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### Presumptions In Roman Legal Argumentation

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## I

Traditionally, the function of legal presumptions has been understood as the resolution of uncertainties. Generally, a party making a legal claim has the burden of proof, i.e., that party has to prove that all the factual prerequisites for the claim are indeed fulfilled. But in some cases, the law establishes presumptions that shift the burden of proof from the claimant, plaintiff, or prosecutor to the respondent or defendant. While it has been recognized that sometimes this shift is motivated by considerations of policy, the general basis for such shifts is sought in factual probability: Since facts already established make it highly likely that one of the factual bases of the claim not yet proved does indeed also exist, the proof of the less likely opposite possibility is now assigned to the respondent, who may also be in a better position to make such proof.

Richard Gaskins, one of the keynote speakers at this year's OSSA Conference, has argued in his book *Burdens of Proof in Modern Discourse* that in contemporary law, presumptions are often used rhetorically to mask significant substantive decisions as merely procedural shifts of the burden of proof (Gaskins 1992: 47ff., 75 ff.). In my paper at the 1999 OSSA Conference, I suggested that such argumentative procedures can already be found in Roman law, both as it was originally developed in Antiquity, and as it was revived and adapted in the Middle Ages. In the present paper I would first like to substantiate this contention further with a fuller analysis of presumptions in ancient Roman law, offering more complete support for the claim that policy concerns often far better explain such shifts of the burden of proof than do considerations of factual probability. Next I will show that presumptions were also used to replace traditional certainties, thus opening up rather than removing possibilities for doubt. Then I will survey the policy goals that were especially prevalent in the establishment of presumptions in Roman law; and I will also highlight the extent to which the Roman jurists openly acknowledged rather than masked their substantive concerns in the process. Finally I will offer some brief suggestions as to why the Roman jurists apparently felt freer to express their normative goals than perhaps judges generally do in our own time.

## II

In addressing the question to what extent presumptions in Roman law were designed to resolve factual uncertainties according to probability, we should remind ourselves at the outset that the Roman jurists did not generally regard it as their function to deal with uncertain facts. In a famous anecdote, reported by Cicero in his *Topica*, the jurist Aquilius Gallus replied to a man who had presented him with a factual dispute: “*Nihil hoc ad ius; ad Ciceronem*” (Cicero, *Topica* 12.51), which means that such issues were regarded as the province of rhetoricians, whose stock-in-trade it was to argue both sides of disputes of this kind, invoking conflicting probabilities. It was the jurists' task to resolve such ambiguous situations with unequivocal solutions upholding the integrity of the *ius* as they saw it.

A good example of this process is provided by the controversy reported in D.34.5.9(10) pr.: A man has appointed Titius as the substitute heir to the second of the man's two sons to die, and both underage sons die together in a shipwreck. In the disputation ensuing from this hypothetical, it can be argued both that Titius should receive nothing, since neither brother survived the other, and thus there is no "second son to die," since neither son died first, or that he should inherit from both, since neither brother was survived by the other, and in that sense both were the "second son to die." The jurist Tryphoninus opts for the second alternative, deciding that the substitute should receive both inheritances: "[S]ince neither brother survived the other, they are each regarded as having died both first and second." From the standpoint of probability, the underlying presumption that both sons died at exactly the same time is in fact the least likely scenario. It would be much safer to assume that one died first; upon his death, his surviving brother, as his nearest agnate, would become his heir, and he in turn, upon dying second, would be succeeded by the substitute heir, who would inherit the now combined estates of both sons. But from Titius' perspective, the problem would be that he could not prove which son had died second, and thus an essential element of his claim, the identity of the person from whom he is to inherit, could not be established, and therefore his claim would fail. The rather non-probabilistic presumption of a simultaneous death allows the jurist to reach the result following from a more likely course of events, but avoiding the awkward problem of the proof of the identity of the survivor by presuming that both are survivors, and thus allowing Titius to inherit from both.

