Presumptions and Their Effect

Leo H. Whinery

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

Part of the Evidence Commons

Recommended Citation
PRESUMPTIONS AND THEIR EFFECT*

LEO H. WHINERY**

Introduction

As described by one authority, a "'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'" There are at least seven senses in which the term has been used by legislatures and courts. First, the word "presumption" has been used to describe what is more particularly known as the "presumption of innocence." In truth, the "presumption of innocence" is merely another form of expression to describe the accepted rule in a criminal case that the accused may remain inactive and secure until the prosecution adduces evidence and produces persuasion beyond a reasonable doubt that the accused is guilty as charged.

Second, the term "presumption" has also been used to create and define the elements of an affirmative defense. In this sense, the term describes nothing more than a rule of law established by either statute or judicial decision that allocates the burden of producing evidence, or of persuasion, to one or the other of the parties to the litigation. In criminal cases, an excellent example of use of the so-called "presumption" to allocate the burden of producing evidence, or persuasion, is the "presumption of sanity." In such a case, the accused who seeks to rely upon the defense of insanity must, depending upon the rules in force in the particular jurisdiction, either produce evidence or persuade the trier of fact of the accused's insanity at the time of the commission of the offense. In either case, the effect of a "presumption" as used in this sense is to create only an affirmative defense.

Third, the terms "prima facie" or "prima facie evidence" are often used interchangeably or in conjunction with the term "presumption." For example, the term "prima facie evidence" has been employed in discriminatory practice acts to create a "presumption of authority" or, in other situations, to describe a "presumption of agency."

---

* This article is derived, in part, from the Reporter's Notes to the Uniform Rules of Evidence, as last revised in 1999, and, in part, from 2 LEO H. WHINERY, OKLAHOMA EVIDENCE, COMMENTARY ON THE LAW OF EVIDENCE §§ 9.14 through 9.25 (2d ed. 2000) with permission of the publishers.
2. 25 OKLA. STAT. ANN. § 1605 (West 2001).
3. See, e.g., Cotcha v. Ferguson, 1933 OK 518, 25 P.2d 767 (stating that the presumption of agency creates a "prima facie case").

Published by University of Oklahoma College of Law Digital Commons, 2001
Presumptions have also been described by statute and judicial decision as "prima facie presumptions." For example, by judicial decision, there is a "prima facie presumption" of the delivery of a letter upon the introduction of sufficient evidence that the letter has been properly addressed, stamped, deposited in the mail, and not returned. This imprecision in the use of terminology has produced confusion in interpretation, particularly, with respect to the effect of rebuttable presumptions. "Prima facie evidence," properly used to avoid confusion, should be confined to those situations in which the party having the burden of first producing evidence has, in fact, introduced sufficient evidence from which the trier of fact can conclude that the fact exists.

Fourth, the courts, on occasion, have also used the terms "inference" and "presumption" synonymously. However, strictly speaking, an "inference" is simply a permissible deduction from evidence, while a "presumption" arises from a rule of law rather than from the logical force of evidence to prove the existence of a fact. It is quite true that the basic facts of a presumption created by a rule of law will also often have probative value of the existence of the presumed fact. Examples of this include the presumption that a child born during wedlock is legitimate, the presumption of the delivery of a letter to the addressee if the letter is properly addressed, stamped, deposited in the mail and not returned, or the presumption that a vehicle driven by a regular employee of the owner of a vehicle is driven in the course of the owner's business. However, the significance of the distinction between an "inference" and a "presumption" is that the "inference" arises only from the probative force of the evidence, while the "presumption" arises from a rule of law.

Fifth, an "inference" may also become standardized in the sense that a rule of law will establish that a fact or facts are sufficient to permit, though not require, in the absence of rebuttal evidence, a finding of the desired inference. Most frequently, the inference called for by the rule of law is one that a court would properly have construed to be a permissible deduction from the evidence even in the absence of a rule of law. In this sense, such a rule of law need be viewed no differently from an inference, which arises as a matter of logic. The doctrine of res ipsa loquitur illustrates rules of law of this sort. The negligence of the defendant may be inferred from evidence that the plaintiff was injured by an instrumentality in the control of the defendant under circumstances that would not ordinarily occur in the absence of the defendant's negligence.

Sixth, on occasion, the terminology "conclusive presumption" has been used by legislatures and courts to describe a basic fact/presumed fact relationship in which the presumption may not be rebutted. In actuality, the terminology is a contradiction in terms, and, in Wigmore's view, there can be no such conceptual principle in the law known as a "conclusive presumption." Rather, the law simply formulates a rule

6. See MCCORMICK ON EVIDENCE, supra note 1, § 342, at 519; see also W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 40, at 257 (5th ed. 1984).
of law prohibiting the introduction of contradictory evidence of a particular fact. An example is the statutory presumption that "[e]vidence of statistical probability of paternity established at ninety-eight percent (98%) or more creates a conclusive presumption of paternity."8

Finally, in civil cases the term "presumption" has been used to describe what has been more specifically denominated as a "rebuttable presumption," which arises from a rule of law creating a basic fact/presumed fact relationship in which a finding of the basic fact requires a finding of the existence of the presumed fact, unless it has been rebutted as may be required by law. Most scholars, led by Thayer and Wigmore, as well as many judges, believe that the term "presumption" should only be employed in this sense.9

I. The Definitions Rule

Consistent with the "rebuttable effect" approach to the meaning of a "presumption" and to avoid confusion, article III of the 1999 version of the Uniform Rules of Evidence10 has been revised to include, in Rule 301, the following definitions:

(1) "Basic fact" means a fact or group of facts that give rise to a presumption.

