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Commentary on Hohmann

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In Response to: Hanns Hohmann's *Presumptions in Roman Legal Argumentation*

Hanns Hohmann has provided an interesting account of the role of presumptions in Roman legal argumentation. His specialized background in both law and Latin has been well used to provide an especially detailed and informed analysis of an important element of Roman judicial practice. While the concept of presumption as an *ultimate* decision rule is discussed in nearly all basic argumentation textbooks, the role of presumptions as the *starting point* for decisions has been less thoroughly explicated and analyzed. Thus, Professor Hohmann's discussion of how Latin jurists came to rely on policy and value presumptions to justify their rulings is particularly illuminating.

Professor Hohmann begins his paper by setting forth four claims and then proceeds to offer support for each assertion. In general, his positions are well supported and reasonable. In responding to his paper what I will attempt to do is to examine these claims and elaborate further upon them or in some cases, suggest alternate or at least additional, interpretations of his data.

I

His first claim is that in Roman law policy concerns better explain shifts in the burden of proof than do considerations of factual probability. To support this conclusion two broad classes of cases are examined.

In the first group of cases, the determination of who is entitled to an inheritance is dependent upon the order of death of victims of a single catastrophic event. As Professor Hohmann effectively demonstrates, the circumstances of these deaths make it impossible to establish a factually probable judgment that any one of the claimants died before the other(s). While this set of cases clearly indicates that policy considerations superceded the courts' desires to base judgments upon factual probabilities, they do not suggest that the courts' judgments were *specifically* motivated by a desire to make policy. Rather, in these cases, the courts were, in a practical sense, *forced* to establish a non-probabilistic presumption in order to arrive at a ruling that was, in other ways, a defensible one.

The second group of cases illustrates various problems Roman courts faced in attempting to determine testator's intent. In many of these cases, the court was able to reach a decision based upon the probable intentions of wills or other legal documents. In other cases, however, the most likely intent of the testators seemed to be in conflict with the wording of the documents, and the courts, once again, moved beyond the facts of the cases and relied upon certain normative presumptions – e.g. "conceptual purity", "equitable considerations", and "solicitude for [or against] particular types of claimants" – to guide them in making decisions. In this second set of cases, as in the earlier sequence of death cases, the courts were forced to rely less on factual probability by virtue of both the special circumstances of the cases and the need to arrive at some kind of justifiable policy.

The point that I wish to make here is that policy considerations in the form of normative goals and other substantive presumptions are an *inevitable* part of the judicial process. As the Roman jurists discovered, many court judgments can not be made solely on the basis of factual

probabilities. That Richard Gaskins (1992) has also found that policy based presumptions are a common feature of contemporary American legal argumentation is not surprising, because now, as 2000 years ago, jurists seek ways to justify and regularize their rulings. When factual probabilities are lacking, jurists *must* find other ways to legitimize their decisions. Because the legitimacy of a court's decisions rests upon its ability to rationalize and make predictable its decisions, normative goals and policy considerations will always be an intrinsic part of the judicial process. The less clear or less certain the factual situation and the fewer and less clear the guidelines provided from outside the judicial system, the more the courts will be compelled to develop their own substantive presumptions. Professor Hohmann's research seems to suggest this additional conclusion.

II

A second claim presented by Professor Hohmann is that presumptions were used in Roman law, in some cases, to replace traditional certainties and in doing so opened up, rather than removed, possibilities for doubt. Here he refers to a number of cases where the Roman courts deviated from traditionally established legal principles and substituted new presumptions. The cases described in the paper clearly demonstrate how reliance on different presumptions *change* policy, but whether the altered presumptions create more or less *doubt* is, I believe, a matter of perspective and interpretation.

At the moment that a traditionally established presumption is abandoned and a new presumption introduced, a certain period of uncertainty regarding how the courts will rule in future cases will undoubtedly exist. But if the new principle is clearer and requires less interpretation of intent, it may, in the long run, assure greater regularity and certainty. In at least some of the cases referred to by Professor Hohmann, this would seem to be a reasonable expectation.

For example, the establishment of the presumption favoring the institution of tutorships created a clearer and more consistent basis for rulings in cases involving tutors for sons in the hands of enemies as well as tutors for both daughters and sons. This new standard assured continuing regularity in the law, and by shifting the burden of proof to anyone wishing to deny a tutor to a child in the hands of enemies or to a daughter, the new presumption gave fair warning that the intent *not* to provide a tutor in either circumstance had to be *explicitly* spelled out. On its face, this standard seems to have created *greater* regularity of *court action* while allowing *testators* flexibility.

III

The third and fourth claims of Professor Hohmann are closely related to one another so I will respond to them together. The third claim asserts that Roman jurists freely acknowledged their policy objectives and made little or no effort to mask these substantive concerns. This conclusion is well illustrated with references to cases in which the Roman courts' concern for the preservation of family proprieties was a dominant and overt priority and by cases in which the courts openly acknowledged their policy goal of expanding the opportunities for slaves to become freemen.

Professor Hohmann's fourth claim attempts to explain why his third claim was possible and why Roman jurists, generally, felt freer to express normative goals than do judges today. In an

all too brief section, he refers to Roman jurists' special social and institutional position and to certain unusual aspects of Rome's legal system as unique circumstances that allowed Latin jurists great latitude in developing and articulating policy and value presumptions.

What I should like to do in responding to these last two sections of Professor Hohmann's paper is to compare the characteristics of the Roman courts with the circumstances of American courts (especially the Supreme Court) and to consider a little more specifically how these differences may affect the use and explicitness of policy presumptions.

The first important characteristic of the Roman court was its relative freedom to "discover" law without fear of encroaching upon the law making role of the Roman Senate, the Consuls or Emperor. As described by Professor Hohmann, the overwhelming majority of presumptions established by the Latin jurists were in the narrow area of civil law that related almost exclusively to the upper propertied class. By contrast, the scope of the American courts is broad, and its rule making authority is constrained by the Constitution, by Congress' jealous protection of *its* legislative prerogative, and by the public's and press's concern for maintaining a separation of powers.

A second difference concerns the relationship of the courts to their constituents. Professor Hohmann suggests that the Roman jurists belonged to the same elite class of society as did those to whom their civil law applied and that, as a result, the judges' presumptions were grounded in a shared consensus with their constituents. Judges in contemporary America, on the other hand, must rule on a broad range of topics affecting an extraordinarily diverse population. In the face of broad differences in economic status, social class, ethnic heritage, and racial and cultural backgrounds, American judges must often struggle to find *any* common ground upon which to build a consensus.

Finally, Roman judges had the explicit support of the Imperial throne behind them. In contrast, U.S. judges can never be certain whether their rulings will be greeted by attacks from the President and his representative or by Executive praise and public support.

These contrasting conditions unquestionably help to explain the reluctance of contemporary American judges to *articulate* explicit policy presumptions. This reluctance may be further supported by a diminished need for the courts to create their own policy presumptions. Legislative acts, presidential directives, regulatory agency rulings, common law and past court precedents provide a vast body of policy guidelines to assist contemporary U.S. jurists in making rulings. Nevertheless, as was earlier noted, the courts' continued need to resolve improbable or equally probable factual claims, to promote and advance regularity within the law and to justify decisions make it inevitable that courts will continue in the future, as they have in the past, to rely upon – if not, to explicitly express – certain of its own policy presumptions.

By enhancing our awareness of the presence and importance of court established policy presumptions and of their role in the evolution of Western law and culture, Hanns Hohmann has provided us a valuable service.

References

Gaskins, Richard H. (1992). *Burdens of Proof in Modern Discourse.* New Haven: Yale University Press.