The same result could also have been reached by presuming one of the two sons to have died first, but on what basis should that decision have been made? One could argue that the older son could be expected to die first, but then one could also assume that the younger son would be weaker and more vulnerable. Moreover, such speculations would increasingly lose plausibility as the actual ages of the two sons moved closer together, either in absolute or in relative terms. For similar reasons, presumptions establishing a sequence of death for parents and children dying together cannot claim to have a firm probabilistic foundation either. In some cases, the parents are presumed to have died before the children (D.34.5.9[10].1; D.34.5.9[10].4; D.34.5.22[23]), and in others, the reverse is presumed (D.23.4.26; D.34.5.9[10].4; D.34.5.23[24]). The cutoff point at which the presumption switches is the reaching of puberty, which in Roman law marked the coming of age and was set at twelve for girls and at fourteen for boys. This means that, in cases of joint deaths in catastrophes, children who could at least theoretically have children of their own and pass on an inheritance to them are presumed to have inherited from their parents, while the opposite presumption keeps the parents' inheritances from children who would be succeeded by their agnates. It is significant that in the hypothetical of the two sons' joint death both are underage; had they had children, we could expect that the substitute heir would have been excluded in the descendants' favor. At any rate, the shift from the presumption of the child's earlier death to the parent's earlier death is set at a legally significant age, not at a point that might be regarded as particularly relevant from the perspective of mortality statistics, which would have suggested the end of infancy as a more appropriate dividing line in terms of life expectancy. That such general survival rates are not really decisive is shown even more clearly by the fact that when a freedman dies together with his son, it is actually the son who is presumed to have died first, which passes the freedman's estate on to his former owner, rather than to the son's heirs (D.34.5.9[10].2).

By far the largest number of presumptions in Roman law concerns the interpretation of legal documents, and among these, wills figure quite prominently, because the specific proof of the

precise intentions of testators encounters obvious difficulties after their demise. There are indeed a number of these presumptions that would seem to be based on what would be the likely intentions of a person choosing a certain wording in a will. A legacy of proceeds from crops in a certain field can be expected to be annual, since the crops are harvested annually (D.7.1.58). When substitute heirs have been instituted in succession with the words “if my son has died before his tenth year, let Titius be heir, if he has died before his fourteenth, let Maevius,” and the son has died at the age of eight, it is more likely that this substitution was intended to apply to successive rather than overlapping periods, so that Titius alone is heir, rather than also Maevius, in spite of the fact that the son has after all also died before reaching his fourteenth year (D.28.6.43.1). It also seems likely that a legacy supposed to take effect upon the legatee’s “reaching his fourteenth year” is meant to await his fourteenth birthday (rather than the time after completion of his thirteenth year), especially in view of the legal significance of a boy’s fourteenth birthday (D.30.49.3). Likewise it appears reasonable to think that when a legacy was established pertaining to a commission or its cash value, and the testator has sold the commission and given the sale price to the legatee, the legacy is supposed to have expired (D.31.22).

Similar observations can be made about the presumptions in D.31.30 (legacy of money for road repair without specifying amount is presumed to be for sum needed for repair); D.31.86.1 (legacy of divided farm under the name the entire estate had before being divided into two farms is presumed to apply to both farms); D.33.7.18.9 (legacy of “rural appurtenances” in conjunction with a farm is presumed to include seeds); D.33.7.20.2 (legacy of a house in conjunction with an “equipped farm” is presumed to be of an equipped house as well); D.33.9.3.2 (legacy of “edibles” is presumed to extend to things not eaten by themselves, but consumed together with food, such as sauces and brine); D.36.1.2 pr. (restoration of an inheritance is presumed to transfer to the restored heir the burden of a large legacy established in the will).

The Roman jurists also offer some likely interpretations for other types of legal documents and agreements: an agreement to pay for the transport of slaves is presumed to require payment for slaves loaded rather than landed (D.14.2.10); the cancellation of a deed is presumed to signify extinction of the debt documented in the deed (D.22.3.24); and payment of interest “every thirty days” is presumed to be due from the day of the stipulation, rather than from the day of repayment of the principal (D.45.1.135 pr.).