(2) "Inconsistent presumption" means that the presumed fact of one presumption is inconsistent with the presumed fact of another presumption.

(3) "Presumed fact" means a fact that is assumed upon the finding of a basic fact.

(4) "Presumption" means that when a basic fact is found to exist, the presumed fact is assumed to exist until the nonexistence of the presumed fact is determined as provided in Rules 302 and 303.11

Subdivision (1) defines "basic fact" as a fact or group of facts that give rise to a presumption. The basic fact of a presumption may be established in an action just as any other fact — either by the pleadings, by stipulation of the parties, by judicial notice, or by a finding of the basic fact from evidence.

Subdivision (3) defines "presumed fact" as a fact that is assumed upon a finding of the "basic fact."

Subdivision (4) defines "presumption" in terms of a "basic fact," "presumed fact" relationship in which the presumed fact is assumed to exist until the nonexistence of the presumed fact is determined as provided in Rule 302 governing the effect of

7. 9 WIGMORE ON EVIDENCE § 2492 (Chadbourn rev. 1981).
8. 10 OKLA. STAT. ANN. § 504(D) (West 2001).
10. Unless otherwise indicated, all textual references and citations to the "Uniform Rules" or "Uniform Rules of Evidence" refer to the Uniform Rules of Evidence as last revised in 1999.
11. UNIF. R. EVID. 301.
presumptions in civil cases or Rule 303 governing the effect of presumptions in criminal cases.

Subdivision (2) defines an "inconsistent presumption" as one in which the presumed fact of one presumption is inconsistent with the presumed fact of another presumption.

II. The Effect of Presumptions in Civil Cases: The General Rule

Uniform Rule 302 provides for the effect of presumptions in civil cases. The general rule is set forth in subdivision (a) as follows:

(a) General rule. In a civil action or proceeding, unless otherwise provided by statute, judicial decision, or these rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.12

Unlike Rule 301 of the Federal Rules of Evidence,13 which follows the Thayer-Wigmore theory of shifting only the burden of producing evidence to the party against whom the presumption operates,14 Uniform Rule 302(a) adopts the Morgan-McCormick theory of shifting the ultimate burden of persuasion to the opponent on the issue of the presumed fact. Rule 302 accomplishes this by providing that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."15 This effect was proposed in Rule 301 of the 1971 Proposed Rules of Evidence for U.S. District Courts and Magistrates on the ground that the underlying reasons for

---

12. UNIF. R. EVID. 302.
13. Rule 301 of the Federal Rules of Evidence provides:

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

FED. R. EVID. 301. For a discussion of the effect of presumptions generally and the effect of Rule 301 of the Federal Rules of Evidence, see the dissenting opinion of Judge Winter in Fisher v. Vassar College, 114 F.3d 1332, 1386 (2d Cir. 1997).

14. Professor Graham illustrates the so-called "bursting bubble" effect of the presumption as follows:

   When the basic facts (A) are established, the presumed fact (B) must be taken as established unless and until the opponent introduces evidence sufficient to support a finding by the trier of fact of the nonexistence of the presumed fact. Upon introduction of such evidence the presumption is overcome and disappears, without regard to whether it is believed. However, any inference which exists from fact A to fact B remains.


15. Professor Graham illustrates the Morgan-McCormick approach to the effect of the presumption as follows: "When fact A is established the jury is instructed that it must find fact B unless and until the opponent persuades the jury that the nonexistence of fact B is more probably true than not true." Id. § 301.16, at 177; see also MCCORMICK ON EVIDENCE, supra note 1, § 343, at 520; Edmund M. Morgan & John MacArthur McGuire, Looking Backward and Forward at Evidence, 50 HARV. L. REV. 909, 913 (1937).
creating presumptions did not justify giving a lesser-effect to presumptions. However, Congress rejected the Morgan-McCormick theory in favor of the Thayer-Wigmore theory of shifting only the burden of producing evidence. The Advisory Committee on the Federal Rules of Evidence has not recommended any amendments to Rule 301.

However, the Drafting Committee to Revise the Uniform Rules recommended and the Conference has retained in Rule 302(a) the "effects" rule adopted by the Conference when the Uniform Rules of Evidence were adopted in 1974. This favors shifting the burden of persuasion, but does not preempt giving the lesser-effect of shifting, for example, only the burden of producing evidence when otherwise provided for "by statute, judicial decision, or these rules."  

