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FACES WITHOUT FEATURES: THE SURFACE VALIDITY OF CRIMINAL INFERENCES

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I. INTRODUCTION

A jury can hear testimony that a defendant checked into a motel with another person and checked out an hour and forty minutes later, be left with no doubt that an act of adultery was committed, but still be uncertain as to whether the legal burden of proof was met. No amount of circumstantial evidence adduced at the trial will obviate the jurors' problem in understanding what the judge meant with his talk of "preponderance of the evidence" or "beyond a reasonable doubt." For laymen there will be in many cases a quantum jump from drawing conclusions to a sense of having correctly applied the burden of proof standard. Uncertainty can result from the terminology used to explain the burden or simple naivete in drawing conclusions.

Common law judges devised an economical solution to this problem of juror uncertainty. For some stereotypical cases the judges created instructions designed to inform jurors that certain facts suffice to prove other facts. These instructions are on deductions called inferences. Their usual form is an expression of a generality, not a comment upon the evidence: the judge says "from spending less than overnight in a motel with another person, you can conclude the guest engaged in sex," not "from the evidence here that defendant spent an hour and forty minutes in a motel, you can conclude he engaged in sex." Through the years some inferences hardened into presumptions, or legal requirements that the jury find certain facts from proof of other facts. Meanwhile, legislatures have also been fashioning inferences and presumptions.

Until the United States Supreme Court's recent decision in *County Court v. Allen*[1] the legal community presumed that the Constitution required both the permissive inference and the compulsory presumption

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[1] 442 U.S. 140 (1979).

to meet a standard of rationality: probable long-run truth. Thus, whether the trial judge told the jury they may or they must find that defendant engaged in sex, the test of validity was the same. The reviewing court would ask itself whether people who check into motels for less than a night with another usually do engage in sex; if the answer was yes, then the evidentiary device, be it presumption or inference, satisfied the demands of due process.

Then the *Allen* case reached the Court: three men and a sixteen-year-old girl were riding in a car stopped for speeding; the officer looked in and saw a gun sticking out of a handbag, which was located next to the girl; it transpired that the handbag contained two loaded guns. All four were charged with possession of the guns. This would seemingly be a troublesome case for a jury. All of the car's occupants probably knew of the presence of the guns, but possession also requires some element of control. The guns probably were held by the girl on behalf of one or more of the men, at least from the moment it appeared that the car would be pulled over, both for concealment and transferral of guilt to her in case of detection. But two guns do not go into three men evenly; the futility of ascribing the guns to a particular man or men is a reason for doubting the guilt of the male defendants.

Yet the jury convicted. Could it be because the trial judge had told them that from the fact of a gun being in a car, jurors could infer that every occupant of the car possessed that gun? An article of faith with commentators is that this kind of instruction inclines a juror toward conviction without determination of the precise location, characteristics, or visibility of the guns, or of the peculiarities of the occupancy of the car by the defendants, for example, where they sat in relation to the guns.[2] In *Allen*, however, the Supreme Court proclaimed that the instruction does not incline jurors to convict upon a generalization about guns in

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[2] *See* Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 201 (1969); Brown, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141, 152 (1966); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192 (1979); Orland, *Presumptions: Reflections on Washington's Proposed Rule 301*, 13 GONZ. L. REV. 935, 940 (1978); Soules, *Presumptions in Criminal Cases*, 20 BAYL. L. REV. 277, 286 (1968); *The Supreme Court 1968 Term*, 83 HARV. L. REV. 7, 110 (1969); Comment, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 ST. LOUIS L.J. 223, 229-33 (1974); Note, *Statutory Criminal Presumptions: Judicial Sleight of Hand*, 53 VA. L. REV. 702, 702-06 (1967); Comment, *Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct*, 18 U.C.L.A. L. REV. 169 (1970). *Cf.* Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J. CRIM. L.C. & P.S. 7, 9 (1966). That a commentator is nominally discussing presumptions does not mean he is not analyzing cases which actually involved inferences.

The Supreme Court has also assumed that inference instructions pressure the jury. *See* United States v. Romano, 382 U.S. 136, 138-39 (1965).

cars and the occupants thereof, and in fact that instructed inferences do not incline a juror to do anything.

Neither the *Allen* majority nor the four dissenters attempted to explain the workings of instructed inferences. The dissent shares the commentators' intuition mentioned above, but intuition does not obviate the necessity to offer reasons. This article will offer nonempirical grounds to show that instructed inferences operate as the dissenters believe, at least when the instruction does not explicitly refer to the evidence at trial, but to occurrences in general.

The constitutional holding of *Allen* also seems fallacious. As stated above, traditionally the Court disposed of challenges to deduction instructions by considering the device without regard to the evidence in the case, simply by deciding whether the proffered deduction was accurate in the long run. The Court's opinions never stated that the vulnerability of the device in question varied with whether it was a presumption or an inference. In *Allen*, however, the majority "discovered" that only presumptions had been tested with regard to long run truth, or what is known as facial validity. Because inferences, by contrast, are drawn by the jury in the light of the evidence, challenges to instructed inferences had been and would continue to be limited to the test of validity as applied. This latter exploration consists of testing the trial evidence of the basic fact (occupancy of a gunladen car) for its sufficiency to support a finding of the inferred fact (possession of a gun). Rather than occupancy in the abstract, the particular way in which the occupancy was manifested in the case is examined. This approach is not a "confirmation" of the inference as instructed (which was in generalities), but is rather a denial that possible general inaccuracy of the inference has significance in a trial.

Despite what the Court held in *Allen*, criminal inferences still have faces, but given the Court's barring of testing facial validity, these are now faces without features. In sum, the *Allen* Court saw jurors as virtually unaffected by inference instructions; despite the instructions, they would still consider the evidence and draw rational conclusions from it alone. However, a judge's charge that the jury can find a defendant possessed a gun from the fact of his occupancy of a car containing that gun does more than simply tell the listener to consider the evidence for what it is worth. The charge is much closer to being an invitation to decide the case on a bald generalization. And if the generalization is not tested the way generalizations are usually tested, is not the rationality of the factfinding process a moot point?

Unfortunately, aside from some indications that jurors do not know

what "inference" means,[3] experiments indicating how juries interpret inference instructions have not been performed.[4] But the *Allen* problem can be approached nonempirically by analysis both of the possibilities of use of inference instructions and of the meaning an ordinary juror is likely to attach to the instructions. These lines of inquiry will point toward the proper treatment of inference instructions for constitutional purposes.

II. *COUNTY COURT V. ALLEN*

In *County Court v. Allen*[5] three men and a sixteen-year-old girl were riding in an automobile on the New York Thruway, the girl with the driver in front and the other two men in the back, when police stopped their car for speeding. The police officer saw the "butt" of a gun protruding from a handbag in the car.[6] A .45 caliber automatic pistol and a .38 caliber revolver, both loaded, were in the open handbag, which rested on either the front floor or the front seat, on the passenger's side.[7] A machine gun and heroin were in the trunk of the car. Police could not find the key to the trunk, but the evidence indicated two of the occupants had placed something in the trunk before embarking; the car itself had been borrowed by the driver from his brother earlier that day.[8]

The four riders were indicted by a New York grand jury for possession of the two loaded handguns,[9] the machine gun,[10] and a pound of

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[3] Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U.L. Rev. 601, 615 (85 percent of jurors cannot choose correct definitions of thirteen listed terms, including "inference").

[4] *See* MATERIALS ON JURIES AND JURY RESEARCH (P. Lermack ed. 1977); Erlanger, *Jury Research in America*, 4 LAW & SOC. REV. 345 (1970); Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J. CRIM. L. & C. 68 (1980).

[5] 442 U.S. 140 (1979).

[6] Brief for Petitioner at 4-5, County Court v. Allen, 442 U.S. 140 (1979); *see* 442 U.S. at 144 n.2 (one gun visible). *Contra*, County Court v. Allen, 442 U.S. at 143 (two guns visible).

[7] The Court said that the handbag was "on either the front floor or the front seat of the car on the passenger side," 442 U.S. at 143, because from its reading of the record "[t]he evidence would have allowed the jury to conclude either that the handbag was on the front floor or the front seat." *Id.* at 163 n.25. Yet the parties agreed that the handbag was on the floor. Brief for Petitioner at 4-5, *supra* note 6; Brief for Respondent at 4, County Court v. Allen, 442 U.S. 140 (1979). The other courts that spoke to this matter agreed that it was on the floor. Allen v. County Court, 568 F.2d 998, 1000 (2d Cir. 1977); Allen v. County Court, No. 76-4794 (S.D.N.Y. April 19, 1977), *reprinted in* Petitioner's Brief for Certiorari at 34a, County Court v. Allen, 442 U.S. 140 (1979); People v. Lemmon, 40 N.Y.2d 505, 508-09, 354 N.E.2d 836, 838-39, 387 N.Y.S.2d 97, 99 (1976); People v. Lemmon, 49 A.D.2d 639, 641, 370 N.Y.S.2d 243, 246 (1975) (dissenting opinion).

[8] 442 U.S. at 144.

[9] N.Y. PENAL LAW § 265.05(2) (McKinney 1967), now § 265.02(4) (McKinney 1980). "Possess" is defined as "to have physical possession or otherwise to exercise dominion or control over tangible property." *Id.* § 10.00(8) (McKinney 1975).

heroin,[11] and were tried together. A New York statute declares that the proven occupancy of a nonstolen automobile at the time a firearm is found in it is "presumptive evidence" of possession of that firearm by the occupant.[12] The statute excepts weapons found upon the person of an occupant, drivers of hired automobiles, and weapons licensed to be carried by an occupant.[13] Another statute creates a similar presumption for controlled substances.[14] The judge instructed the jury that the Penal Law provided that upon proof of presence of guns or narcotics in an automobile the jury could infer that these items were possessed by each person who occupied the automobile at the time the contraband was found.[15]

The jury convicted the defendants of possession of the handguns and acquitted as to the machine gun and heroin. After affirmance of the convictions,[16] a United States district court granted the men (the girl not having petitioned) writs of habeas corpus on the ground that the inference of possession was not reasonable on the facts of the case.[17] The Court of Appeals for the Second Circuit affirmed, stating that the statutory deduction was unconstitutional on its face.[18] The Supreme Court granted the state's petition for certiorari.[19]

The Court reversed, five-to-four. Writing for the majority, Justice Stevens stated as a premise that a litigant has no standing to argue that a statute would be unconstitutional if applied to third parties in hypothetical situations. The Second Circuit therefore erred in testing the validity of the gun-in-the-car statute on its face. That court had evaluated the statute by applying it to "implausible" situations in which it was improbable a jury would convict or a prosecutor even prosecute. But, Justice Stevens said, respondents had no standing to argue those hy-

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[10] *Id.* § 265.05(1) (McKinney 1967), now § 265.02(2) (McKinney 1980).

[11] *Id.* § 220.23 (McKinney Supp. 1972-73), now § 220.21 (McKinney 1980) (four ounces).

[12] *Id.* § 265.15(3) (McKinney 1980).

[13] The New York courts deemed the defendants to have waived the first exception by failing to request that the jury be instructed to determine if the exception was applicable. People v. Lemmon, 40 N.Y.2d 505, 512, 354 N.E.2d 836, 841, 387 N.Y.S.2d 97, 101 (1976).

[14] N.Y. PENAL LAW § 220.25(1) (McKinney 1980); *see* 442 U.S. at 155 n.14. This statute was held constitutional in Lopez v. Curry, 583 F.2d 1188 (2d Cir. 1978), and People v. Levya, 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975) (by implication).

[15] The charge as to weapons is set out in note 166 *infra*.

[16] People v. Lemmon, 49 A.D.2d 639, 370 N.Y.S.2d 243 (1975) (mem.), *aff'd*, 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976).

[17] Allen v. County Court, No. 76-4794 (S.D.N.Y. April 19, 1977), *reprinted in* Petitioner's Brief for Certiorari at 33a, County Court v. Allen, 442 U.S. 140. The court also granted the writ because the statute was inapplicable "as a matter of law." *Id.* at 36a.

[18] Allen v. County Court, 568 F.2d 998 (2d Cir. 1977). One judge, concurring in result only, would have affirmed on the ground the inference was unconstitutional as applied. *Id.* at 1011-12.

[19] 439 U.S. 815 (1978).

potheticals, which involved hitchhikers or other casual passengers who might not know of the presence of the gun or might not have control of it.[20]

The Court had, in fact, tested some statutory deductions on their face, but these devices had been presumptions, referred to by Justice Stevens as "mandatory presumptions." Presumptions compel a jury's findings, absent rebuttal. A jury cannot reject a presumption by its own evaluation of the state's evidence; it follows that the validity of a presumption is logically divorced from the facts of the case, and turns on the accuracy of the presumption in the run of cases. Justice Stevens distinguished inferences as "permissive inferences or presumptions." Here a jury is free to credit or reject the deduction, and the burden of proof is unaffected; hence application of the reasonable doubt standard is implicated only if, under the facts of the case, the jury can in no rational way make the connection permitted by the instructed inference. Accordingly, past decisions did not test the validity of inferences on their face but only as applied. In the presumption cases, by contrast, the amount of evidence in the record has been irrelevant.[21]

Turning to the case at hand, Justice Stevens stated that the trial judge made it clear the inference was merely a part of the state's case, that it gave rise to a permissive rather than a mandatory conclusion of possession, and that it could be ignored by the jurors even absent rebuttal evidence. When coupled with the instructions on reasonable doubt and the presumption of innocence, plainly the jurors were directed to consider all the circumstances tending to support or contradict the inference and to decide the matter for themselves.[22] Because the device was permissive in this case, it must be evaluated as applied to the record, not on its face. Considering the unlikelihood that the girl was the sole custodian of the handguns or the only person able to control them, the instructed inference was rational as applied. Justice Stevens viewed the case as one in which the guns were in plain view of all occupants, and thus ability and intent to exercise dominion and control over them could be inferred.[23] Hence the basic facts proved were rationally connected to the ultimate facts inferred, and the latter were more likely than not to flow from the former, linkage beyond a reasonable doubt being required only for presumptions. The inference was constitutional, so issuance of the writs must be denied.[24]

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20 442 U.S. at 154-56, 162-63. The Court first resolved an issue of jurisdiction to issue habeas corpus. *Id.* at 147-54.

