have fulfilled this due process requirement by examining the factual basis for the inference authorized by the presumption to determine its rationality. This was accomplished in pre-*Ulster* cases by either reflecting on the dictates of common knowledge and experience,¹²⁶ or by examining relevant factual data.¹²⁷ The *Ulster* test for "permissive" presumptions ignores this requirement and instead requires only that, in light of all the evidence adduced at trial, the jury be able rationally to infer the presumed fact. After *Ulster*, therefore, only those presumptions judged to be "mandatory" will have their underlying rational sufficiency tested.

The effect of creating different standards for "mandatory" and "permissive" presumptions will be to force appellate judges to scrutinize jury instructions to determine the type of presumption involved so that the proper test can be applied. Because of the similarity in the language used to instruct juries on the use of "mandatory" and "permissive" presumptions, this scrutiny of instructions is likely to be a highly subjective determination which will affect the consistency of appellate review of presumption cases.¹²⁸ Although scrutiny of trial instructions is necessary to differentiate "conclusive" presumptions from other types of presumptions, the distinction made in *Ulster* is too narrow to justify the broad discrepancy in the standards of review the *Ulster* Court prescribed for "mandatory" and "permissive" presumptions.¹²⁹ As a result of the holding in *Ulster*, a slight difference in the wording of the jury instructions can now make the difference between a presumption being forced to satisfy the "reasonable doubt" test on its face, and the "more likely than not" test supported by the facts of the case.

¹²⁵ See *Tot*, 319 U.S. at 467.

¹²⁶ E.g., *Barnes*, 412 U.S. at 845.

¹²⁷ E.g., *Turner*, 396 U.S. at 410-16.

¹²⁸ A comparison of the instructions used in *Leary*, *Romano* and *Gainey* illustrates the fine distinctions which appellate courts will be forced to make when classifying presumptions in future cases. The instructions in all three cases stated that proof of the basic fact shall be deemed sufficient evidence to authorize conviction unless the defendant explains to the satisfaction of the jury. Yet the *Ulster* Court characterized the presumption employed in *Gainey* as "permissive" because the trial judge explained to the jury that they were not required to accept the presumption's inference, and classified those employed in *Leary* and *Romano* as mandatory. 442 U.S. at 157-60 nn.16 & 17. See text at notes 82-83 *supra*.

The difficulty in distinguishing between "mandatory" and "permissive" presumptions is also evidenced by the broad range of opinions among commentators concerning the types of presumptions involved in past cases. See McCORMICK, *supra* note 29, at 831; Ashford & Rissinger, *supra* note 45, at 201-02; Chicago Note, *supra* note 31, at 153; Note, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390, 410-19 (1976).

¹²⁹ The fact that no prior cases have mentioned the distinction between mandatory and permissive presumptions in prescribing the appropriate standard may be taken as an indication that it isn't warranted. See note 114 *supra*. The degree of difference in practical effect between the two types of presumption is also questionable. The presumption employed in *Barnes*, which the *Ulster* Court described as "permissive," resulted in a shift in the burden of going forward with evidence to the defendant. 412 U.S. at 846 n.11.

Another result of the *Ulster* decision is to change the court's role when reviewing "permissive presumptions." Whenever a presumption is determined to be "permissive," the court must look to the facts of the case to see if a rational juror could have made the connection inferred by the presumption. This type of analysis ignores the effect the presumption may have had, and merely considers the sufficiency of the evidence. As a result, the court's function in review becomes essentially that of a second factfinder re-examining the evidence to see if it supports the verdict.¹³⁰ This is not the court's proper role. Instead, the appellate court should examine the presumption to determine whether it possesses a sufficient rational foundation to be constitutionally employed to influence the factfinder, regardless of what other evidence was introduced.