III. Constitutional Considerations

It is now unlikely that there are any serious constitutional limitations on the effect to be given presumptions in civil cases under Rule 302(a). There are two early decisions of the Supreme Court of the United States that presented the question of whether a presumption in a civil case could assign the burden of persuasion to the party against whom the presumption operates. The first of these, Mobile v. Turnipseed, involved an action against a railroad company for the death of an employee caused by the derailment of a train. The case required the interpretation of a Mississippi statute, which provided that

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

The defendant contended that this statute constituted a denial of due process of law because it created a presumption of the railroad company's liability for damages. The Supreme Court, in holding the statute constitutional, said that due process requires only that (1) there be "some rational connection" between the basic fact and the presumed fact of the presumption, and (2) the statute not be applied so as to preclude the opponent from presenting his defense to the presumed fact. The Court then found that both of these due process requirements had been met and, with respect to the second requirement, stated:

18. Unif. R. Evid. 302 reporter's notes.
20. Id. at 41. See the Introduction, supra, for a discussion of the term "prima facie" in describing a rebuttable presumption.
The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the *prima facie* case is enough as matter of law.  

In other words, the effect of the "inference" or, more accurately in this case, the rebuttable presumption, was to allocate only the burden of producing evidence to the defendant. Therefore, as construed and applied, the statute was unobjectionable on constitutional grounds.

Later, the Court had occasion in *Western & Atlantic Railroad v. Henderson*\(^2\)\(^3\) to consider the validity of a Georgia statute establishing a presumption of negligence which provided in part that "[a] railroad company shall be liable for damages . . . unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence."\(^2\)\(^4\) The plaintiff had brought an action against the company for the death of her husband in a railroad crossing accident. The jury had been instructed by the trial court that negligence was presumed from the fact of the injury and that the burden of persuasion was on the company to show that it had exercised ordinary care and diligence. In holding that the Georgia statute violated the Due Process Clause of the Fourteenth Amendment, the Supreme Court distinguished the earlier *Turnipseed* case as follows:

That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.  

A reading of these two cases together suggested that in a civil case the presumption may operate to shift the burden of *producing evidence*, but not the burden of *persuasion*, if constitutional problems under the Fourteenth Amendment are to be avoided.  

---

22. *Id.* See the Introduction, *supra*, for a discussion of the use of the term "inference" in describing a rebuttable presumption. 
23. 279 U.S. 639 (1929). 
24. *Id.* at 640. 
25. *Id.* at 643 (citations omitted). See the Introduction, *supra*, for a discussion of the use of the term "inference" in describing presumptions.
26. This possibility of a constitutional limitation on the effect of presumptions in civil cases led the
Intervening events have now led to the preferred view that in civil cases there are no constitutional limitations in employing presumptions to cast on the opponent the burden of persuasion of the nonexistence of the presumed fact. First, the decision that disapproved of allowing the presumption of negligence to shift the burden of persuasion has been discredited. There has been a shift away from negligence and in the direction of absolute liability, and it also seems clear that a legislature would now be permitted to assign the question of the lack of negligence to the status of an affirmative defense. Second, the Supreme Court, without deciding the constitutional issue, has approved a state rule in which the presumption of accidental death places the burden of persuasion on the insurer that the death of the insured was caused by a self-inflicted wound.

IV. Effect if Federal Law Supplies the Rule of Decision

Uniform Rule 302(c) provides:

(c) Effect if federal law provides the rule of decision. The effect of a presumption respecting a fact that is an element of a claim or defense

draftsmen of the Uniform Rules of Evidence of 1953 to distinguish between the effects of presumptions in which the basic facts have probative value of the presumed fact and those in which they do not. The draftsmen accomplished this by assigning the burden of persuasion to the opponent in the former case and the burden of producing evidence only in the latter. See UNIF. R. EVID. 14 (1953); Edmund M. Morgan, Presumptions, 10 RUTGERS L. REV. 512 (1956). As indicated in the text, this distinction is now unnecessary for constitutional reasons. See Edwin N. Lowe, Jr., Note, The California Evidence Code: Presumptions, 53 CAL. L. REV. 1439, 1467-71 (1965).

27. MCCORMICK ON EVIDENCE, supra note 1, § 345, at 530. For further support, see the concurring opinion of Judge Calabresi in Fisher v. Vassar College, 114 F.3d 1332, 1354-61 (2d Cir. 1997), in which he gives some credence to the continuing vitality of Turnipseed and Henderson. However, the dissenting opinion of Judge Winter is better reasoned. He observes that confidence in the continuing vitality of Turnipseed and Henderson is not widely shared. The original Advisory Committee that drafted the Federal Rules of Evidence found no existing barrier to its proposal (rejected by Congress) of giving all presumptions the burden-shifting effect that the court invalidated in Henderson. Id. at 1388 n.2 (Winter, J., dissenting); see also Fed. R. EVID. 301 advisory committee's notes to 1972 proposed rules. The McCormick text concludes that Henderson is of "questionable status." MCCORMICK ON EVIDENCE, supra note 1, § 345, at 530. Lilly regards Turnipseed and Henderson as giving "no definitive answer" to an issue that presently "is usually a distant concern." Graham C. Lilly, An Introduction to the Law of Evidence 72 n.3 (3d ed. 1996). Mueller and Kirkpatrick show their view of Henderson's current irrelevance by not mentioning it in their discussion of presumptions. CHRISTOPHER B. MUELLER & LARD C. KIRKPATRICK, FEDERAL EVIDENCE § 3.8 (2d ed. 1994).