21 *Id.* at 157-60.

22 *Id.* at 160-62.

23 *Id.* at 162-65.

24 *Id.* at 165-67. Chief Justice Burger wrote a brief concurring opinion. *Id.* at 167.

Justice Powell, joined by Justices Brennan, Stewart, and Marshall, dissented. Justice Powell felt instructions in this case encouraged the jury to find certain facts. Because such instructions suggest to a jury that it would be sensible to draw certain conclusions, the precedents have required in criminal cases that inferences reflect some valid general observation about the natural connection between events as they "occur in our society."[25] Justice Powell read no recognition in the Court's prior decisions that the distinction between presumptions and inferences was relevant.[26]

The charge in this case undeniably encouraged the jury to draw a particular inference regardless of the evidence. The inference charged was unconstitutional, Justice Powell said, because it did not fairly reflect what common sense and experience tell us about passengers in automobiles and the possession of handguns. Occupants are not more likely to be the possessors of guns in the car.[27] While the majority relied on all of the evidence to justify the inference the instruction authorized the jury to convict on the facts of occupancy and presence of the gun alone—the majority simply ignored the possibility that the jury discredited all other evidence, such as the visibility and precise location of the guns.[28] (The majority answered Powell's last argument principally by finding an exact congruence between the proof that the guns were in the car and the proof of their precise location in the girl's handbag.[29] But the majority overlooked the possibility that the jury believed the officer's testimony that he recovered the guns from the car but disbelieved that the guns were in the handbag. Such bifurcated crediting of testimony is quite plausible in a "plain view" case.[30])

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25 *Id.* at 168-72 (Powell, J., joined by Brennan, Stewart & Marshall, JJ., dissenting).

26 *Id.* at 170 n.3.

27 *Id.* at 173-74.

28 *Id.* at 175-76.

29 *Id.* at 166 n.29. The majority found additional support for its hypothesis of how the inference worked in the fact that the jury acquitted for possession of the contraband in the trunk of the car. *Id.* But the Chief Justice, while joining "fully in the Court's opinion," thought the verdict was "rather obviously a compromise verdict." *Id.* at 167 (concurring opinion).

30 Juries often may accept testimony in bite-sized portions; if a witness swears he entered a room on a certain occasion and saw it was green, the jury can credit his entrance and reject his description. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.08 (3d ed. 1977) (right to reject all testimony of witness if part disbelieved; this right implies a right to believe only part). The *Allen* jury could have analytically separated the evidence that the guns were in the car from testimony as to the precise location of the guns inside the car. Even the majority stated that the jury could have found that the guns were in either of two places on the testimony, *see* note 7 *supra*, and this does not begin to consider a jury finding constructed out of rejection of *all* testimony on exact location. The testimony on the location of the gun asserted that a gun was partially visible; this is known as plain or open view testimony. *See* Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971) (plurality opinion). The officer's testimony had its antecedents in a pretrial hearing on a

Justice Powell concluded by analyzing the Court's opinion as permitting the use of any instructed inference, no matter how irrational, provided sufficient evidence exists to support a finding of guilt. In conclusion Justice Powell characterized the majority's reasoning as applying an unarticulated harmless error standard.[31]

III. PRESUMPTIONS, INFERENCES, AND THE *ALLEN* PROBLEM

Because so many of the *Allen* Court's conclusions depend upon the classification of a deduction device as a presumption or an inference, a clear understanding of these terms and their functional relationship to each other is necessary for understanding of the issues raised by *Allen*.

A *presumption* is a legal compulsion to find a fact. If the basic or evidentiary fact is proven at trial,[32] the factfinder is compelled by law—the presumption—to treat the presumed fact as found. This compulsion is subject to a condition subsequent: if there is proof that the presumed fact is not the case, then it is not found as a result of the presumption, the presumption having been rebutted. The judge instructs a presumption as follows: If you find that fact *A* has been proven, then you must conclude that fact *B* has been proven, unless the evidence persuades you that fact *B* is not the case.[33] What quantum of evidence is necessary for the jury to find that the presumption has been rebutted, and what is the vitality, if any, of a rebutted presumption, are topics which have generated an elephantine literature.[34] What must be borne in mind is that a presumption forces a conclusion of one fact from proof of another, and the only escape from the operation of a presumption is for its opponent to persuade by evidence—not argument against the logic of the presumption—that the presumed fact is not accurate.[35]

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motion to suppress the guns as illegally seized evidence. *See* People v. Lemmon, 49 A.D.2d 639, 641, 370 N.Y.S.2d 243, 246 (1975) (dissenting opinion). Plain view testimony at such a hearing is often the notorious "dropsy" tale, in which the officer swears that the defendant openly abandoned the contraband at his approach. Dropsy testimony is so suspect that the renowned district attorney of New York County, Frank S. Hogan, once asked the New York Court of Appeals to impose a higher burden on *him* when dropsy testimony was offered. People v. Berrios, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971). In short, an officer who testifies that contraband was in plain view is often disbelieved. In *Allen*, belief of the officer entailed believing that the custodian of the guns was unable to secret them before being pulled over.

31 *Id.* at 177. *Cf.* the inference analysis in text accompanying notes 110-13 *infra*.

32 The basic fact could also be judicially noticed, or stipulated to, or judicially admitted, or be presumed or inferred. *See* Annot., 5 A.L.R.3d 100 (1966).

33 *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 300[01] (1978); 1 J. WIGMORE, EVIDENCE § 25 (3d ed. 1940); MODEL CODE OF EVIDENCE rule 701(2) (1942). *Contra*, FED. R. EVID. 301.

34 *See* 1 J. WEINSTEIN, *supra* note 33, ¶ 300[01], at 300-01.

35 One major variation is that the opponent must merely produce enough evidence to support a finding that the presumed fact is not the case and then the presumption drops out

An *inference* is a deduction of *B* from *A* which the factfinder is free to make or not as it sees fit.[36] While one presumes in obedience to law, one infers as an act of choice based upon reasoned evaluation of the evidence.[37] Of course, all persons are more or less continually engaged in the mental activity of inferring and choosing not to infer whether sitting as factfinders or going about daily life. The drawing and rejecting of conclusions from perceived events, such as deducing that a person is outside the threshold from a knock at the door, are inescapable psychological events.

Jurors will therefore weigh many inferences without instructions from the judge. Suppose that the evidence shows a letter was mailed. Even if the judge says nothing about the conclusion to be drawn from this, the jury will probably infer that the letter was received. Going to the opposite extreme, suppose the judge instructed a presumption: "If you find the letter was mailed, you must find that it was received, unless you are persuaded by the evidence that it was not received." Now the jury will definitely find that the letter was received, unless the jury is not law-abiding, or the evidence of nonreceipt is persuasive.

The *Allen* problem revolves around a variation lying between the poles of a naturally drawn inference and a presumption: the judge *tells* the jury "If you find the letter was mailed you may, if you wish, conclude that the letter was received." This is an instruction of an inference, called an "instructed inference" in this article. Often a reference by courts and commentators to an inference is a reference to an instructed inference, and sometimes is a reference to the inference drawn following the instruction of an inference. The instruction literally allows the jury the option of inferring receipt of the letter, but then again, the jury usually has the option of inferring the ultimate fact even without an instruction. I say "usually" because irrational instructed inferences are not unknown to the law, and it is obviously not the case that a factfinder has the option, absent a special rule (the instructed irrational inference), to draw an irrational conclusion. Are irrational instructed inferences unconstitutional? What is the standard for determining whether an instructed inference is irrational? These questions are facets of the *Allen* problem.

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of the trial. *See* Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245, 247-49 (1943). Two weeks after *Allen* the Court apparently held that in criminal cases the Constitution requires that defendants be allowed to rebut presumptions in this manner. Sandstrom v. Montana, 442 U.S. 510 (1979).

[36] R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 882-83 (1977); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 67, at 536 (1977).

[37] 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 90, at 144 (13th ed. 1972); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 327 (1952). *See also* CAL. EVID. CODE § 600 (West 1966). *See generally* 21 WORDS AND PHRASES, *Inference* (1960).

At common law instructions telling jurors that they can infer in general raise no issue.[38] Besides telling a jury that it has a right to draw conclusions in general, judges have often talked about the evidence in the case and suggested possible lines of inference from specific facts. Such instructions—inference "hints" that are born and die with particular cases, because they are grounded in the peculiarities of particular trials—have been approved or disapproved according to a jurisdiction's philosophy of the trial judge's right to comment upon the evidence.[39] What is under discussion here is an instruction tailored *ad hoc* to the evidence, such as "If you find that defendant got behind the wheel of the automobile at 9:00, you can infer that he was driving the car at the time of the accident at 9:10." If the jurisdiction allows such comment upon the evidence,[40] evaluation of this instruction depends upon the rationality of inferring the ultimate fact absent the instruction—the sufficiency of the evidence to support a finding of the inferred fact.

But the motive force in evidence law has been recognition that recurring situations forge generalized acceptable or unacceptable deductions. Acceptability has depended upon whether the logic of the deduction is sufficiently compelling, or either insufficiently or excessively compelling, in which case evidence of the basic fact is prejudicial. The acknowledged value of the collective experience of the courts has led to admissibility, limited admissibility, or inadmissibility of a host of recurring items of evidence[41] and, inevitably, endorsement of recurring inferences, and, finally, presumptions. Thayer further documented the historical evolution of given facts, demonstrating how they eventually become the bases of substantive rules of law.[42] First, courts accept that a given fact tends to prove another fact (relevance), and later decide that the given fact is sufficient to find the other fact. The given facts here are

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[38] *See* Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 331 (1960); COMMITTEE ON PATTERN JURY INSTRUCTIONS, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 10 (District Judges Ass'n, Fifth Circuit 1979).

[39] *See* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 488 (1969); McCormick, *What Shall We Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185, 188 (1938); Wright, *Instructions to the Jury: Summary Without Comment*, 1954 WASH. U.L.Q. 177.

Inferences instructed in generalities, discussed below in text, might also be rejected by jurisdictions that frown on judicial comment. *See* George v. Alexander, 229 Ark. 593, 317 S.W.2d 124 (1958); Clifford v. Lee, 23 S.W. 843 (Tex. Civ. App. 1893); Lappin v. Lucurell, 13 Wash. App. 277, 285, 534 P.2d 1038, 1043 (1975).

[40] *See* Holland v. United States, 348 U.S. 121, 129 (1954); Stone v. Geyser Quicksilver Min. Co., 52 Cal. 315, 318-19 (1877); Pridmore v. Chicago, R.I. & P. Ry., 275 Ill. 386, 394, 114 N.E. 176, 179 (1916); Peters v. Bourneau, 22 Ill. App. 177, 178-79 (1887); Kennedy v. Phillips, 319 Mo. 573, 589-90, 5 S.W.2d 33, 39-40 (1928); Hammond v. Coursey, 2 Posey 29, 33 (Tex. Comm'n Ct. 1880).

[41] *See* C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 184-211 (E. Cleary ed. 1972).

[42] J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 317-31 (1898).

not about drivers at 9:00, of course, but are more generalized, such as the fact of leaving town shortly after a crime has been committed (tends to prove consciousness of guilt)[43] or absence for seven years (sufficient to prove death).[44]

To insure that the jury understands the probative value of a fact, and even to encourage them to find other facts, the trial judge might instruct that the basic fact is sufficient to find the ultimate fact. If higher courts approve of this instruction—or the legislature originates or codifies it—then the *Allen* type of inference is created. There is little point to courts collecting and memorializing instructions that are tailored to the evidence, because the details of the evidence (driving at 9:00) will not likely recur; there is even less reason for the legislature to enact such specific inferences. Hence the instructed inferences that are passed down and around by the courts or that are enacted by legislatures are in general terms.

Below, the facts of *County Court v. Allen* are placed in a matrix which reflects the historical evolution of evidence:

RELEVANCE:	Occupancy of a car containing a gun tends to make the occupant's possession of that gun more probable than if the occupancy and the presence of the gun were not known.[45] Determination that evidence is relevant here leads to its admission in a possession case. Relevancy is a matter of logic, but at one time authority played a large role.[46]
RELEVANCE INSTRUCTION:	Having admitted the evidence, the judge has the option of instructing the jury that it may consider occupancy and presence of the gun on the issue of possession. But often the judge will not explain what evidence tends to prove, leaving that to counsel in summation. Instructions on relevance are principally limiting instructions: directions not to use evidence to prove certain facts.[47] These limitations result from fear that jurors will overestimate the logical value of evidence, or from policies extraneous to the logic of proof.
AD HOC INFERENCE:	Having found occupancy and presence,

[43] *See* C. MCCORMICK, *supra* note 41, at § 271.

[44] *See* 25A C.J.S. *Death* § 6 (1966).

[45] FED. R. EVID. 401.

[46] The Federal Rules of Evidence prescribe logical, not legal (handed down by authority) relevance. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5164, at 38-41, 43 (1978).

[47] *See* FED. R. EVID. 404(b), 407, 408.

factfinder decides to conclude that there was possession, influenced by the particularities of the case, for example, where defendant was sitting in the car, where the gun was. (Matters not going to occupancy and presence are assumed to be unproven or irrelevant, because the *Allen* problem is about conclusions from the basic facts as set forth in instructions.) By upholding the verdict, the courts endorse the inference of possession.[48] If the judge has instructed "from the evidence of occupancy and presence you have heard, you may find possession," then the case presents an instructed, tailored inference as well—a judicial comment upon the evidence. This raises a general question of whether judges should comment in jury trials.

GENERALIZED INFERENCE: The judge instructs "from occupancy and presence you may deduce possession." This instruction does not explicitly refer to the particularities of the case; it originates in the common law process or with the legislature. The courts could have occasion to approve this inference even if it were not instructed, as by laying down a general rule that occupancy and presence suffice to prove possession. But does the converse hold true—does approval of the instruction endorse the sufficiency of such evidence? This is an important aspect of the *Allen* problem.[49]

PRESUMPTION: The judge instructs "if you find occupancy and presence, you must find possession, unless the defendant persuades you of non-possession." Presumptions are inevitably created and instructed in general terms. Presumptions which require defendants to persuade are unconstitutional in criminal cases, as of a few weeks after *Allen*.[50]

SUBSTANTIVE RULE OF LAW: The judge instructs "if you find occupancy and presence you must convict." Given the abstract nature of possession, is this not what is practically being instructed by the *Allen* trial judge?