As a consequence of this change in the court's role, it becomes very difficult to show that the use of a presumption has abridged any of the defendant's due process rights as long as the presumption is clearly worded by the trial judge in permissive terms. Because the *Ulster* standard allows a permissive presumption's inference to be supported by the facts of the case, it may result in a presumption with a tenuous connection being upheld because of strong supporting facts. Therefore, it becomes very difficult for a permissive presumption to be declared invalid unless the supporting facts are such that the presumption's inference is essential to a finding of guilt. The resulting difficulty in challenging permissive presumptions is likely to result in a significant relaxation of the scrutiny of these presumptions.

IV. A PROPOSED TEST FOR PRESUMPTIONS

A primary test that must be satisfied when considering any criminal conviction is the due process guarantee announced in *In re Winship*: the prosecution must prove every fact which constitutes the crime charged beyond a reasonable doubt.¹³¹ Any presumption invoked to aid in establishing an elemental fact of the crime charged must be examined in light of this constitutional guarantee to ensure that the prosecution's burden of proof has not been lightened unconstitutionally. The test employed should require not only that the burden of proof be properly controlled, but also should ensure that the inference authorized by the presumption has sufficient evidentiary support.¹³² The *Ulster* standard for permissive presumptions, however, only accomplishes the first of these objectives. Under that standard, proof of the basic fact of a permissive presumption may constitute prima facie evidence of an elemental fact of the crime.¹³³ Then, in light of the facts of the case, as long as there is a rational connection between the fact proved and the fact presumed, and if the latter is more likely than not to flow from the former, the prosecution can rely on all the facts in the record to support the factfind-

¹³⁰ See text note 119 *supra*.

¹³¹ 397 U.S. at 364.

¹³² See Jeffries and Stephan, *Presumptions, Assumptions and the Burden of Proof*, 88 YALE L.J. 1325, 1396 (1979); Comment, *supra* note 43, at 166.

¹³³ 442 U.S. at 157.

er's finding of the presumed fact beyond a reasonable doubt. Because the presumption is permissive, the inference it makes is not required to meet any test of sufficiency standing alone, but may rely on the facts of the case to support its conclusion. This test ignores the possibility that the jury may rely on the presumption for its decision regarding the presumed fact without considering whether the supporting evidence requires a conclusion of the elemental fact beyond a reasonable doubt.¹³⁴ The likelihood of a jury making a conclusion based solely on a presumption becomes clearer in light of the prominent position the presumption has in jury instructions.¹³⁵ The instruction on a presumption directs the factfinder's attention to the inference permitted by the presumption and gives the impression that either the court or the legislature sanctions this conclusion. Such an instruction undoubtedly has an influential effect on jurors, and requires that substantial opposing evidence be introduced to overcome the presumption.¹³⁶

Once this likely effect on factfinders is understood, the potentially damaging effect a presumption may have on the defendant's rights can be seen. Although in a case relying on a "permissive" presumption it is within the trial judge's discretion to decide whether the issue regarding the presumption should be submitted to the jury,¹³⁷ once he has submitted it he cannot ensure that the factfinder will consider all the evidence to be sure that the presumed elemental fact has been established beyond a reasonable doubt.¹³⁸ Instead, it is likely that some jurors will base their conclusion solely on the presumption which has been subjected only to the "more likely than not" test. If such is the case, and the presumption involved would not satisfy a "beyond a reasonable doubt" test, an elemental fact of the case has not been found beyond a reasonable doubt, and the defendant's due process rights have been abridged.

To ensure that these due process guarantees are not sacrificed, presumptions should be forced to satisfy a "beyond a reasonable doubt" test before they can be invoked in the jury instructions to aid the prosecution in proving its case.¹³⁹ The Court has recognized that jurors are likely to conclude a fact inferred by a presumption, even though permissive, without considering whether the evidence supports the conclusion beyond a reasonable doubt.¹⁴⁰ Acknowledging this fact, the only way to ensure that a juror will find a fact inferred by a presumption, which fact is an element of the crime charged,

¹³⁴ In prior cases, the Court has acknowledged juries' susceptibility to basing their conclusion solely on presumptions. See note 26 *supra*; see also *United States v. Romano*, 382 U.S. 136, 138-39 (1965).