28. KEETON, supra note 6, § 75, at 536-38.


30. Dick v. N.Y. Life Ins. Co., 359 U.S. 437 (1959). The Supreme Court said, "Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." Id. at 443. The Court further stated, "In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." Id. at 446.
as to which federal law provides the rule of decision is determined in accordance with federal law.31

Rule 302(c) incorporates former Uniform Rule 302, providing for the effect of presumptions where federal law supplies the rule of decision. Parallel jurisdiction in state and federal courts exists in many instances. Rule 302 was adopted and is retained in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any applicable federal presumption shall be applied.

Accordingly, in all civil actions and proceedings where federal law supplies the rule of decision, Rule 301 of the Federal Rules of Evidence applies. It provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of persuasion in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party to whom it was originally cast.32

Federal Rule 301, which shifts only the burden of producing evidence to the party against whom it operates, applies in all civil actions and proceedings, except those proceedings involving statutory presumptions as to which Congress has specifically provided that the presumption be given some other effect.33

In contrast, in civil actions or proceedings brought in states where state law supplies the rule of decision with respect to a fact that is an element of a claim or defense, the effect of the presumption would be determined in accordance with Uniform Rule 302(a). Rule 302(a) imposes upon the party against whom it operates not only the burden of going forward with the evidence, but the ultimate burden of persuasion as well.34

V. The Effect of Presumptions in Criminal Cases: The General Rule

Uniform Rule 303 governing the effect of presumptions in criminal cases provides as follows:

(a) Scope. Except as otherwise provided by statute, or judicial decision, this rule governs presumptions against an accused in criminal cases, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt.

(b) Submission to jury. The court may not direct the jury to find a presumed fact against an accused. If a presumed fact establishes guilt,
is an element of the offense, or negates a defense, the court may submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic fact, could find guilt or the presumed fact beyond a reasonable doubt. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury if the basic fact is supported by substantial evidence or is otherwise established, unless the court determines that a reasonable juror could not find on the evidence as a whole the existence of the presumed fact.

(c) Instructing jury. At the time the existence of a presumed fact against the accused is submitted to the jury, the court shall instruct the jury that it may regard the basic fact as sufficient evidence of the presumed fact but is not required to do so. In addition, if a presumed fact establishes guilt, is an element of the offense, or negates a defense, the court shall instruct the jury that its existence, on all the evidence, must be proved beyond a reasonable doubt.35

Uniform Rule 303 retains the substance of former Uniform Rule 303, which is the same in substance as Proposed Rule 303 of the Federal Rules of Evidence.36 Subdivision (a) simply provides that presumptions against an accused in a criminal case either recognized at common law37 or created by statute are governed by Rule 303. It also clarifies the law by specifically providing that the term "presumption" includes statutory provisions stating that certain facts are "prima facie evidence" of other facts or guilt. This accommodates many state statutory provisions employing the terminology "prima facie evidence," despite that, in the strict sense of the word, the terminology in the statutes embraces what has been more particularly defined in Uniform Rule 301(4) as a rebuttable presumption.38

Subdivision (b) of Rule 303 deals with the effect to be accorded presumptions in criminal cases and is an elaboration on Rule 301(4), which provides that "the presumed fact is assumed to exist until the nonexistence of the presumed fact is determined as provided in Rule . . . 303."39 The rule is permissive only by providing that the court may submit the questions of the existence of the presumed fact to the jury in either the case of guilt, if the jury could find the presumed fact beyond a reasonable doubt, or in the case of a presumed fact of lesser-effect, if the basic fact is supported by substantial evidence or is otherwise established. This subdivision, together with subdivision (c), providing that the court shall instruct the

35. UNIF. R. EVID. 303.
37. Id. at 212-13 (advisory committee's notes).
38. See supra Introduction for a discussion of the term "prima facie" in describing a rebuttable presumption. An example of such a state statute, title 21, section 1503 of the Oklahoma Statutes, provides that the surreptitious removal or attempted removal of baggage from a lodging establishment "shall be prima facie proof of intent to defraud" the lodging establishment. 21 OKLA. STAT. § 1503 (Supp. 1999).
39. UNIF. R. EVID. 301(4).
jury that it may regard the basic fact as sufficient evidence of the presumed fact but is not required to do so, is constitutionally in accord with this lesser-permissive effect to be given presumptions in criminal cases. The rule thus avoids the complexities associated with the allocation of the burden of producing evidence or of persuasion under Supreme Court decisional law where the presumption is found to be mandatory. The question of whether the constitutional complexities and evolving doctrine associated with the use of mandatory presumptions warranted any revisions of Uniform Rule 303 was considered by the Drafting Committee. It considered these issues, but, as demonstrated in the succeeding pages, it concluded that Uniform Rule 303 is at least consistent with evolving constitutional doctrine governing the lesser-permissive effect in criminal cases and that further complexities should not be incorporated into the rule.