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[48] *See* Bozza v. United States, 330 U.S. 160 (1947).

[49] *Cf.* United States v. Gainey, 380 U.S. 63, 68 (1965) (statute authorizing jury to infer guilt from presence at still does not deprive judge of discretion to take case from jury or render a judgment *n.o.v.*).

[50] Sandstrom v. Montana, 442 U.S. 510 (1979).

The progression from relevance to substantive rule on this matrix indicates the increasing significance of occupancy of a car and presence of a gun therein both as proof of possession and as a reason in itself to impose criminal penalties, at least if one assumes knowledge of the gun. Transformation of inferences and presumptions into substantive rules is more common and explicable in civil law, where the basic facts are more likely to have social significance in their own right, such as where a spouse's absence for seven years is of as much substantive significance as that spouse's death. Still, even in the criminal area, evidentiary facts have been transformed into crimes, as in jostling[51] and perhaps possession of a weapon.[52] In any event the Supreme Court has rejected constitutional justification of criminal deduction devices through the substantive significance of the basic fact.[53]

County Court v. Allen raises questions as to the precise evidentiary significance of the basic fact in an instructed generalized inference. This device lies somewhere between an *ad hoc* deduction offered by the judge and which the jurors understand to be utterly voluntary and grounded solely in the particularities of the evidence, and a generalized deduction offered to them independently of the evidence and carrying an expressed degree of encouragement. Does the *Allen* inference push the jurors' deliberations into the particularities of the evidence, as claimed by the Court, or does it hoist them out of the specifics of the case like a presumption? How much pressure, if any, does the *Allen* instruction exert upon the jurors? What should be the test of constitutionality of the inference? The balance of this article shall address these questions.

IV. FACIAL VALIDITY AND VALIDITY AS APPLIED

A. DEDUCTION DEVICES PRIOR TO *ALLEN*

The Supreme Court in *County Court v. Allen* read its precedents as requiring a party challenging the constitutionality of an *inference* "to demonstrate its invalidity as applied to him," even though *presumptions* had "generally" been examined on their face.[54] No cases had suggested that inference statutes should be examined for facial validity, the Court said.[55]

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51 N.Y. PENAL LAW § 165.25 (McKinney 1975).

52 N.Y. PENAL LAW § 265.01(2) (McKinney 1980) (possession of dangerous instrument with intent to use); *id.* § 265.15(4) (presumption of intent to use). *Cf.* J. HALL, CRIMINAL LAW 206-07 (2d ed. 1960) (possession is not an act or omission); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 25, at 182 (1972) (same).

53 Tot v. United States, 319 U.S. 463, 472 (1943). *But see* County Court v. Allen, 442 U.S. 140, 155 (1979) (legal risks of riding in vehicles containing dangerous weapons).

54 442 U.S. at 157-58.

55 *Id.* at 163.

Determining the accuracy of the *Allen* Court's reading of history involves the usual difficulties when distinctions are newly made. First, as to whether a particular precedent involved a presumption or an inference: the Court's nomenclature has never been uniform, so labels in opinions are of no help here. Moreover, while the Court now recognizes that what is involved in an evidentiary deduction device case is that which is instructed to the jury,[56] this was not always so clear to the Court, so some decisions do not even quote, much less analyze in depth, the jury charge. While the instructions in precedents are a matter of record, the importance of instructions in cases which do not treat them in depth is dubious. Second, the *Allen* distinction between facial validity and validity as applied is similarly elusive in the precedents. As the Court has not explicitly found this distinction significant in past presumption and inference cases, the closest reading can lead to only an approximate pigeonholing. Inspection of the cases leads to the conclusion, however arguable, that the precedents cited in *Allen* all involve inferences and tests of facial validity.

Constitutional challenge to a presumption or an inference is based on the due process clause.[57] From the outset due process has employed in various formulations the common law criterion for fashioning inferences and presumptions:[58] the deduction must be likely to accord with truth.[59] Constitutional citation is the principal difference between a

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[56] *Id.* at 158 n.16; Sandstrom v. Montana, 442 U.S. at 514.

[57] A few presumptions have been struck down under other clauses, but these cases are for the most part ultimately grounded on the consideration that informs due process: rationality. *See* Bailey v. Alabama, 219 U.S. 219 (1911) (thirteenth amendment), and Keyishian v. Board of Regents, 385 U.S. 589 (1967) (first amendment), both discussed in note 70 *infra*. In Oyama v. California, 332 U.S. 633 (1948), a presumption was struck down under the equal protection clause under a theory that does not ultimately depend on lack of rationality as much as on disparate treatment of the affected individual.

[58] So-called "artificial" presumptions, though, are not based on the logic of experience, but may be grounded in considerations of procedural efficiency or social policy. *See* Morgan, *The Law of Evidence 1941—1945*, 59 HARV. L. REV. 481, 495 (1946); Morgan, *Further Observations on Presumptions*, 16 S. CAL. L. REV. 245 (1943).

[59] *See* text accompanying notes 38-44 *supra*. The first case in the Court to articulate reasons for upholding or striking down a presumption or inference was Adams v. New York, 192 U.S. 585 (1904), where the Court said that the presumed fact "likely" followed from the basic fact. See the discussion of *Adams* in note 70 *infra*. Prior to *Adams* the Court had considered the constitutionality only of the presumption of regularity of proceedings leading up to delivery of a tax deed. Pillow v. Roberts, 54 U.S. (13 How.) 472, 476 (1851); *see* Turpin v. Lemon, 187 U.S. 51, 59 (1902); Marx v. Hanthorn, 148 U.S. 172, 182 (1893). *See also* Diaz v. United States, 223 U.S. 442 (1912). The Court in *Pillow* said that the power of the legislature to create the presumption "cannot be doubted." 54 U.S. (13 How.) at 476. Since the case predated the fourteenth amendment, the statement was probably a reference to a state's legislative subject matter jurisdiction under the Constitution. Compare the statement in *Adams* that "it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government." 192 U.S. at 599. *See* 2 J. WIGMORE, EVIDENCE § 1356 (2d ed. 1923). This theory is resurrected in Vance v. Terrazus, 444 U.S. 252, 267-70

Supreme Court opinion determining whether a deduction device exists as part of federal common law and an opinion determining the constitutionality of one of these devices.[60] Indeed, one of the constitutional decisions relied heavily on the common law in upholding a state inference.[61]

This discussion concerns what I call the "internal" validity of presumptions and inferences, that is, whether a given deduction device is sufficiently rational. Of no concern to the *Allen* problem is what I call the "external" validity of a presumption or inference, that is, whether these devices *as a genre* can be used in criminal cases, a much mooted problem related to placing burdens of proof on a criminal defendant,[62] and arguably the proving of facts without using evidence.[63] Until *Allen*, the only heated issue relating to internal validity was whether the generalization embodied in the deduction had to be true beyond a reasonable doubt, or merely more likely true than false.[64] The issue was apparently resolved by a glancing dictum in *Allen* stating that presumptions must satisfy a reasonable doubt standard, and that inferences need only be more likely than not correct.[65]

(1980). *Cf.* 4 J. WIGMORE, EVIDENCE § 1356 (Chadbourn rev. 1972) (Wigmore view regarding unnecessary application of a rationality standard has given way to a constitutional rule requiring a rational connection between facts and presumptions).

Two other rationales have been used to validate presumptions: (1) the power to substantively regulate the basic fact includes the power to create a presumption based upon it, Ferry v. Ramsey, 277 U.S. 88 (1928), and (2) the convenience to the defendant, compared with the prosecutor, of disproving the presumed fact, *see* Casey v. United States, 276 U.S. 413 (1928). These cases are discussed in note 70 *infra*. Both theories have been abandoned by the Court, at least in criminal cases. *See* Tot v. United States, 319 U.S. at 469, 472. A hint of revival of theory (1) appears in Patterson v. New York, 432 U.S. 197, 207-08 (1977).

60 *See* Greer v. United States, 245 U.S. 559 (1918); Wilson v. United States, 162 U.S. 613 (1896). For a list of presumptions and inferences recognized by the Court as part of federal law, *see* 7, 7A UNITED STATES SUPREME COURT DIGEST LAWYERS' EDITION, *Evidence* §§ 115-420 (1979).

61 Barnes v. United States, 412 U.S. 837 (1973).

62 *See* Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases after Patterson v. New York*, 76 MICH. L. REV. 30 (1977); Jeffries & Stephan, *Defenses, Presumptions and Burden of Proof in Criminal Cases*, 88 YALE L.J. 1325 (1979); Underwood, *The Thumb on the Scales of Justice*, 86 YALE L.J. 1299 (1977); Note, *The Constitutionality of Affirmative Defenses after Patterson v. New York*, 78 COLUM. L. REV. 655 (1978). Some commentators have implied that burden-of-persuasion shifting presumptions have never been constitutional in criminal cases. *See* C. MCCORMICK, *supra* note 41, § 342, at 804; Nesson, *supra* note 2, at 1201 n.34. The Court had, however, upheld such presumptions, although the shifting of the burden of proof issue had not been raised. *See* Hawes v. Georgia, 258 U.S. 1 (1922), and Adams v. New York, 192 U.S. 585 (1904), both discussed in note 70 *infra*. The Court has now explicitly held that burden of persuasion shifting devices are unconstitutional. Sandstrom v. Montana, 442 U.S. 510. The Court implied that burden of production shifting presumptions would be constitutional.

63 *See* Turner v. United States, 396 U.S. 398, 425 (1970) (Black, J., dissenting); United States v. Gainey, 380 U.S. 63, 71, 74 (1965) (Douglas and Black, JJ., dissenting).

64 *See* Barnes v. United States, 412 U.S. 837 (1973).

65 442 U.S. at 166-67.

As the *Allen* ruling that presumptions must be facially valid while inferences must be valid as applied is not explicit in the prior cases, analysis of these cases requires examination of what was done, but not stated, in those decisions. To the *Allen* Court, the facial validity test of a presumption consists of looking at the basic fact A in the instruction, which is inevitably a general fact (an occurrence or condition describable without reference to the evidence), and determining if the presumed fact is associated therewith in the world with the requisite frequency (under *Allen*, beyond a reasonable doubt). Only plausible hypothetical instances of A in the world are surveyed, "plausible" meaning instances which would in fact be prosecuted or lead to affirmed convictions.[66] The instance of A revealed by the evidence at trial is irrelevant.[67] The test of validity as applied of an inference is performed by examining the evidence of A to determine if a rational factfinder could deduce B therefrom as being "more likely than not true."[68] This examination is apparently intended to reconstruct the jury's use of the instructions on the inference.[69] The evidence shows an instance of A which will be more or less suggestive than the generalized A of a presumption; it is the difference between knowing where defendant was sitting in the car, where the gun was, and other factors relating to occupancy and presence, versus simply considering all the "plausible" cases of people in cars containing guns.

The decisions cited by the *Allen* majority—all of the significant criminal cases of the modern era—will be examined here in text. The balance of the presumption and inference validity cases in the Court, both criminal and civil, are examined in a footnote.[70] The footnote

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66 *Id.* at 155 & n.14.

67 *Id.* at 159-60.

68 *Id.* at 166. *But cf.* note 138 *infra* (noting confusion over what evidence is used in making the inference).

69 442 U.S. at 164.

70 This footnote will discuss all post-fourteenth amendment Supreme Court cases on the constitutionality of presumptions and inferences which are not discussed in text. Pre-fourteenth amendment cases, all involving state laws and therefore not due process issues, are discussed in note 59 *supra*. Occasionally the Court will speak of a "presumption" in a case that does not involve a presumption but merely an implicit legislative judgment. *See* Stanley v. Illinois, 405 U.S. 645, 650 (1972); Morrison v. California, 291 U.S. 82, 92-93 (1934); Allen, *supra* note 62, at 57-61.

Criminal cases: In Adams v. New York, 192 U.S. 585 (1904), a presumption that possession of a policy slip was knowing possession was upheld because "policy slips are property of an unusual character and not likely, particularly in large quantities, to be found in the possession of innocent parties." *Id.* at 599. The phrase "large quantities" referred to the evidence, which showed defendant possessed 3500 slips, but the quoted language as a whole ("property of an unusual character") shows a facial or general long-run consideration of the presumption.

In Bailey v. Alabama, 219 U.S. 219 (1911), a statute providing that failure of a person who enters an employment contract to perform the contract or to refund money or pay for

cases all test the device in question facially, with the exception of two

property obtained under the contract was "prima facie" evidence of fraud was held to violate the 13th amendment on its face. *Id.* at 239-45. A similar statute was voided facially in Taylor v. Georgia, 315 U.S. 25 (1942). In Pollock v. Williams, 322 U.S. 4 (1944), the Court held that a guilty plea did not waive the right to attack yet another similar presumption.

In McFarland v. American Sugar Co., 241 U.S. 79 (1916), a criminal presumption that a local refiner who systematically paid less for sugar within the state than he paid out of the state is a party to a monopoly or conspiracy in restraint of trade was struck down facially as having "no relation in experience to general facts." *Id.* at 86.

In Hawes v. Georgia, 258 U.S. 1 (1922), a presumption that a person in actual possession of premises on which a still is found has knowledge of the still was upheld. The Court pointed out that distilling is not an ordinary incident of a farm, and that in a prohibition state a still has an illicit character and is not so silent and obscure that one who rented a farm would probably be ignorant of it. The Court pointed to facts in the record, such as that the still was within 300 yards of defendant's house and that smoke rising from the still could have been seen from the house. Hence the presumption was likely being upheld as applied to the facts of the case. The reference to ordinary incidents of a farm also demonstrates an applied analysis, since there are premises, such as forest land, which would be less likely to support the deduction. The reference to a prohibition state is not an applied analysis because the Georgian statute could only be applied in Georgia.

In Yee Hem v. United States, 268 U.S. 178 (1925), opium for smoking was presumed to have been imported illegally, and possession of such opium was made sufficient evidence by statute to find that the possessor knew it was so imported. The Court found it "not an illogical inference that opium, found in this country more than four years (in the present case, more than fourteen years) after its importation had been prohibited, was unlawfully imported. . . . Legitimate possession, unless for medicinal use, is so highly improbable" that it is reasonable to put the burden of proof on the possessor of importation and knowledge. *Id.* at 184. As the Court did not rely upon the time period disclosed by the facts, but upon the period between the ban on importation and the effective date of the enacted presumption, the presumptions were examined on their face.