¹³⁵ See note 38 *supra*.

¹³⁶ See Ashford & Rissinger, *supra* note 42, at 203-05; Comment, *supra* note 40, at 169; St. Louis Note, *supra* note 70, at 232-33.

¹³⁷ See note 76 *supra*.

¹³⁸ The defendant's due process rights are also made dependent on the judge properly deciding whether there is sufficient evidence to support a finding of the fact inferred by the presumption beyond a reasonable doubt. This is not as much of a threat to these rights, however, since this is a judgment which judges should be qualified and capable of making.

¹³⁹ For some suggested standards for criminal presumptions, see Ashford & Rissinger, *supra* note 45, at 184-86; St. Louis Note, *supra* note 70, at 233.

¹⁴⁰ See note 134 *supra*; see also text at notes 82 & 89 *supra*.

beyond a reasonable doubt, is to require that the presumption satisfy a "beyond a reasonable doubt" test on its face. Only if a "beyond a reasonable doubt" test is adopted will the due process guarantee that the prosecution prove every fact which constitutes the crime charged beyond a reasonable doubt be protected.

Although such a test may result in some presumptions being removed from the use of prosecutors, the magnitude of the impact of the adoption of such a test is not likely to be great. Subjecting presumptions to this stricter test of sufficiency will not eliminate them. The fact that many presumptions will be able to meet this test was shown by the presumptions upheld in *Turner*¹⁴¹ and *Barnes*¹⁴² which satisfied a "beyond a reasonable doubt" standard. It is also questionable whether this test would increase unnecessarily the preparation which the prosecutor must undergo for a case. Under the standard announced in *Ulster*, the prosecution still must produce sufficient evidence to permit a finding of any fact inferred by a permissive presumption beyond a reasonable doubt. Therefore, the amount of evidence the prosecution must amass and produce at the trial to prove the fact inferred by a permissive presumption does not seem to differ from that required to prove a fact not aided by a presumption. Considering the questionable impact which the adoption of the "reasonable doubt" test will have on the prosecutor's task as compared to the real threat to the defendant's due process rights which presumptions that do not satisfy a "beyond a reasonable doubt" test present, the balance weighs heavily in favor of requiring a "reasonable doubt" test.¹⁴³

CONCLUSION

The *Ulster* decision held that permissive presumptions must be viewed in light of all the facts of the case and that the fact presumed need only be found to be "more likely than not" to flow from the fact proved for the presumption to be constitutionally employed. The decision also indicated that mandatory presumptions should be required to satisfy a "beyond a reasonable doubt" test on their face. While this decision clarifies long-standing uncertainty over the proper test for presumptions, it raises questions about the possible infringement of the constitutional mandate which requires that the prosecution prove every element of its case beyond a reasonable doubt. Also, because the *Ulster* standard requires that a "permissive presumption" be tested in light of the facts of the case, the decision has made it very difficult to show, in cases with strong supporting evidence, that the presumption has abridged the defendant's rights, regardless of how weak the connection made by the

¹⁴¹ See text at note 95 *supra*.

¹⁴² See text at note 97 *supra*.

¹⁴³ Powell's dissent in *Ulster* gives a strong indication that he believes that this is the required standard: "It may well be that even those presumptions that do not shift the burden of persuasion cannot be used to prove an element of the offense, if the facts proved would not permit a reasonable mind to find the presumed fact beyond a reasonable doubt." 442 U.S. at 169 (Powell, J., dissenting).

presumption is. Because of the difficulty in showing that permissive presumptions have abridged any of the defendant's rights in cases with strong evidence supporting the presumption's conclusion, this standard may result in reduced scrutiny of presumptions. Whether these effects can be avoided is something to be resolved in future cases.

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