VI. Constitutional Considerations: Fifth Amendment

The constitutionality of presumptions in criminal cases turns on the existence of a rational connection between the basic fact(s) and presumed fact of the presumption. There are at least four significant variables that have been established by the Supreme Court of the United States in determining whether this requirement of a rational connection has been met. These variables are: (1) the standards for determining whether a rational connection exists between the basic fact(s) and presumed fact of the presumption; (2) the permissive or mandatory nature of the presumption; (3) the factual basis required in determining whether there is a rational connection between the basic fact(s) and presumed fact; and (4) the procedural effect to be accorded the presumption.

A. The Standards for Determining Whether a Rational Connection Exists Between the Basic Fact(s) and Presumed Fact

The requirement of a rational connection between the basic fact(s) and presumed fact of the presumption was initially developed in *Tot v. United States*. The question before the Supreme Court was the constitutionality of a federal statute making the possession of a firearm by a person convicted of a crime of violence "presumptive evidence" that the firearm was received in interstate commerce. In deciding that the statutory presumption was unconstitutional, the Court held that there was no rational connection between the basic fact (possession of a firearm by a person convicted of a crime of violence) and the presumed fact (receipt of the firearm in interstate commerce). The Court said that "the inference of the . . . [presumed fact] from proof of the . . . [basic fact] is arbitrary because of lack of connection between the two in common experience." The "rational connection test" enunciated in the *Tot* case was applied in two later decisions of the Court, *United States v. Gainey*, sustaining the validity of the presumption in question,

40. 319 U.S. 463 (1943).
41. Id. at 468.
42. Id. at 467-65.
43. 380 U.S. 63 (1965). Here, the defendant was convicted of carrying on the business of a distiller
and *United States v. Romano*, holding that the presumption was unconstitutional. The cases were thoughtfully distinguished, but the meaning of "rational connection" was left essentially vague.

Further clarification came in two subsequent decisions of the Court. The first, *Leary v. United States*, involved a federal statutory presumption that *knowledge of the illegal importation of marijuana* may be presumed from the *possession of*

without a bond in violation of a federal statute. The statute in question provided that the *carrying on of an illegal distilling business* could be presumed from *presence at the site of the still* "unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)." *Id.* at 64 n.2. The Court held that the "rational connection test" of *Tot v. United States* had been met; there was a rational connection "between the facts proved [basic facts] and the ultimate fact presumed [presumed fact]." *Id.* at 66. The Court said:

The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and culled conclusions from it. As the record in the Circuits shows, courts have differed in assessing the weight to be placed upon the fact of the defendant's unexplained presence at a still . . . . Yet it is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress' resolution is appropriate . . . . Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implications of seclusion only confirms what the folklore teaches — that strangers to the illegal business rarely penetrate the curtain of seclusion.

*Id.* at 67-68 (citation and footnote omitted).

44. 382 U.S. 136 (1965). Here, the defendant had been convicted of possession of an illegal still. The presumption in question was that the possession, custody, or control of a still could be presumed from *presence at the site of the still* "unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)." *Id.* at 138 n.4. The Court held (1) that the "rational connection test" of *Tot v. United States* had not been met; (2) that there was no rational connection "between the facts proved [basic facts] and the ultimate fact presumed [presumed fact];" and (3) that mere presence of an illegal still is "insufficient proof of possession" and therefore did not satisfy the "rational connection test" of the *Tot* case. *Id.* at 143-44.

45. In *Romano*, the Court distinguished Gainey as follows:

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. Section 5601(a)(1), however, proscribes possession, custody or control. This is only one of the various aspects of the total undertaking, many of which have nothing at all to do with possession . . . . Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. 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 — "the inference of the one from proof of the other is arbitrary . . . ."