Cockrill v. California, 268 U.S. 258 (1925), upheld a presumption that property taken in the name of a person other than the alien who is to pay for it was taken with intent to avoid escheat under the Alien Land Law. The Court said the deduction is not fanciful, arbitrary, or unreasonable, without referring to the facts of the case. *Id.* at 261.

In Casey v. United States, 276 U.S. 413 (1928), a statute provided that the absence of tax stamps from narcotics is "prima facie" evidence the drugs were purchased not in or from an original stamped package. The law was upheld on the grounds of "rational connection" between the basic and presumed facts, and a possessor's superior access to evidence on the issue. *Id.* at 418. The Court did not rely on the facts of the case, that defendant, a lawyer, delivered morphine-soaked towels to jailed clients. The Court did say, however, that defendant "cannot complain of the statute except as it affects him." *Id.*

Manley v. Georgia, 279 U.S. 1 (1929), struck down a statute presuming that every bank insolvency is a fraud committed by the president and directors. The Court considered the deduction unreasonable without referring to the facts of the case. *Id.* at 7.

In Oyama v. California, 332 U.S. 633 (1948), the Court struck down a presumption that land recorded in a son's name is held for the benefit of the father if the father is ineligible for citizenship. The Court held that the equal protection clause was violated by the presumption, which petitioner had challenged "as it has been applied in this case." *Id.* at 635. The Court's examination of the device as applied was therefore compelled by the petitioner's position.

In Dombrowski v. Pfister, 380 U.S. 479 (1965), a criminal statute provided that citation of an organization by the United States attorney general, United States Subversive Activities Control Board, or a committee or subcommittee of Congress, as a Communist-front organization, is prima facie evidence of the truth of the characterization. The Court struck down the

criminal and two civil cases. But those decisions involved presumptions,

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statute on its face for failure to comply with procedural safeguards necessary to insure rationality.

In Cupp v. Naughten, 414 U.S. 141 (1973), a presumption that every witness speaks the truth was upheld in a criminal case without reference to the particulars of the case.

In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court struck down a "presumption" of malice aforethought from the fact of a homicide being intentional and unlawful; the rationale was not irrationality but impermissible shifting of the burden of proof to defendant. *See* Patterson v. New York, 432 U.S. 197, 215-16 (1977). *But see* Allen, *supra* note 62, at 57-61.

In Sandstrom v. Montana, 442 U.S. 510, the Court voided a presumption instruction that a person intends the ordinary consequences of his voluntary acts. The ground of invalidity was that the jury might have interpreted the instruction as creating either a "conclusive presumption" or a burden of persuasion-shifting presumption.

Civil cases: Note 59 *supra* discusses cases involving the presumption of regularity of tax sale proceedings.

In Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910), a presumption that damage caused by the running of a train is negligently inflicted, was upheld as applied to a derailment. *Id.* at 43-44.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), upheld a presumption that "makes proof of certain designated facts *prima facie* but not conclusive evidence of the common source of the waters and of the injurious effect of the pumping." *Id.* at 82. The Court upheld the presumption facially. *Id.* at 83.

In Luria v. United States, 231 U.S. 9 (1913), a presumption that a naturalized citizen who takes up permanent residence in another country within five years of naturalization did not intend to become a permanent citizen of the United States was facially upheld: "five years . . . seems long, [but not] excessive or unreasonable." *Id.* at 27. The Court also noted that the intervening time on the facts of the case was short, and as "so construed, we think the provision is not in excess of the power of Congress." *Id.*

In Hawkins v. Bleakly, 243 U.S. 210 (1917), a presumption that an employer who has rejected a workers' compensation plan is the negligent cause of his employee's injury at work was held facially "not reasonable." *Id.* at 213-14.

In James-Dickenson Co. v. Harry, 273 U.S. 119 (1927), a presumption that a promise involving real estate or stock which was not complied with was fraudulently made was upheld as rational on its face.

In Ferry v. Ramsey, 277 U.S. 88 (1928), a statute providing that bank directors of an insolvent or failing bank that accepts deposits prima facie know of and assent to those deposits was facially upheld because the legislature could have made the directors liable to depositors in every case where a bank accepts deposits while insolvent. *Id.* at 94.

In Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929), a presumption that a railroad is negligent if it causes damage was struck down in a collision case because "[t]he mere fact of collision . . . furnishes no basis for any inference as to . . . negligence . . . ." *Id.* at 642-43. This is "as applied" language.

In Bandini Co. v. Superior Court, 284 U.S. 8 (1931), a statute providing that release of natural gas is prima facie unreasonable waste was upheld because of the "manifest connection" between the basic and presumed facts "in the present case," the Court making no reference in this portion of its opinion to the facts of the case. *Id.* at 18-19. As the sentences prior to the words "in the present case" discussed the general rules of validity of presumptions, "in the present case" probably was a reference to the statute, not the facts, so the presumption was passed upon facially.

In Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933), a presumption that illegal failure to ring a train bell is the proximate cause of any collision and injury at a railroad crossing was facially upheld. *Id.* at 508-09.

In Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944), a presumption of abandonment

and do not support the *Allen* Court's claim that inferences are tested as applied.

The "Presumption" Cases

The *Allen* Court cited four precedents as involving presumptions, and therefore facial validity. The cases indeed tested devices on their face, but the devices arguably were all instructed as inferences.

In *Tot v. United States*[71] the Court struck down a statute which provided that possession of a firearm or ammunition by one who had been convicted of a crime of violence or was a fugitive was presumptive evidence that the possessed item had been received in interstate commerce.[72] The record shows the trial judge read the statute to the jury, referred to it as a presumption, and spoke of whether defendant's evidence "met" the presumption. Crucially, though, the judge added that "you must determine whether or not that presumption plus the other evidence" was sufficient to establish that the firearm was received in commerce.[73] The Supreme Court called the device a presumption but also said the jury was free to act on the statute.[74]

Probably the jury would not understand the trial judge's confused charge, but the Court seemingly classified the statute as an inference,

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of bank deposits after various periods of inactivity in accounts was upheld as not being without "support in experience." *Id.* at 241.

In Kennedy v. Mendoza-Martinez, 372 U.S. 144, 201 (1963), Justice Harlan, dissenting, reached an issue not considered by the Court, and said "we are concerned here only with the presumption [that failure to comply with compulsory military service laws shows that departure from this country was for the purpose of evading service] as applied in *this* instance. . . . [I]t is no answer to suggest that in *other* instances application of the presumption might be unconstitutional." No reasons or authority for this proposition were offered.

In Adler v. Board of Educ., 342 U.S. 485 (1952), a rule that membership in an organization which advocates forcible overthrow of the government shall be prima facie evidence that the member so advocates was upheld because the " 'generality of experience' [did not point] to a different conclusion." *Id.* at 495.

In Keyishian v. Board of Regents, 385 U.S. 589 (1967), a statute providing that Communist Party membership is prima facie evidence of advocacy of forceful overthrow of the government was held to "suffer from impermissible overbreadth" under the first amendment. *Id.* at 609.

Lavine v. Milne, 424 U.S. 577 (1976), facially upheld a presumption that an applicant for welfare who files within 75 days of quitting his job quit in order to obtain welfare benefits.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), facially upheld presumptions that a coalminer with ten years' employment who has contracted pneumoconiosis got the disease from employment, and that a coalminer who dies from a respiratory disease died from pneumoconiosis. *Id.* at 28-30.

Vance v. Terrazas, 444 U.S. 252 (1980), facially upheld a presumption that an act of expatriation is done voluntarily.

71 319 U.S. 463 (1943).

72 15 U.S.C. § 902(f) (1938) (repealed 1968).

73 Record at 40, 41, 43, Tot v. United States, 319 U.S. 463 (1943).

74 319 U.S. at 466-67.

since it referred to the jury's "freedom." Justice Roberts held the statute invalid for being inconsistent with experience. He did not attempt to bolster the statutory deduction by using the trial evidence, but the evidence was not particularly helpful to the Government in any case.[75] Roberts referred to "common experience," the "circumstances of life as we know them," and "mere possession."[76] This is the language of generalization, so the Court clearly was examining the device on its face.

In *United States v. Romano*[77] the Court struck down a statute which deemed evidence that defendant was at the site of an illegal still to be sufficient to authorize conviction for possession, custody, or control of the still.[78] (The statute excepted defendants who explain their presence "to the satisfication of the jury;" this common proviso will be discussed below.[79]) The jury was told the difference between an inference and a presumption, and the judge read the statute, including its caption: "Presumptions—Unregistered Stills."[80] The Supreme Court called the device an inference, stating that the jury may have disbelieved the other evidence of possession and given the instruction "considerable weight."[81] The Court's characterization seems correct, given the key word in the instruction "authorize." It is possible a jury would think they *must* do that which they are "authorized" to do, but the ordinary sense of the word tips the scales in favor of juror interpretation of the statute as permissive.[82] Certainly the judge did not say the jury *must* convict if presence is proven, absent a satisfactory explanation.

Writing for the Court, Justice White discussed the significance of presence at a still in general, without considering the particulars of the defendant's situation. Concluding that many individuals who serve functions requiring them to be present at a still do not possess or control the still, Justice White held the statute void. His approach was clearly facial.

In *Leary v. United States*[83] the Court struck down a statute authorizing conviction for transporting or concealing marijuana known to have been illegally imported, upon proof of possession of marijuana.[84] The

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75 One defendant purchased his gun in 1933 or 1934; it had been shipped interstate after being manufactured in 1919. *Id.* at 464-65. The other defendant possessed his gun in 1941; it had been manufactured prior to 1920, and some of his ammunition had been manufactured in Germany, while other ammunition was made in Ohio after 1934. *Id.* at 465.

76 *Id.* at 467-68.

77 382 U.S. 136 (1965).

78 I.R.C. § 5601(b)(1) (1954) (repealed 1976). *See also* § 5601(a)(1).

79 *See* note 105 & text following note 172 *infra*.

80 Record at 95, 100, United States v. Romano, 382 U.S. 136 (1965).

81 382 U.S. at 138-39.

82 *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 146 (3d ed. 1971).

83 395 U.S. 6 (1969).

84 21 U.S.C. § 176(a) (1956) (repealed 1970).

trial judge had read and paraphrased the statute for the jury.[85] Justice Harlan, writing for the Court, termed the statute a presumption, but he seemingly used that term to refer to devices which authorize inferences,[86] and the Court in a subsequent case read *Leary* as involving an inference.[87] If the *Romano* analysis above is correct as to what "authorize" means to a jury, then this characterization is accurate.

Justice Harlan, in *Leary*, said that he would consider the validity of the statute "in the circumstances of this case."[88] This is validity-as-applied language. But Justice Harlan surveyed what a majority of marijuana possessors have learned of the foreign origin of their marijuana.[89] After examining the data, Justice Harlan found that a "significant percentage" of the drug in America may not have been imported, so that it could no longer be postulated that possessors are even roughly aware of the proportion actually imported.[90] This, of course, is a general, or facial, analysis of validity. The statutory deduction was held void because it was not more likely true than false, without reference to the facts of the case.[91]

Finally, in *Turner v. United States*[92] the Court upheld a *Leary*-type statute regarding heroin but struck it down as to cocaine.[93] (As in *Romano*, the *Leary* and *Turner* statutes contained exceptions for defendants who produce "satisfactory explanations.") The trial judge read the statute to the jury and referred to it as a presumption.[94] The Court called the statute an inference (again, a reasonable characterization considering the statutory term "authorize") and said that the jury was obligated by the instructions to assess for itself the weight, if any, to be accorded the statutory deduction.[95]

How was the statute reviewed—facially or as applied? Justice White's opinion for the Court contains ambiguous statements in the abstract, so it is best to concentrate on what he did.[96] Examination of the

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85 Appendix 97a-98a, 103a-04a, Leary v. United States, 395 U.S. 6.

86 395 U.S. at 29, 31, 32-33 n.56.

87 Turner v. United States, 396 U.S. 398, 403 (1970).

88 395 U.S. at 29.

89 *Id.* at 52.

90 *Id.* at 46.

91 *Id.* at 36 & n.4. One theory of guilt submitted to the jury was the inference plus the evidence that the defendant had transported the marijuana from New York to Texas. *Id.* at 31.

92 396 U.S. 398 (1970).

93 21 U.S.C. § 174 (1964) (repealed 1970).

94 Record at 15, 16, 21, Turner v. United States, 396 U.S. 398 (1970).

95 396 U.S. at 407.

96 Justice White said that the jury might have used its own knowledge, or lacking information, may have convicted in reliance on the inference, perhaps reasoning that the statute represented an official determination. *Id.* at 407. If the jury used its own knowledge or accepted the statute as "official," then the evidence could not have played a role and the review

data showed that heroin in this country is almost beyond question imported. This is facial, since there was no data introduced at trial. But Justice White also pointed to Turner as doubtlessly knowing his heroin was imported because sellers are in a class apart.[97] Turner had been caught with 275 glassine envelopes of heroin, so this seems to be validity-as-applied to the facts of the case. Justice White did not explain how the jury could use Turner's expertise. While Turner's status as a seller appeared from the evidence, nothing of his knowledge of a fact not in evidence (importation) could be deduced by jurors. In no *Allen* sense then was the inference justified as applied, that is, by examining the sufficiency of the evidence, as jurors would, to see if the verdict could be reached without accepting the instructions in the abstract. Moreover, Justice White upheld the inference as applied to users who frequently purchase heroin at retail, as they also would know the source of heroin.[98] Nearly all possessors of heroin are either sellers or frequent users, so Justice White virtually had exhausted the range of possible applications of the statute—another way of upholding the statute on its face.