*Id.* at 141.

marijuana. The Court reviewed its prior holdings decided pursuant to the "rational connection" test and concluded as follows:

The upshot of Tot, Gainey, and Romano is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily.47

Accordingly, the Court adopted a test of probative sufficiency in lieu of a test of relevancy to explain the meaning of "rational connection." In other words, not only must a logical relationship exist between the basic fact and the presumed fact, the presumed fact must "more likely than not" flow from the basic fact of the presumption. The Court then examined the legislative history of the statute, governmental and nongovernmental reports, and other books concerning the proportion of domestically consumed marijuana of foreign origin. The Court decided that it could not conclude "with substantial assurance that one in possession of marijuana is more likely than not to know that his marijuana was illegally imported."48 The Court said:

As we have seen, the materials at our disposal leave us at large to estimate even roughly the proportion of marijuana possessors who have learned in one way or another the origin of their marijuana. It must also be recognized that a not inconsiderable proportion of domestically consumed marijuana appears to have been grown in this country, and that its possessors must be taken to have "known," if anything, that their marijuana was not illegally imported. In short, it would be no more than speculation were we to say that even as much as a majority of possessors "knew" the source of their marijuana.49

Accordingly, the Court refused to uphold the "knowledge" aspect of the presumption. A person in possession of marijuana (basic fact) was not more likely than not to have knowledge of the illegal importation of the marijuana (presumed fact).

In the Leary case, the Court also raised the question of whether a presumption in a criminal case must also satisfy the "reasonable doubt" standard if the presumed fact of the presumption would constitute proof of either the crime, or an essential element of the crime charged. However, it was unnecessary to decide the question because the Court concluded that the presumption did not meet the lesser "more

47. Id. at 36 (footnote omitted).
48. Id. at 46.
49. Id. at 52-53.
likely than not" standard of sufficiency, which the Court concluded was minimally necessary to satisfy the "rational connection" test.\textsuperscript{50}

The approach followed by the Court in Leary in holding the presumption of the illegal importation of marijuana unconstitutional was also used a year later in Turner v. United States.\textsuperscript{51} In Turner, the Court decided the constitutionality of a federal statute providing that knowledge of the illegal importation of a narcotic drug may be presumed from its possession. The drugs in question were heroin and cocaine. As in Leary, the Court reserved the question of whether the "more likely than not" or the "reasonable doubt" standard controlled in criminal cases. After an examination of the pertinent legislative facts, the Court concluded that the presumption, as it applied to heroin, would be valid under either the "more likely than not," or the "reasonable doubt" standard; however, as applied to cocaine, the presumption was invalid because it failed to satisfy even the "more likely than not" standard. As later pointed out by the Court in Barnes v. United States,\textsuperscript{52}

What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.\textsuperscript{53}

The decision in the Barnes case still left the issue undecided on the degree of probative value necessary to sustain the presumption. Further clarification on this issue came in a 1979 decision of the Supreme Court, though one may wonder whether the decision is really worth the confusion it has created.

In County Court v. Allen,\textsuperscript{54} the Court was faced with determining the constitutionality of a New York statute providing that the presence of a firearm or other weapon in an automobile "is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found."\textsuperscript{55} The defendants had been tried for possession of two loaded handguns, a loaded machine gun, and over a pound of heroin found in the automobile in which they were riding when it was stopped for a traffic violation. The handguns were in clear view in the front seat near the passenger side, where one of the defendants was sitting. The guns were positioned crosswise in the defendant's open handbag, which was either on the front floor or front seat. Subsequently, the police discovered the machine gun and heroin in the trunk of the vehicle. The prosecution relied upon the statutory presumption to connect the

\textsuperscript{50} Id. at 36.
\textsuperscript{52} 412 U.S. 837 (1973). In the Barnes case, the Court sustained the constitutionality of a presumption that knowledge that property was stolen may be presumed from possession of recently stolen property on the ground that the presumption satisfied the reasonable doubt standard.
\textsuperscript{53} Id. at 843.
\textsuperscript{54} 442 U.S. 140 (1979).
defendants with the contraband, and the trial court instructed the jury that it was permissible for them to find that the defendants were in possession of the contraband based upon their presence in the automobile. The convictions of the defendants were affirmed by the New York Court of Appeals.\textsuperscript{56} The constitutionality of the New York statute reached the Supreme Court on a habeas corpus proceeding in which the Court of Appeals for the Second Circuit had concluded that the statute was unconstitutional on its face.\textsuperscript{57}

On the issue of the proper standard to apply in determining whether there was a rational connection between the basic fact (presence of weapons in the automobile) and the presumed fact (possession by the occupants of the automobile), the defendants specifically argued that a statutory presumption must be rejected unless the evidence of the basic fact is sufficient for a rational jury to find the presumed fact beyond a reasonable doubt. In rejecting the defendant's contention, the Court distinguished between presumptions with the effect of permitting the jury to find the presumed fact (permissive presumption) and those with the effect of requiring the jury to find the presumed fact unless it is rebutted by the defendant (mandatory presumption).\textsuperscript{58} It then held that if the presumption is in the nature of a "permissive presumption," as applied to the facts of the case before the court,\textsuperscript{59} it is sufficient if the presumed fact "more likely than not" flows from the basic fact.\textsuperscript{60}

At the same time, the Court also appears to have laid to rest, for the moment at least, the theretofore undecided circumstances under which the more stringent "beyond a reasonable doubt" standard will apply. The Court said, in the case of the so-called "mandatory presumption," that "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."\textsuperscript{61} Thus, the \textit{Allen} case somewhat clarified the variable of the relative circumstances under which the dual standards of "more likely than not" and "reasonable doubt" are to be applied in determining the existence of a rational connection between the basic fact(s) and the presumed fact of the presumption.

\textbf{B. The Permissive or Mandatory Nature of the Presumption}

The \textit{Allen} case also introduced the permissive or mandatory nature of the presumption as a second variable in determining whether the rational connection test, established in \textit{Tot}, has been met. In so doing, the Court defined a "permissive presumption" as one "which allows — but does not require — the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which

\textsuperscript{56} People v. Lemmons, 354 N.E.2d 836 (1976).
\textsuperscript{57} Allen v. County Court, 568 F.2d 998 (2d Cir. 1977), rev'd, 442 U.S. 140 (1979). The Supreme Court held that it was error for the Second Circuit Court of Appeals to pass on the constitutionality of the statute on its face on the ground that the validity of a permissive presumption rests upon an evaluation of the presumption as it applies to the record before the court. \textit{Allen}, 442 U.S. at 162-63.
\textsuperscript{58} \textit{Allen}, 442 U.S. at 157.
\textsuperscript{59} Id. at 163-65.
\textsuperscript{60} Id. at 165.
\textsuperscript{61} Id. at 167.
places no burden of any kind on the defendant. In contrast, the Court described a "mandatory presumption" as one that "tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." In the case of "mandatory presumptions," the Court further categorized them into two parts as follows: "presumptions that merely shift the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution; and presumptions that entirely shift the burden of proof to the defendant."

Accordingly, with respect to the proper standard to apply in measuring the constitutionality of a presumption in a criminal case, a determination must first be made whether the effect of the presumption is merely to permit the jury to find the existence of the presumed fact upon the establishment of the basic fact. If the presumption has only a permissive effect, then due process requires only that one may conclude from the existence of the basic fact that it is more likely than not that the presumed fact exists.

If it is determined that the effect of the presumption is to require the jury to find the existence of the presumed fact from the establishment of the basic fact, then due process requires that the establishment of the basic fact be sufficient to support proof of the presumed fact beyond a reasonable doubt. In this case the presumption would also be valid and, within limitations, it would then presumably be appropriate to instruct the jury that it must make a finding according to the presumed fact of the presumption unless it is rebutted by the defendant.

C. The Factual Basis Required in Determining Whether a Rational Connection Exists

The third variable deals with the required factual basis for determining whether there is a rational connection between the basic fact(s) and presumed fact. In Allen, the Supreme Court may have also modified the due process principle upon which that test was based, namely, the requirement of an independent finding of a connection between the basic fact and presumed fact of the presumption founded on common experience. A majority of the Court said, "Our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the Court. None suggests that a court should pass on the constitutionality of this kind of statute 'on its face.'"

---

62. Id. at 157.
63. Id.
64. Id. at 157 n.16.
65. Id. at 162-63.
Although rejected by the dissenting judges,66 the Court held, in the case of a permissive presumption, that the rational connection test is met if there is ample evidence in the record other than the presumption itself to support the conviction. It is not necessary to examine the basic fact(s)-presumed fact relationship to determine whether it is an accurate reflection of history, common sense, and experience in the community.67

In contrast, in the case of a mandatory presumption, the majority concedes that the validity of the presumption must be determined on its face rather than in the context of the particular case before the court. The Court said:

In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases. It is for this reason that the Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction.68

D. The Procedural Effect To Be Accorded a Presumption

Finally, how does the fourth variable, the procedural effect to be accorded presumptions, affect their constitutionality? Under the principle established in In re Winship,69 that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,"70 it seems clear that Tot's "rational connection" test means that if a statutory presumption in a criminal case is to be sustained in the future, the basic fact must establish the presumed fact of the presumption beyond a reasonable doubt.71 In view of this, in the case of the permissive presumption, the inference does not shift either the burden of producing evidence or the burden of persuasion, and the trier of fact is left "free to credit or reject the inference."72 Under these circumstances, the constitutionality of the presumption is not called in question and

66. The dissenters argued that "the Constitution restricts the court in its charge to the jury by requiring that, when particular factual inferences are recommended to the jury, those factual inferences be accurate reflections of what history, common sense, and experience tell us about the relations between events in our society." Id. at 172 (Powell, J., dissenting).
67. Id. at 162-63.
68. Id. at 157-60 (citation omitted) (emphasis removed).
70. Id. at 364.
71. See McCormick on Evidence, supra note 1, § 347, at 531.
the application of the "beyond a reasonable doubt" standard... [is not affected unless] under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination. 73

Otherwise, the permissive presumption would be valid and it is permissible to instruct the jury on the presumption so long as the jury is also instructed that it is free to disregard the presumption. 74