The Court next turned to Turner's conviction for knowing possession of imported cocaine. Importantly, neither the *Turner* nor *Allen* Courts considered that testing the statute separately for heroin and for cocaine implied that the statute was being tested as applied. The trial judge had told the jury that the statutory term "narcotic drugs" covers heroin and cocaine; thus no opportunity arose for the jury to apply the statute to each drug and determine whether the inference was justified depending upon the drug in question.[99]

Because this country legally produces more cocaine than is smuggled in, and because enough of the domestic product is stolen to dispel

would thus be facial. But Justice White also said "the question on review is the sufficiency of the evidence." *Id.* This sounds like a validity-as-applied analysis. But he added to the last quote, "the soundness of inferring guilt from proof of possession alone." *Id.* This sounds like facial validity again.

97 *Id.* at 416.

98 *Id.* at 417 n.33.

99 The trial judge charged that heroin and cocaine were narcotic drugs within the statute. Record at 14, 17, Turner v. United States, 396 U.S. 398. The jury thus was presented with two inferences, one in terms of heroin and one about cocaine, just as if separate statutes were being used in two trials. The trial judge's interpretation of the statute with resultant bifurcation into two inferences logically and chronologically preceded any "application" of the instructions by the factfinder. In determining the statute's validity, given this bifurcated instruction, a reviewing court would have to premise that the inference is triggered by both heroin and cocaine *eo nomine*, not that it is triggered by "narcotic drugs" and might therefore be valid as applied to for example, heroin but not to cocaine. Constructions of a statute become the terms of the statute itself for constitutional purposes. *See* Terminiello v. Chicago, 337 U.S. 1 (1949); Stromberg v. California, 283 U.S. 359 (1931). Therefore, if the statute were struck down because it is irrational when cocaine is being considered, that would be striking it down facially, not as applied.

any conclusion that a possessor probably knows his cache has been imported, the inference as to cocaine was voided. This analysis is undoubtedly facial, but significantly Justice White did not reject the government's argument that the inference might be valid for possessors of much larger amounts than Turner. By leaving this possibility open,[100] Justice White arguably voided the inference only as applied to small possessors. Still the inescapable conclusion is that a jury would not know of a large possessor's expertise on the source of large amounts of cocaine, absent evidence, not simply of large possession, but of the origin of large amounts. As the government's argument for large possessors did not include a possible showing of the origin of large amounts at trial, again the inference in a "large" case would depend upon facts extraneous to the evidence, not upon an *Allen* jury evaluation of the evidence.

The "Inference" Cases

The *Allen* Court cited three decisions as involving inferences, and therefore testing validity only as applied. The cases do indeed deal with inferences, but all were tested on their face.

In *Barnes v. United States*[101] the Court upheld a common law inference that from the fact of possession of recently stolen property the possessor knows that the property is stolen, absent a satisfactory explanation. Unlike the cases discussed previously, the inference here was charged in terms of the evidence—the instructions offered the deduction of knowledge in the "light of the surrounding circumstances shown by the evidence in the case," and pointed out that the longer the period of time elapsing between the theft and possession, the more doubtful the inference. But Justice Powell for the Court, after characterizing the device as an inference that juries may draw, performed the classical facial examination: he considered the history of the inference.[102] Even though the instruction incorporated the evidence by reference, the Court looked at the inference as a generalization.

Due process requires a testing in the light of present day experience, Justice Powell continued. He stated that on the basis of the evidence alone common sense and experience supported an inference of the defendant's guilty knowledge.[103] This sounds like a departure from the historical facial analysis, tending rather toward an application to the evidence. But since the prior thought had been of "present day experi-

100 396 U.S. at 418-19. Justice White found in "unnecessary" to deal with the argument. *Id.* at 419 n.39.

101 412 U.S. 837 (1973).

102 *Id.* at 838, 843-44, 846 n.11.

103 *Id.* at 845.

ence," the reference to the evidence at trial may be seen as an alternative holding to validity, that is, even without the inference the jury would have found scienter. This reading is reinforced by Powell's expression "on the basis of the evidence alone;" the word "alone" appears to distinguish this line of reasoning from one upholding the verdict on the basis of the instructed inference. Moreover, the evidence against Barnes was plentiful,[104] yet Powell said that the practical effect of the instruction shifted the burden of going forward to defendant.[105] Had Justice Powell viewed the inference not facially but as applied, he more naturally would have pointed to the inference *combined* with the evidence as shifting the burden to Barnes.[106]

Turner, discussed above, also had the misfortune of being convicted under a statute prohibiting purchasing, selling, dispensing, or distributing narcotic drugs except in or from the original stamped package.[107] The jury was read a statute which provided that the absence of stamps from possessed drugs shall be "prima facie" evidence of guilt of the possessor.[108] Once again the Court upheld the statute as to heroin but struck it down as to cocaine.[109]

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104 Barnes had opened a checking account pseudonymously a month before he endorsed four government checks made out to different individuals; these all bore forged prior endorsements to the pseudonym, some of which, an expert testified, were Barnes' handiwork. Barnes' out-of-court explanation for all this bordered on the preposterous. *Id.* at 838-39.

105 *Id.* at 846 n.11. Here Justice Powell was beginning to discuss the "satisfactory explanation" component of the inference, which tells the jury it may not infer culpability given a satisfactory explanation of the basic fact by defendant. This common phrase appears in *Romano*, *Leary*, *Turner* and *Gainey*, all discussed in text.

Arguably the "satisfactory explanation" component is redundant on the theory that a jury would not first draw the inference if they had a countervailing satisfactory explanation. *See* United States v. Johnson, 515 F.2d 730, 732-33 n.7 (7th Cir. 1975). This reasoning ignores the possibility that a universal inference might encourage the jury to convict on a generalization; having accepted a generalized inference, what might otherwise be a satisfactory explanation of defendant's conduct might not be convincing enough to cause rejection of the generalization. Also, the jury might not have required a satisfactory explanation to begin with had it not been afforded a generalized inference of guilt; it simply might not have inferred culpability from the evidence at the outset.

Does the fact that an instructed inference has a "satisfactory explanation" component—and therefore necessitates incorporation of the evidence—mean that such inferences are always judged as applied? Given the above analysis of the nonredundancy of that component, it would seem not.

106 Arguably the fact that the *Barnes* charge referred to the surrounding circumstances, meant that the instruction should have been reviewed as applied. But Justice Powell considered the history of the guilty-knowledge inference; he did not view the validity of the instruction as dependent upon the evidence in the case. Dissenting in *Allen*, Justice Powell wrote that the *Barnes* inference was "well founded in history, common sense, and experience, and therefore upheld . . . ." 442 U.S. at 172.

107 I.R.C. § 4704(a) (1954) (repealed 1970).

108 Turner v. United States, 396 U.S. at 402, 420; Record at 18, *id.*

109 This did not mean that the Court reviewed the statute as applied as the trial judge told the jury the statute covered heroin and cocaine. Record at 19, *id.*; *see* note 99 *supra*.

What a jury would make of the operative term "prima facie" is unknowable. Justice White called the device a presumption,[110] but also said the statute "authorize[s] an inference of guilt."[111] His and the *Allen* Court's characterization of the case as involving an inference can be accepted for purposes of testing *Allen*'s categorization of the precedents, for the device was tested on its face. Justice White first viewed the inference as playing no role in the case because of plentiful evidence of distribution of heroin.[112] Alternatively he assumed that the evidence did not show distribution, in which case the jury's use of the inference was assumed and had to be judged.

Justice White found the "bare fact" of possession of heroin insufficient to infer distribution or sale, so the inference could not be used for those acts.[113] The "bare fact," of course, is the language of facial validity. But, Justice White continued, the inference was not invalid as to purchase because undoubtedly possessors have purchased their heroin, and no one purchases from a stamped package, stamps for heroin not being issued by the government.[114] Here again Justice White was not relying on the evidence to uphold this deduction.

As for the cocaine count, enough cocaine is stolen from legal, stamped channels, to infer a high possibility that a possessor purchased from a stamped package. Hence, the cocaine inference was invalid. Again, as no trial evidence indicated the source of Turner's cocaine, Justice White examined the inference facially. He did look to the amount of cocaine Turner possessed in concluding that the inference was "critical" to the case.[115] He did this to demonstrate the necessity of passing upon the validity of the inference—not to determine the validity of the inference.

In *United States v. Gainey*[116] the Court held a jury could draw an inference of the operation of an illegal distilling business from mere presence at the site of a still.[117] The judge had charged that such presence was a circumstance to consider on guilt, but added that a statute provided that presence was itself sufficient to convict, absent a satisfactory explanation.[118]

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110 396 U.S. at 421, 424.

111 *Id.* at 400.

112 *Id.* at 420. Justice White's analysis should be compared with that in United States v. Allen discussed in text accompanying note 31 *supra*.

113 396 U.S. at 421.

114 *Id.* at 422.

115 *Id.* at 423.

116 380 U.S. 63 (1965).

117 I.R.C. § 5601(b); *see* I.R.C. § 5601(a)(4).

118 380 U.S. at 69-70. The *Allen* Court said the *Gainey* charge involved an inference because the judge had said presence was only a circumstance to be considered, whereas *Romano*,

Justice Stewart for the Court saw this authorization statute as allowing an inference.[119] Congress' purpose in enacting the device was to mediate a dispute among the courts of appeals as to what to tell the jury about the weight afforded to presence, and represented the legislative resolution in favor of including the inference in jury instructions.[120] The statute, Justice Stewart said, only confirms what the folklore teaches about persons near a still.[121] Justice Stewart's analysis was not about particular cases, but the general problem of presence—a classical facial analysis. He added Congress had merely accorded the evidence its natural probative force.[122] Surely Justice Stewart was not referring to the evidence in Gainey's case, where the defendant had driven up to the still in a swamp with darkened headlights and fled when confronted by revenue agents. Congress could not have been anticipating Gainey's misadventure. So Justice Stewart's analysis rigidly adhered to the face of the statute.

B. APPLICATION OF AN INFERENCE: A SQUARED CIRCLE

The *Allen* Court's test for validity of an instructed inference—application of the inference by determining the sufficiency of the trial evidence of one fact to prove the inferred fact—is based on a false model and avoids the constitutional problem presented by a given inference. This is so of the usual instructed inference, which is in general terms, not in terms of the evidence. In *Allen* the trial judge spoke about occupancy of an automobile, not occupancy as demonstrated by the evidence. The typical instructed inference is not meant to be applied, nor can it be applied.

Universals and Particulars

To appreciate why the nature of an instructed generalized inference makes its application an impossibility, it is necessary to consider the difference between universals and particulars.[123] Baseball, for example, can be discussed in terms of characteristics of the game and its plays

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discussed in text accompanying notes 77-82 *supra*, involved facial testing because the judge had said presence was sufficient evidence to convict. 442 U.S. at 158-59 n.16. Actually, the *Gainey* judge also charged presence was sufficient to convict, 380 U.S. at 69-70. Furthermore, such an instruction is not that of a presumption, requiring facial testing, but of an inference, because the trial judge in reading the statute stated that presence is sufficient to *authorize* conviction. *See* note 82 *supra*.

119 380 U.S. at 64.

120 *Id.* at 66.

121 *Id.* at 67-68.

122 *Id.* at 71 (quoting McNamara v. Henkel, 226 U.S. 520, 525 (1913)).

123 The discussion here is about language, not metaphysics, so no allegiance to theories reifying ideas is implied. *See generally* Woozley, *Universals*, 8 ENCYCLOPEDIA OF PHILOSOPHY 194, 203 (P. Edwards ed. 1972).

(the game is boring; this is how to execute a squeeze play), or in terms of examples (third game of last year's World Series, Maris' sixty-first home run). When a term is used generally, referring to a concept, the term is a universal; when the term refers to an example, it is a particular. The discussion of baseball in the general sense can proceed without reference to particular real or fictitious games, as in "baseball is slow-moving." A discussion in terms of particulars refers to concrete examples, as in "that double-play was almost balletic."

Rules of law are made of words. Their generality of purpose—the intended use of the rules in an infinite number of cases—shows that their terms are universal in nature.[124] Of course the rules are meant for application to particulars, the facts of cases. But the terms in the rules are not about a particular case, but all acts which fall within their sweep. Thus a burglary statute is not about entry without permission into the house at 142 Third Avenue, but about the concept of entry into premises without authority. Causes of action, crimes, defenses, and the rest of the legal galaxy are about ideas; how these ideas are used in trials is at the core of the *Allen* problem.

Take the application of a substantive rule: "If A, then B (a legal consequence)," where A is negligence and the consequence is liability for damages caused thereby. A is a concept, a universal, which the factfinder will be asked to apply to a particular—the defendant's conduct. To insure in some measure that the jury obeys the law, the trial judge will not send the case to it unless there is a possibly rational appraisal of the evidence that could lead to a conclusion of negligence. To further decrease the possibility of jury lawlessness, the judge will define negligence, ideally with the help of examples. The jury determines whether the evidence shows an example of negligence and returns its verdict without further ado once this determination is made. Finding or not finding negligence from the evidence is all that the jury did when it "applied" the substantive rule. The consequences of application of the rule proceed unassisted by the jury from the force of the rule itself, assuming that the jury obeyed its instructions.

Now compare the use of an inference rule, commonly instructed not in terms of the evidence but in terms of concepts. The judges in most of the cases considered said "If you find A, then you may infer B," not "From the evidence of A, you may infer B." A is occupancy of a gunladen car or presence at a still, a universal, not jury-determined presence in this case, a particular. It follows that B, possession of the gun or carrying on the business of a distiller, proceeds in the rule, not from the particular evidenced at trial, but from occupancy of a gunladen car or

124 *See* Wilson, *A Note on Fact and Law*, 26 MOD. L. REV. 609, 615 (1963).

presence at a still in general. An inference instruction invites the factfinder to proceed not from the evidence but, once having found that *A* is instanced in the evidence, from the universal, regardless of the peculiarities of the evidence. The instruction to the jury referred to the evidence only as a trigger for the option of the inference, not as a basis for exercising that option.

If the factfinder finds *A*, it has not finished working with the instructed inference. It must still exercise or reject the option to infer *B*. Various factors, including the evidence, may influence this choice. In exercising the option the jury is allowed by the instruction to draw *B* not from the evidence but from the concept of *A*. The reason this occurs with instructed inferences and not with other rules is that no other rules linger after finding a particular of the rule's universal in the evidence (with the exception of a presumption, which sets the jury to the task of determining if it has been rebutted). Yet more work remains in the case of an inference. By the terms of the rule as handed down by the courts or enacted by the legislature, and by the terms of typical instructions, that work is not tied to evaluation of the evidence but to the terms of the rule itself.