In the case of the mandatory presumption, it tells the trier of fact that it "must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." 75 A mandatory presumption may either shift only the burden of producing evidence or both the burden of producing evidence and the ultimate burden of persuasion. 76 In the Allen case, the Supreme Court seemed to assume the constitutionality of presumptions that shift only the burden of producing evidence, provided that the basic facts are sufficient to support the presumed fact of guilt beyond a reasonable doubt. 77 The Court in Allen suggests that a mandatory presumption would be constitutional if a rational juror could find the presumed fact beyond a reasonable doubt from the basic facts. 78 However, the Allen decision, together with the later decision in Sandstrom v. Montana, 79 strongly suggests that a mandatory presumption that shifts the burden of persuasion to the defendant will deprive the defendant of his right to due process of law. 80 Even then, it has been held that a conviction based upon an instruction that unconstitutionally allocates the burden of persuasion to the defendant should not be set aside if the reviewing court can confidently say, on the record as a whole, that the constitutional error was harmless beyond a reasonable doubt. 81

73. Id.
74. Id. at 161.
75. Id. at 157.
76. Id. at 157 n.16.
77. Id. at 157-58 n.16. The case reads as follows:

The mandatory presumptions examined by our cases have almost uniformly fit into... [the class of presumptions shifting only the burden of producing evidence], in that they never totally removed the ultimate burden of proof beyond a reasonable doubt from the prosecution. 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 160 (citations omitted).
78. Id. at 167.
80. Id. at 523-24; see also Francis v. Franklin, 471 U.S. 307 (1985).
81. Rose v. Clark, 478 U.S. 570 (1986); see also 2 Leo H. Whinney, Oklahoma Evidence, commentary on the law of evidence § 11.17, at 253 n.24 (2d ed. 2000) (dealing with constitutional error in the admission or exclusion of evidence).
VII. Constitutional Considerations: Fourteenth Amendment

Prior to the decision in County Court v. Allen, it was undecided whether the Supreme Court of the United States would apply a different test for determining the validity of presumptions under the Fourteenth Amendment. All of the prior cases involved federal prosecutions, though it seemed unlikely that a different test would be applied. Allen, involving the constitutionality of the New York statute under the Fourteenth Amendment to the Constitution, resolves this issue. The same tests, however they might be interpreted, will apply in determining the constitutionality of both federal and state statutes, including Uniform Rule 303 where adopted.

VIII. Inconsistent Presumptions

Uniform Rule 302(b) provides:

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

"Inconsistent presumption," defined in Uniform Rule 301(2) as meaning "that the presumed fact of one presumption is inconsistent with the presumed fact of another presumption," can be illustrated as follows:

W, asserting that she is the widow of H, claims her share of his property, and proves that on a certain day she and H were married. The adversary then proves that three or four years before W's marriage to H, W married another man. W's proof gives her the benefit of the presumption of the validity of a marriage. The adversary's proof gives rise to the general presumption of the continuance of a status or condition once proved to exist, and a specific presumption of the continuance of a marriage relationship.

In this situation, as defined in Uniform Rule 301(2), the presumed fact of the validity of W's marriage to H is inconsistent with the presumed fact of the continuance of the marriage relationship with another man. How is this inconsistency in the presumed facts of the two presumptions to be resolved? Rule 302(b) provides that "the presumption applies that is founded upon weightier considerations of policy." The presumption of the validity of a marriage is founded on the strongest social policy favoring legitimacy and the stability of family inheritance and expectations. In contrast, the presumption of the continuance of a marriage relationship is founded principally on probability and trial convenience. The conflict should be resolved under Rule 302(b) in favor of the presumption of the validity of the marriage because it "is founded upon weightier considerations of policy."

82. 442 U.S. 140 (1979).
83. UNIF. R. EVID. 302(b).
84. MCCORMICK ON EVIDENCE, supra note 1, § 344, at 521.
85. J.E. Keefe, Jr., Annotation, Presumption as to Validity of Second Marriage, 14 A.L.R.2d 7, 37-
In contrast, where the presumption of control of a student driver by the person in the right front seat is inconsistent with the presumption of control by the owner of the vehicle, the considerations of policy are of equal weight and, under Uniform Rule 302(b), the issue of control would be determined without regard to the presumptions.\textsuperscript{86}

Conclusion

The principal substantive change in article III of the Uniform Rules is the adoption of Uniform Rule 301. This rule sets forth the definitions applicable in the use of the term "presumption" and clarifies that the term is applicable only to describe what is more particularly known as a "rebuttable presumption." This is more particularly described in subdivision (4) of Rule 301, which provides that the presumed fact of the presumption "is assumed to exist until the nonexistence of the presumed fact is determined as provided in Rules 302 [governing the effect of presumptions in civil cases] and 303 [governing the effect of presumptions in criminal cases]." The retention of the effects of Rules 302 and 303 in civil and criminal cases is constitutionally in accord with the case law of the Supreme Court of the United States and, where adopted in the several states, would assist in overcoming what has come to be known, along with "burden of proof," as "the slipperiest member of the family of legal terms."\textsuperscript{87}

\textsuperscript{41} (1950).


\textsuperscript{87} See supra note 1 and accompanying text.