An instructed inference creates its own feedback, like a rule of renvoi:[125] the inference first refers the jury to the evidence to find *A* and then, if triggered by a finding of *A*, swoops the jury back up to *A* as a universal, whereupon the jury considers the option of deducing *B* therefrom. Noninference rules point the jury to a particular *A* and then, if triggered, sweep by the jury carrying through to the rule's consequences unassisted by the factfinder.

How Instructed Inferences Are Used

The *Allen* type of instructed inference is one instructed in terms of universals, not the evidence. Inferences instructed in terms of the evidence do, however, have impact upon jurors.[126] An analysis of universal inference instructions may also apply to particularized inference instructions. The *Allen* Court saw the universal instruction in that case as operating like a particularized instruction. An example shows the difference in action between the two: the task of determining if there are at least one hundred fifty potatoes in a sack. The taskmaster says:

> If you find at least one hundred potatoes, then, by consideration of the evidence—comparison of the bulk of the counted with the bulk of the uncounted spuds, and of the respective weights of those bulks, examination of the sack, etc.—you may conclude that there are one hundred fifty potatoes in the sack.

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125 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971).

126 This impact is examined principally in the text accompanying section V. B. *infra*.

Imagine having counted one hundred potatoes and thus being about to consider the potato evidence in light of this instruction. This is the *Allen* conception of what happened in that case.

But suppose the taskmaster suddenly says, "On second thought, if you find there are one hundred, you may conclude there are one hundred fifty." After hearing this, no one would weigh piles of potatoes. This latter instruction was actually given in *Allen*. It could pass constitutional muster under a facial validity test if the data show that ninety-eight percent of potato sacks containing at least one hundred potatoes in fact contain one hundred fifty. The *Allen* Court said that the data is irrelevant, however, so even if only two percent of the sacks containing one hundred contain as many as one hundred fifty, the Court would uphold the inference "as applied," providing only that there was a rational means, working with the sack, to find one hundred fifty. Of course there is—counting. But the jury might well not have counted. Thus, *Allen* holds that a reviewing court which acts as it thinks a jury should or might have acted should validate an inference which derails a jury from acting as it should, but under the inference did not, act.

Arguments that the counter is "presumptively rational"[127] or sincere miss the point. If befuddled, the counter will take a shortcut backed by the prestige of a judge or a potato taskmaster. The process of determining a man's guilt is not on the mechanical level of counting potatoes, but this argues as strongly for taking an authorized shortcut as it does for well-intentioned stabbing in the dark.

Does the *Allen* Court think that instructed inferences play any role in jury deliberations? The Court was silent, but the most tempting explanation to support the *Allen* holding is that the inference penetrates the facts of a case coating them with a power to imply further facts, as a freshly painted snake wriggling through a newspaper colors the pages. In this model, an inference is an expert witness who testifies about his field but does not give his opinion as to what happened in the case. The instruction is simply an indication of relevance and sufficiency. The jury may be puzzled about the relationship between defendant's occupancy of the gunladen car and possession. The inference educates the jurors to the fact that, in general, possession can be found from sufficiently suggestive occupancy and location of the gun. The jury hears this, sees the evidence in a new light, and decides whether the particulars of the case imply possession, thus "applying" the inference. If the evidence supports the jury's deduction, the inference is valid as applied.

The problem with this model is its dependence on an uneducated guess by the jurors as to the usage of the inference, thereby contradicting

127 County Court v. Allen, 442 U.S. at 157.

the hypothesis of the jury as a presumptively rational factfinder. Relevance instructions tell a jury that facts are significant, perhaps through presentation of the reason the facts are associated with other facts. Inference instructions tell a jury facts are sufficient, without giving reasons. When a judge points out relevance, he is offering advice about a problem but not a solution; when he instructs an inference, he is offering a solution, but no advice. No generalization about how many potatoes are in a sack can be evaluated by a jury to determine whether the particular sack is an instance of the general proposition. This holds true even if the instruction explicitly refers to the evidence, unless, as in the first potato instruction, a methodology of analyzing the evidence is afforded.[128]

An inference instruction says "if you find one thing exists, you can deduce that another thing exists." The "things" are understood by the listener, but not the "deduce." How is *B* found from *A*? The inference instruction doesn't say, and the boilerplate in the rest of the charge about considering all of the evidence, the state's burden of proof and the presumption of innocence—all old friends whom appellate judges frequently embrace to salvage a charge[129]—do not explain to a jury how to reject or accept the inference. The instructed inference is a tool without the accompanying instruction booklet. As it does not carry its own explanation, but merely its own conclusion, it does not have the power to enhance the deductive ability of the jury. The inference can only be taken in hand or not; it can not be used in conjunction with any other facet of the charge. The instruction affirms the validity of the inference;

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128 Wittgenstein's remarks on signposts are instructive:

> A rule stands there like a sign-post.—Does the sign-post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or the footpath or cross-country? But where is it said which way I am to follow it; whether in the direction of its finger or (e.g.) in the opposite one?—And if there were, not a single sign-post, but a chain of adjacent ones or of chalk marks on the ground—is there only *one* way of interpreting them?—So I can say, the sign-post does after all leave no room for doubt. Or rather: it sometimes leaves room for doubt and sometimes not. And now this is no longer a philosophical proposition, but an empirical one.

L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 85 (G. Anscombe trans. 1953). The more familiar we are with words and other signs and symbols, the more we tend to think their meaning visibly inheres in their being, like color. But of course every meaning and association had to be learned. Nothing about an arrow explains how to understand it; the direction had to be shown to any given signreader at one time in his life, even if only by natural association between the activity of pointing with the index finger and the configuration of the arrow. And the meaning of finger pointing also had to be learned from a context—accompanying words, activities, expressions of approval or disapproval. Whether one has learned a meaning is Wittgenstein's "empirical" proposition. An arrow, for example, could be interpreted as representing the locus of its reader at the point of the arrowhead, in which case the direction would be the opposite from the conventional interpretation.

129 *See, e.g.*, County Court v. Allen, 442 U.S. at 161-62.

it does not elucidate the process of inference. One might as well teach tapdancing by saying "if you stand, you can tapdance." Thus any use of the inference must consist of tracking the inference itself, that is, by going from the universal A to B. There is no lane for reasoned decision-making on this road. This was recognized over a century ago by the California Supreme Court:

> To say to the jury that they would be authorized to find a fact because of the existence of another, is but saying, in another form, that the existence of the latter raises the reasonable presumption of the existence of the former, since the jury can find the former only as a presumption from the existence of the latter. It is a very different thing from saying that one fact *tends to prove* another.[130]

Perhaps the jury needs no guidance in how B flows from A. If an inference only shows jurors *that*, jurors' intelligence, common sense, and experience will show them *how*.[131] But if the jury can devise its own methods for recognizing that a given case of occupancy implies possession, then the argument contradicts the model of the inference as expert guidance: to tell jurors that in general (or on the evidence of this case) occupancy and possession are associated would be pointless superfluity. The *Allen* Court does not explain why instructed inferences have been created if all they do is tell the jury what it knows. If the Court thinks that the inference does not tell the jury anything, but only encourages them to reach a result, then the Court mischaracterized the jury as "free to credit or reject the inference."[132] A lawyer's procedural freedom is not the kind of freedom that is relevant here: lack of judicial pressure or incitement. The Court said years ago: "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable."[133] To think the jurors function in a pristine manner after having heard the judge charge an inference, even one that incorporates the evidence, is naive. But the universal inference is worse: it encourages the jurors to reach a conclusion blindly.

Focusing on the inference as expert witness, some instructions do transmit expertise, but expert knowledge, not expert ability. The *Turner* importation of heroin inference is illustrative. In that case the judge told the jury that possession of heroin authorizes a finding that the heroin was imported and that the possessor knew it. Nothing in the evidence allowed the jurors to evaluate the accuracy of the generalization that

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130 Stone v. Geyser Quicksilver Mining Co., 52 Cal. 315, 318-19 (1877).

131 *See* G. RYLE, THE CONCEPT OF MIND 27-32 (1949) (distinction between knowing how and knowing that).

132 442 U.S. at 157.

133 Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944).

heroin comes from abroad. The *Allen* Court saw this branch of *Turner* as a presumption, so the "application" analysis was inappropriate.[134] Justices Black and Douglas have argued forcefully that the use of an instruction on a presumption or an inference offends the Constitution by introducing unsworn "testimony."[135] The concern here is whether the *Allen* inference, which involves the comparatively commonplace—car riders and their possession of the objects in the car—can operate any differently from the esoteric *Turner* inference. If the *Allen* inference is no more useable by juries than the *Turner* inference, then the Court's model of the *Allen* jury as reasoning beings, as distinguished from the *Turner* jury as being forced to accept a presumption, is fallacious.

If a juror can reason from the facts of *Allen* to a conclusion, then, as shown above, the inference is superfluous. If the jury cannot so reason, the inference does not help it to do so. If the inference is taken to be an expert on guns and cars, the jury is free to accept or reject it as a source of facts. But an expert witness is subject to cross-examination and opposing witnesses. By contrast, the judge instructing an inference is not answerable for his statements. The existence of (but not the right to call)[136] witnesses to the probability of possession by occupants in general is problematic, and attorneys cannot in their summations counter the instructed inference as a possible truth because it is the law. Presumably defense counsel could not argue to the jury that the anticipated instruction is wrong in general, or even that it could not possibly follow in the case on trial. Of course, he could argue why they should not draw the inference, but his argument is followed by the judge saying—without giving reasons—that the inference *is* possible. True, the judge also charges that jurors can credit or discredit expert witnesses, but those are people, hence obviously fallible. When the judge charges the inference, he does not state it is infallible, but does present a generalization obviously endorsed by the law, and gives no reason to reject it other than the jury's consideration of "all of the evidence." Why should the jury reject what the law has seemingly found generally accurate? Even evidence tending to show that defendant did not possess the gun hardly qualifies as expert evidence against the inference, because such evidence does not disprove the long-run accuracy of the generalization, and especially not in the one trial in which the jury has heard the inference charged despite the receipt of such evidence.[137]

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134 442 U.S. at 157-58.

135 *See* note 63 *supra*.

136 *See* Turner v. United States, 396 U.S. 398, 409 (1970).

137 *Allen* itself involved acquittal for items in the trunk of the car despite the instruction of the inference, but the verdict could have been the result of compromise, as the Chief Justice opined. 442 U.S. at 167 (concurring opinion).

Although the *Allen* Court offered no explanation of how an inference operates, the majority did say that the jury, being free to draw or not to draw the inference as it saw fit, must be deemed to have made a rational choice when the evidence is sufficient to support a finding of the inferred fact. It is as if the evidence is a governor on the use of the inference.[138] That the evidence is a governor does not preclude use of the instruction as a generalization apart from the particularities of the evidence. Suppose a jury were told that, if a golf ball is known to be at least partially white, it may infer the ball is entirely white. Now a juror could conclude on the basis of evidence that a partially visible ball looked white that the ball was entirely white as a matter of experience and common sense. Still, another juror could have his doubts. Turning to the instructed inference, the doubting juror could resolve his puzzlement merely on the ground that the judge has furnished him with a generalization. This juror uses the generalization, not the highly probative evidence, to reach this conclusion.

The Court's validation of the inference depends upon whether it finds sufficient evidence to reach the inferred fact rationally. Appellate review of sufficiency of the evidence normally assumes that the jury has squeezed the evidence dry.[139] This assumption is grounded in administrative and policy considerations, not a belief of judges that juries actually evaluate the evidence in the light most favorable to the verdict winner. There is simply no other assumption to make, given the secret nature and the sovereignty of the jury deliberations, and the impossibility of applying any other assumption. Why should the hypothesis of the "efficient" jury prevail when the trial judge has commented on the evidence by instructing an inference? That the jury followed the suggestion in the instruction is as probable as that it independently evaluated the evidence. It is not that the jury had no choice whether to infer. The problem is not that the jury accepts the invitation of the instruction in

138 The court is not clear whether the evidence it measures when determining the validity of the inference as applied is all the evidence pointing toward the inferred fact, or just the evidence of the basic fact in the instructed inference. The Court spoke of "the connection permitted by the inference" under the facts of the case, *id.* at 157, in its general discussion of presumptions versus inferences. But when it passed upon the validity of the *Allen* inference, the Court referred to evidence of a knife carried by the owner of the handbag to show the rationality of deducing that she was not the sole custodian of the guns. *Id.* at 164. This knife is not a constituent of the basic facts of occupancy of a gunladen car. One could stretch a bit and fit the knife into the basic fact of "occupancy," as in "occupancy of a car in that the defendant sat in a car near a girl with a knife."

If the Court actually intended that evidence other than that proving the predicate facts can be taken into account in passing on the validity of the inference, then it is virtually impossible to determine what the Court believes is the operation of the instructed inference.

139 *See, e.g.*, United States v. Tutino, 269 F.2d 488, 490 (2d Cir. 1959) (take the evidence in the view most favorable to the government when defendant challenges sufficiency to convict).

the face of unpersuasive evidence, but that the jury might shirk its duty to evaluate the evidence given the instruction. Rather than being a governor on the use of the inference, the evidence might merely conspire against blind use of the inference, with the problematic chance of success typical of conspiracies. If the *Allen* Court was implying that the jury's intelligence is the principal brake on indiscriminate use of an instructed inference, then the Court has made the jury, not the judges, the arbiters of the validity of such instructions.

C. FACIAL VALIDITY OF CRIMINAL INFERENCES AS AN INESCAPABLE ISSUE

Paradoxically, the more irrational the instructed inference is, the less likely it is to cause harm, as the jurors will tend to see it for an absurdity and ignore it. The seductive inference, however, such as the gun-in-the-car, cries out for professional confirmation (as is required of presumptions) lest defendants be convicted for being at the scene of a crime. If the analysis above on the operation of inferences is incorrect, still nobody knows for sure how they work, so the hypothesis should be that they can exert control over juries. Facial validity is a requirement, then, for rational criminal procedure.

The Supreme Court has not enunciated a unified theory of facial validity—why that issue is reached in some cases and not in others. That constitutional questions should be avoided is fundamental constitutional jurisprudence. A corollary of this doctrine is to decide unavoidable constitutional questions on the narrowest possible grounds.[140] Yet since *Marbury v. Madison*,[141] the court has held statutes to be "void," despite the inevitably present narrower ground of decision that the statute is unconstitutional as applied.[142] There are pockets of constitutional law, first amendment overbreadth,[143] and void-for-vagueness[144] which doctrinally require that the facial validity of statutes be passed upon. Yet the Court has considered facial attacks based upon grounds which do not involve the face of the statute.[145]

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[140] *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

[141] 5 U.S. (1 Cranch) 137, 180 (1803).

[142] If a statute is the expression of a universal rule, then Chief Justice Marshall was correct in *Marbury* as a matter of formal logic. Universal propositions are logically invalidated by a single disconfirming instance; one black swan voids "all swans are white."

[143] *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970).

[144] *See* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 96-97, 109 n.224 (1960).

[145] *See, e.g.*, Mackey v. Montrym, 443 U.S. 1 (1979); Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 439 (1977); United States v. Jackson, 390 U.S. 570 (1968); Berger v. New York, 388 U.S. 41, 64 (1967); New York v. O'Neill, 359 U.S. 1, 8 (1959); Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940); Great N. Ry. v. Washington, 300 U.S. 154, 161-62

A holding that a statute is unconstitutional on its face implies that the statute can be allowed effect in no case, as applied to any facts.[146] A holding that a statute is unconstitutional as applied implies that the conduct disclosed by the facts of the case is protected from the consequences which the statute would attach to that conduct.[147] Holdings of facial and applied validity *vel non* have in common the fashioning of a constitutional rule with the following structure: "If *A*, then legal consequences (liability, criminality, subjection to judicial jurisdiction, etc.) (may) (may not) follow." In facial holdings, *A* represents the terms of the statute; in applied holdings, *A* represents the facts of the case. A complete collection of these rules, as garnered from all decisions, past and future, comprises that "legal code" Justice Marshall did not find explicit in the Constitution.[148]

A constitutional rule on the facial validity of an instructed inference has this structure: "If 'if *A*, then *B*,' (is) (is not) (beyond a reasonable doubt, or some lesser standard) true, then the jury (may) (may not)

(1937); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Wuchter v. Pizzutti, 276 U.S. 13 (1928); James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1875).

146 Steffel v. Thompson, 415 U.S. 452, 474 (1974); *see* United States v. Realty Co., 163 U.S. 427, 439 (1896). *See also* 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2.06 (C. Sands rev. 1972). *Compare* Pollock v. Williams, 322 U.S. 4 (1944) (guilty plea under facially invalid statute is void), *with* Brady v. United States, 397 U.S. 742 (1970) (plea is valid). Oddly, the Court once held a statute to be facially void and then proceeded to decide if it was valid as applied. Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964).

A holding that a statute is unconstitutional as construed is a category of facial invalidity, because the interpretation of a statute, whether by appellate court, *see* Stromberg v. California, 283 U.S. 359 (1931), or by trial judge instructing the jury, *see* Terminiello v. Chicago, 337 U.S. 1 (1949), is functionally equivalent to the words of the statute themselves.

147 *See* Spence v. Washington, 418 U.S. 405, 415 (1974) (per curiam) Boddie v. Connecticut, 401 U.S. 371, 379 (1971); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 590-91 (2d ed. 1973).

The role a statute plays in a holding of void-as-applied is one of exemplification: the statute stands in for all possible rules that sweep in the protected conduct and attach similar consequences. *Cf.* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 531 (1st ed. 1953) (discussing the importance of the particular facts as found in determining as-applied invalidity). This generalization may seem too much to accept for cases in which constitutionality is challenged, not as violative of the Bill of Rights, but because the statute was enacted without authority, that is, outside of Congress's Article I powers or outside a state's subject matter jurisdiction, or in cases where the statute conflicts with judicial subject jurisdictional limits as in *Marbury* itself. The generalization that the conduct is held protected when a statute is voided as applied can be saved in these cases by construing the Constitution to protect the actor (sometimes, as in *Marbury*, an agency of government such as the Supreme Court) from being compelled to engage in the particular conduct by the legislating body in question. In this way even *Marbury* may be interpreted as a holding of invalidity as applied: the Supreme Court cannot be compelled to issue a mandamus in cases not affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. This analysis avoids reaching the broader, if practically equivalent, question of the facial validity of a statute authorizing the Court to issue writs of mandamus to persons holding office under the authority of the United States.

148 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

be told 'if A is found, then B may be found.' " If the suppositions of this article on the use of inferences by juries are also true for judges, then the rule could be expanded to encompass judges as factfinders.

The structure of the *Allen* rule on the constitutionality of inferences is: "If B (can) (can not) be rationally deduced as more likely than not true from the evidence of A,[149] then the jury (may) (may not) be told 'if A is found, then B may be found.' "

My disagreement with the *Allen* holding is based in part on a belief that every use of an inference instructed in universal terms entails an assertion by the trial judge that may or may not be correct on the facts of the case. The evidence may lead the judge to think that use of the inference is appropriate (or he may have no choice if instructing on the inference is required by statute), but what evidence will be credited by the jury is unknowable at the time of the instruction so the accuracy of the universal assertion in the instruction is not an optional inquiry. The judge instructs the jury not to use the inference unless they find the basic fact, but if the basic fact is not sufficient to infer the ultimate fact in most instances—something the *Allen* court said was immaterial—then the verdict might rest upon an irrational inference. Similarly, if a universal inference is used to find sufficient evidence to send a case to the jury, it should also be facially tested.

The wisdom of using universal inferences does not follow from facial validity. The jury is still being encouraged to decide the case on a generalization,[150] rather than on particulars.[151] If universal inferences are tested facially and not as applied it does not follow that the defendant will be afforded less protection than under *Allen*. The law of sufficiency of evidence and the constitutional standard of reasonable doubt[152] insure sufficient evidence to send the case to the jury. Also, a defendant should always be able to claim that a presumption or an in-

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149 *See* note 138 *supra*.

150 Characteristically indignant, Jeremy Bentham railed against presumptions, finding the "probative force of circumstantial evidence, no fit subject for general rules." Bentham, *Rationale of Judicial Evidence*, c. xii, § 11 (1827), in 6 WORKS OF JEREMY BENTHAM 50 (J. Bowring ed. Edinburgh 1843). Bentham argued that resulting "mischiefs" were (1) the use of the rule only because the judge thinks the jury will not draw his conclusion, hence each use of a presumption entails an incorrectly decided case (observe that it is irrelevant to this argument that a presumption may be required by the legislature), (2) a presumption originates non-rigorously in judicial experience and is subsequently used in cases in which the presumed fact is even less well-founded, resulting in "an aggregate mass of pernicious error" and (3) jurors "rights" are violated. *Id.* at 51-52. Bentham saw mistaken *ad hoc* inferences by jurors dying with the case, but mistaken presumptions created by judges formalizing a "course of error." Presumptions to him were made rebuttable or conclusive according to whim. *Id.* at 53. His arguments apply to instructed universal inferences.

151 A proposal for an instruction in particulars appears in text accompanying note 174 *infra*.

152 *See* Jackson v. Virginia, 443 U.S. 307 (1979).

ference was unconstitutional as applied, meaning that it was instructed in a case in which a rational juror could not find that fact *A* exists. As for inferences instructed in particulars by referring not to *A* but to the evidence at trial of *A*, those should be tested by the *Allen* doctrine of applied validity. Facial validity of such inferences is academic because by their terms they encompass no cases except those precisely like the case at bar, and properly enunciated, they communicate that fact to the jurors. If they are rational in the one case, they are rational in all exactly similar cases.

The *Allen* Court's doctrinal error was viewing defendants in that case as seeking to assert the rights of others. But statutes have been held facially void without reliance on the rights of nonparties.[153] If a rule operates the same way in every case—as instructed universal inferences potentially do—the rule is simply valid or not regardless of the facts of the case. Even the *Allen* Court recognized this in the case of presumptions.

V. THE QUINTESSENCE OF INEERENCE INSTRUCTIONS

> Now what is the difference between the report or statement "Five slabs" and the order "Five slabs!"?—Well, it is the part which uttering these words plays in the language game. No doubt the tone of voice and the look with which they are uttered, and much else besides, will also be different. But we could also imagine the tone's being the same—for an order and a report can be spoken in a *variety* of tones of voice and with various expressions of face—the difference being only in the application.
>
> Wittgenstein[154]

> When the court says that a certain inference may be drawn from certain facts, if proven, most juries would understand the instruction as meaning that it was their duty to draw such inference.
>
> Supreme Court of Illinois, 1872[155]

> It is true that the instruction only says that the facts stated authorized a verdict for the defendant; yet that, coming from the court as an instruction, would be understood as a declaration of law that, from certain facts, a certain conclusion must be drawn.
>
> Supreme Court of Missouri, 1854[156]

The Supreme Court in *County Court v. Allen* saw jury instructions as only "generally" controlling on the question of what type of deduction device—presumption or inference—was involved in a given case.[157] A few weeks later, however, the Court recognized in *Sandstrom v. Montana* that constitutional issues revolving around deduction devices depend

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153 *See* note 145 *supra*.

154 L. WITTGENSTEIN, *supra* note 128, at ¶ 21.

155 Herkelrath v. Stookey, 63 Ill. 486, 488 (1872).

156 Glover's Admin. v. Duhle, 19 Mo. 360, 361 (1854).

157 442 U.S. at 157-58 n.16.

completely on the way in which a "reasonable juror could have interpreted the instruction."[158] *Sandstrom* is much closer to the truth than is *Allen*. In *Allen* the Court said that the interpretation of the instructions in a given case "may require recourse to the statute involved and the cases decided under it."[159] But if all the jury hears is the instructions and does not read the statute and the cases interpreting it, how else can presumptions and inferences be analyzed other than by how a typical juror understands the instructions?

This section will therefore examine inference instructions as a juror would. While statutes and appellate cases may tell trial judges what the substance of the instructions should be, the essential form of inference instructions is limited for analytical purposes to two alternatives: universals, which do not refer to the evidence, and particulars, which do refer to the evidence as a premise for the deduction offered by the instruction.

A. THE *ALLEN* CHARGE

When jurors receive instructions, their self-image takes on a distinctive coloration of receptivity.[160] Besides the magic of the law's authority, the jury will likely feel beholden to and hence anxious to please the giver of the instructions, a kindly father or motherfigure, powerful, wise, and the only participant in the trial with the jurors' interests at heart. Their perception accounts for reversals for instructions that are explicitly revelatory of the judge's opinion, even though he cautioned that the jurors are the sole judges of the facts.[161]

What a judge says carries persuasive power.[162] He even has the power, according to the Supreme Court, to cause jurors to disregard facts.[163] In an inference instruction, the judge says "you *may* deduce," but this suggestion comes from The Judge. Even if the inference is presented explicitly as an alternative—"you may but need not"[164]—it is not as if the judge has said nothing at all. He still has unleashed a possibility of deduction backed by his own and the law's prestige. Literally neutral statements, such as "you will [accurately] recall that witness W

158 442 U.S. 510, 514 (1979).

159 442 U.S. at 157-58 n.16.

160 *Cf.* Head, *Confessions of a Juror*, 44 F.R.D. 330, 332 (1967).

161 *See, e.g.*, United States v. Woods, 252 F.2d 334 (2d Cir. 1958); Sullivan v. United States, 178 F.2d 723 (D.C. Cir. 1949).

162 *See* Gordon & Temerlin, *Forensic Psychology: The Judge and the Jury*, 52 JUD. 328 (1969); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266 (1975).

163 *See* Lakeside v. Oregon, 435 U.S. 333 (1978). *Cf.* Quercia v. United States, 289 U.S. 466, 470 (1933) (judge's lightest word or intimation may prove controlling on jury).

164 *See* United States v. Crespo, 422 F.2d 718, 721-22 (2d Cir. 1970).

testified to X," call special attention to their subject because uttered by the judge. This is not much less than a suggestion to draw the inference in "if you find *A*, then you may conclude *B*."[165] And a "helpful" and easily utilizable suggestion like that stands out starkly against the rest of the charge, uselessly obscure or trivially commonsensical snatches of an impenetrable lecture.

The inference instructions in *Allen* used the word "presumption," or a variant, twelve times.[166] "Presumption" in ordinary language means an assumption, something believed without proof.[167] The trial judge called the "presumption" an "element of proof," clothed it with the authority of "Our Penal Law," and spoke of a seeming need for rebuttal, even if only from a lack of evidence. Yet the judge once used the words "you may infer and draw conclusions," and thereby, to the Supreme Court, charged an inference and not a presumption. The Court said that "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 . . . ."[168] But even if this is true, instructions did not even hint that the jury should not decide the case on the Penal Law generalization based

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165 *Cf.* R. SUTLIFFE, IMPRESSIONS OF AN AVERAGE JURYMAN 41 (1931) ("some judges dwell so pointedly upon the facts in a case that only a juror mentally blind could fail to see the points in His Honor's mind . . . .").

166 The instruction was as follows:

> Our Penal Law also provides that the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.
>
> In other words, those presumptions or this latter presumption upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found. The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced.
>
> . . .
>
> To establish the unlawful possession of the weapons, again the People relied upon the presumption and, in addition thereto, the testimony of Anderson and Lemmons who testified in their case in chief.
>
> . . .
>
> Accordingly, you would be warranted in returning a verdict of guilty against the defendants or defendant if you find the defendants or defendant was in possession of a machine gun and the other weapons and that the fact of possession was proven to you by the People beyond a reasonable doubt, and an element of such proof is the reasonable presumption of illegal possession of a machine gun or the presumption of illegal possession of firearms, as I have just before explained to you.
>
> . . .
>
> The presumption or presumptions which I discussed with the jury relative to the drugs or weapons in this case need not be rebutted by affirmative proof or affirmative evidence but may be rebutted by an evidence or lack of evidence in this case.

442 U.S. at 160-61 nn.19, 20.

167 Sandstrom v. Montana, 442 U.S. at 517.

168 442 U.S. at 162.

on occupancy, if the jurors did not find the evidence decisive one way or the other. The judge had charged that the deduction can be made "upon proof of the presence of the machine gun and the hand weapons" and could apply to "each of the defendants who occupied the automobile at the time when such instruments were found." The particularities of the case were entirely ignored in the charge on the inference, which was stated to be "the presence in an automobile of any machine gun or of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession."

Other portions of the charge, such as on the prosecutor's burden of proof, do not neutralize an instructed universal inference because boilerplate does not stand in opposition to the proffered generalization. This follows not only from the analytical separability of the instructed inference, but from the commonality of the source of all portions of the instruction—the trial judge. An instructed inference stands alone in the charge as a sufficient basis unto itself to determine a factual issue, even if instructed in terms of the evidence.

B. INFERENCE INSTRUCTIONS IN ORDINARY LANGUAGE

No matter how often or in how many ways the judge tells the jurors that they are the sole judges of the facts and that he has no opinion on the case (a lie so transparent that it is probably counterproductive) jurors might deduce that they would not be given the case if a guilty verdict was not authorized. An instruction on how to deduce guilt reinforces this deduction and in turn is galvanized by it. Whether the inference instruction is a generalization (universal) or explicitly incorporates the evidence (particular), it conveys a message that "this is the way to find guilt," and has an encouraging effect.

What follows below is a linguistic analysis of inference instructions heightened by a sensitivity to the nature of the judge-jury relationship, just as the Supreme Court has analyzed verbal conduct in terms of the policeman-civilian relationship.[169] The instruction under analysis is either universal or both universal and particular, as many of the points made apply to both forms.

Tautology

Proposition P is true or not true. This tautology is always "correct," not because of what it says about the world, but because of logic. As a logical truth, it is valid no matter what the contents of P are. "If you find

[169] *See* Rhode Island v. Innis, 100 S. Ct. 1682 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Miranda v. Arizona, 384 U.S. 436 (1966).

A, then you may find *B*" by extension could be thought to include "or find not-*B*." Then the inference instruction would be offering a tautology, *B* or not-*B*, and hence offering the jurors nothing but a logical truth, something that could not possibly prejudice their deliberations.

The problem with the surmised extension is that not-*B* is *not* offered; the judge does not suggest finding that occupants did not have possession from the fact of occupancy. (Moreover, jurors are supposed to find whether guilt has been proven, not what defendant did.) Juries probably do not assume that judges are telling them that all black cats are black.

A variation is that the instruction does not compel a deduction any more than"take it or leave it" compels, because the latter commands nothing. "Take it or leave it" may not be an order,[170] but it is certainly an offer and perhaps an offer of something the jury would not have considered without the instruction.

Redundancy

Redundancy is on the same level of innocuousness as tautology. Redundancy does not offer a logical truth, but adumbrates the methods that the jury would use to evaluate the evidence absent the instruction. It does not seem likely that juries will consider inference instructions redundant, just as it does not seem likely that legislatures and judges would use inference instructions if they were redundant and hence of no effect. While the jury already may have thought that *A* implies *B* in a given case, the instruction seems more substantial than a reference to the power of the particular evidence in the case. The jurors may assume that the judge says nothing that is apparent to them, or at least that his words might have special meanings in a trial ("technically the law is . . . ."). Jurors might think that the judge would not be telling them something obvious about reasoning from the evidence—why would he bother?

Attention Getter

An inference instruction arguably is simply an attention getter, like "Be careful!," which reminds the jury of what it knows about the evidence, without suggestively sponsoring a theory of the case. "Be careful!" tells the listener to take care, not of what or how. "Be careful!" does not help with that which is not obvious upon slightly extending one's vista, so the analysis would be that the inference instruction adds nothing of content to the trial.

The problem with this model is that, in the case of an inference, one

170 *See* L. WITTGENSTEIN, THE BLUE AND BROWN BOOKS 161 (2d ed. 1960).

can "be careful" without knowing how to take care: one can find *B* just by saying "I find *B*." Of course, the instructor may have intended that jurors go through a process of ratiocination before concluding that *B* is the fact, but the instruction is not explicit on this if it contains the bare operative term "infer." The *Allen* instruction said "you may infer and draw a conclusion." This may mean nothing to jurors other than "announce a finding of *B*." Inference instructions can be interpreted as an endorsement of a finding arrived at just by stating a finding is made. In other words, the instruction may appear to a juror as a multiple-choice question; checking a box ("I find *B*") may appear to jurors to be a legitimate way of reaching a conclusion absent confidence in other means of doing so. If the jury takes the instruction's "advice," no juror ratiocination necessarily occurs.

Question

Is the judge asking jurors "does *B* follow from *A* in this case?" If that is all he is doing, avoidance of examination of facial validity is justifiable, as questions can be analyzed as having no truth value; "is it raining?" is neither true nor false.

A judge will be thought to ask questions that can reasonably be answered affirmatively. The question-model reduces to an issue of redundancy; no reason appears to jurors for a judge to ask them if certain things happened or can be done or deduced unless one acceptable answer is yes. Naturally the same holds true when they are asked "is he guilty?," but that question is unavoidable unless the judge tells jurors that the law requires cases to be sent to them even if the evidence is insufficient to support a verdict of guilty—a white lie, but a very reasonable one. The inference "question" asks whether this is a way of deciding the case, which opens up the issue of why the judge is pointing out ways of deciding the case to begin with. The factfinder should be left to its own devices; cases should be decided without judicial hints. An instructed inference, even seen as a question, is undeniably a hint.

Permission, Choice, or Invitation

An inference instruction can give permission to a jury to do something it would otherwise not have thought itself able to do. More encouraging than formal permission is an informally offered choice. Stronger still is a cordial invitation to find *B* from *A*.

The permissive nature of the instruction can be seen by considering that the judge says "you may infer." Obviously he is not predicting, as in "you may find this book enjoyable." The *Allen* Court saw the jury reasoning from the evidence before deciding whether to take advantage

of the permission. Yet one does not say "I may infer;" one says "I can infer" or "I infer." Someone in authority saying "you may infer" might be pointing to the conclusion, the "can," the announcement of the inferred fact, not the process of going through the inferring. The response could be "Yes, I infer," accepting the permission and ratifying the route to *B* as proposed by the judge: from *A* given only that *A* first be found to exist in the case. "You may reach the conclusion that *B* exists" does not inevitably require a process of reasoning to find *B*.

Proposition or Axiom

The jury might take the instruction to be a statement of fact which has been confirmed by the law or the judge or, worse yet, as an undebatably true supposition. "If you find *A*, then you can infer *B*" strikes those legally trained as a legalism, because they see it in context as a legal rule. To a layman, though, it might sound like a law of nature, factual, about the world, knowledge added to the mix. The judge says that if certain things happen, certain other things are associated therewith. This does not sound as much like the opening up of an issue to a layman as much as a readymade finding which can be plugged in upon finding *A*. This model is supported strongly by the history of instructed inferences, which shows that lawmakers wanted to present juries with prefabricated conclusions.[171]

Norm

Juries might take instructions not as statements of fact, which they could test by the evidence, but as normative statements which they ought to follow. The jury listens to many statements about what it must do: follow the law as the judge lays it down, give the defendant a presumption of innocence, consider only the evidence, and so on. In the midst of all this an inference instruction could blend in as another normative proposition. Not that the jury would necessarily think that they must draw the inference, but that they should strive to.

An example of what in cold print looks like permission, but which operates orally as a normative statement, appears in the "satisfactory explanation" part of the instruction in *Romano*, *Leary*, *Turner*, *Barnes*, and *Gainey*. In this instruction, the judge says that "if *A* is found, then you may infer *B*, unless *A* has been satisfactorily explained." In *Allen* the judge said the inference "is effective only so long as there is no substantial evidence contradicting the conclusion flowing from" it.[172]

Logically, the "satisfactory explanation" component seems to be a

171 *See* text accompanying note 42 *supra*.

172 *See* note 166 *supra*.

reason for not exercising the option afforded by the instructed inference, an "out" for the party against whom the inference might be drawn. But an actual satisfactory explanation can be conspicuous by its absence once a judge has mentioned it in his charge. If a reason not to exercise an option is stated, it might be interpreted as the sole reason. Consider the statement "You may leave the room." Assuming that the context is not imperious, that is, the speaker is not a teacher addressing a pupil, the statement seems to be one of permission. Add a ground for not taking advantage of the permission: "You may leave the room, unless you have a good reason not to." Literally this is as permissive as the unadorned statement, yet it sounds compulsory, like "Absent a good reason not to leave the room, you must leave."

Gibberish

Perhaps inference instructions are not unambiguous or clear enough to be intelligible. Some people have concluded that most instructions are unintelligible to jurors.[173] The question of the effective meaning of the *Allen* instruction divided the Supreme Court five-to-four. But jurors who do not understand inference instructions to convey anything denotatively may still be washed over by a connotation—that the case can be decided a certain way just because the judge says so. And the hypothesis that an instruction is taken as gibberish does not seem an entirely satisfactory basis upon which to avoid testing its abstract validity.

C. A PROPOSAL

Suppose a judge were given the task of instructing a jury on the sufficiency of A to prove B without tilting the jury toward the prosecution, and certainly without affording them the chance to decide the case on a generalization. I propose the following for the solution of this problem:

> Some people would look to the circumstances of defendants being in the car (if the State's evidence about that is credited by you) and the circumstances of the guns being in the car—where they were, their visibility, their size, where defendants were each sitting, and anything else about the defendants and the guns being there that helps you decide—and use all of

173 *See* J. FRANK, COURTS ON TRIAL 116-18 (1949); A REPORT ON A SURVEY OF TENTH CIRCUIT JURORS 15, 21, *passim* (1954); Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUD. 478 (1976). *Cf.* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (an attempt to isolate the linguistic features typical of "legalese" that cause jurors to have comprehension problems, to rewrite jury instructions in light of those features, and an empirical verification of the efficacy of those revised instructions). *See also Judges Revising Guide to Instruct Civil Juries*, N.Y.L.J., Sept. 26, 1979, at 1, col. 2.

> those circumstances as a basis for figuring out that the defendants knew the guns were there, had access to them, could control them—in other words, had possession as I've defined "possession." Other people would look at those same circumstances and not be too sure. [Pause.] The reason you are here and not those various other people I've mentioned is that everybody connected with this trial and with our system wants you to decide this case for yourselves. What do you think?[174]

Since the proposed instruction incorporates the evidence no functional difference exists between its facial validity and its validity as applied. Unless the Constitution forbids judicial comment on the evidence—a question on which the author expresses no opinion—it can hardly be unconstitutional for the judge to suggest a line of deduction which, under the facts of the case, would be rational. Whether it is good policy is still another question. The constitutional test for the proposed instruction is, therefore, as in *Allen*: whether a rational factfinder could make the deduction authorized. Whether the deduction would be correct to a reviewing court more times than not or correct beyond a reasonable doubt does not matter; if the jury would be permitted to make such a deduction—if the evidence of the basic fact is sufficient to take the issue of the inferred fact to the jury[175]—then there is nothing irrational about the judge pointing this out. Whether judges should be permitted to comment in criminal trials is another issue entirely, but one which goes to the role of the jury, not the rationality of the trial.

The *Allen* Court required only that the jury be able to make the instructed deduction with a standard of certitude more likely true than false.[176] But the Court thereby committed the classic mistake of classifying a deduction device as a chunk of evidence rather than as a process.[177] While an item of evidence is the proverbial brick that builds the wall, an inference or a presumption is the laborer who does the building. The Court evidently saw the record as a melange of testimony, tangible

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174 One commentator proposes that the judge tell the jury that fact *A* is highly probative on the existence of *B* and could, when considered together with other circumstantial evidence which the jurors might credit, warrant a finding of guilt beyond a reasonable doubt, and claims that such an instruction would accomplish the legislature's objectives. Nesson, *supra* note 2, at 1223. But one of the legislature's objectives is to inform the jury that *A* is sufficient to find *B*, at least insofar as legislative intent can be deduced from the plain meaning of the enacted inferences. Professor Nesson asserts, however, that the legislature's objectives were to criminalize *B* and communicate that *A* is "highly probative" of *B*. *Id.* at 1222. "Highly probative" is hardly as forceful as "legally sufficient" to find a fact. As to telling the jury to consider fact *A* with other circumstantial evidence, it is unclear whether Professor Nesson means all other circumstantial evidence in the case, or simply the particulars of fact *A* as manifested in the evidence.

175 *See* Jackson v. Virginia, 443 U.S. 307 (1979).

176 442 U.S. at 166-67.

177 *See* McBane, *Presumptions; Are They Evidence?*, 26 CALIF. L. REV. 518 (1938). On category mistakes generally see G. RYLE, *supra* note 131, at 16-18.

items of proof, and inferences, to be weighed as a whole when reviewing sufficiency of the evidence.[178] Yet it is inference from evidence that is the subject of the reasonable doubt standard when sufficient evidence to find a fact beyond a reasonable doubt is certified.[179] So the instructed deduction must be one which a rational factfinder could make beyond a reasonable doubt;[180] as I stated above, this does not mean that the deduction must be believed by a reviewing court to be true beyond a reasonable doubt.

VI. CONCLUSION

The notorious complexity of the subject of deduction devices is no excuse for the *Allen* Court's insensitivity to the effect instructions have upon jurors. Interpretation of a judge's instructions in a lawyerlike manner—a methodology apparently abandoned by the Court two weeks later in *Sandstrom*—avoids the crucial dimension of impact on the layman. Ironically enough, the famous earlier decision in *Allen v. United States*,[181] which upheld the "dynamite charge," also proceeded from a one-dimensional analysis of instructions. In the earlier *Allen* case, a charge that juror hold-outs should question their position and take into account that a majority disagreed with them was approved, the Court stating that "[i]t certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case . . . ."[182] That "certainly cannot be the law," but the issue the giving of an instruction raises is not simply what is the law, but also how will the jurors interpret the instruction. *County Court v. Allen* was a triumph of pedantry over realism.

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178 *But cf.* J. THAYER, *supra* note 42, at 337 (inferences are separate from evidence and should not be weighed as one "mass of probative matter").

179 *See* 2 C. WRIGHT, *supra* note 39, § 467, at 259-60.

180 *See* Jackson v. Virginia, 443 U.S. at 318.

181 Allen v. United States, 164 U.S. 492 (1896). *See* 2 C. WRIGHT, *supra* note 39, § 502, at 353-60.

182 164 U.S. at 501.