Other interpretive presumptions are more problematic from the perspective of probability: While it may indeed be more likely than not that the legacy of a house remains intact if the house is repaired to the extent that none of the original building materials remain (D.30.65.2 pr.), why should the same principle not also apply if the house has been torn down and rebuilt, a case for which the jurists establish a contrary presumption (D.30.65.2 fin.), at least as long as the new structure is not significantly grander than the old one. Here the concern for conceptual purity (the legacy fails because it is no longer “the same house”) seems to outweigh attention to the testator’s likely intent. Is wine left on a farm to be presumed to be included in a legacy of “the farm and what is on it,” even if the testator has subsequently sold the wine (partly) and received payment for it (D.33.7.27.2)? Would it not be more likely that the testator would want to legate only things to which others have no claims? Similarly, is the presumption that a testator meant a *fideicommissum* to an object that he later sold due to urgent need to remain in effect (D.32.11.12) really based on probability, or would it not be at least equally likely that he would not want to burden the *fideicommissarius* with the obligation of reacquiring an object that was no longer part

of the estate at the time of death? In these cases, too, solicitude for enforcing the words of the will (and for holding testators to their written commitments) appears to trump probable intent.

And if the term *alimenta* in a legacy is to be presumed to extend beyond food to other needs of life such as clothing and housing, even though the root meaning refers to nourishment, then why should it not also apply to educational costs (D.34.1.6), especially since the term is also in general use for payments to educators? Here an initial impetus to provide more broadly for the needs of a legatee seems to have reached its limit in the jurist's mind without any clear guidance from general word usage or a likely testator intent.<sup>1</sup> A certain tendency to exercise juristic generosity towards legatees even in the absence of clearly likely testator intentions can also be observed when “smaller dishes” are presumed to indicate medium-sized dishes (D.34.2.31); and that generosity is yet more tenuously founded in probable testator intent when a person removed from a will as heir is nevertheless still presumed to be entitled to certain legacies (D.34.9.12).

While such legal presumptions not clearly based on probability make the presence of normative goals on the part of the jurists effecting these shifts of the burden of proof particularly apparent, it should be noted that even where the presumed intent is indeed probable, the very fact that this intent is considered in preference to the wording which speaks in favor of the party opposing the claim, or does at least not clearly speak for the party making it, constitutes an important policy shift. Rather than maintaining the earlier legal tradition of holding authors of documents to their words and denying claims that had no clear basis in those words, later jurists favored an increasingly flexible approach that emphasized equitable consideration of intent over a strict enforcement of literal meaning, even if that shift, too, had its limits.

Among the presumptions that do not pertain to the interpretation of words, we also find some more and some less based on probabilities. It certainly seems likely that a person of high rank was not coerced into paying what was not owed, (D.4.2.23 pr.), that a prudent person would not pay what was not owed (D.22.3.25 pr.),<sup>2</sup> that a man writing himself into a will as *tutor* (guardian) for an infant son may have suspect motives (D.48.10.18.1), that a person having paid certain taxes for the last three years also paid them in previous years, or that someone who draws a sword or attacks another with a weapon intends to kill (D.48.8.1.3). But while this shows that in these cases probability supports the presumptions, this does not mean that probability is the decisive basis for them; because in many other instances the mere fact that the assertions of the claimant are more likely than those of the opponent of the claim does not suffice to shift the burden of proof to the latter. The establishment of a presumption thus always indicates a special solicitude for the particular types of claimants benefiting from them, or a special disfavor

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<sup>1</sup> This passage is also interesting because the phrase making it clear that this is a (rebuttable) presumption, “unless a contrary intention on the part of the testator is proved” (*nisi aliud testatorem sensisse probetur*), is specifically added from Paulus (book 14 of his *responsa*), while the initial interpretation of *alimenta* comes from Iavolenus (book 2 of his *ex Cassio*). In the controversy concerning the extent to which presumptions were already established in classical Roman law, as opposed to being introduced into the classical sources by Justinian's compilers in the 6th century, proponents of the latter view often point to such *nisi* phrases as automatic indicators of post-classical interpolations, simply added to original texts that did not contain them. But if indeed the compilers were in the habit of appending such phrases to their sources at will, why did they in this case bother to look for a specific source for this addition?

<sup>2</sup> But see also C.4.5.11.

towards their opponents, even if such policy concerns tend to be clearer in cases where presumptions do not have probability on their side.

Further instances of the latter include the highly paternalistic presumption that not only minors, the legally inexperienced, the simple-minded, and the slothful, but also women, soldiers, and farmers cannot be trusted not to pay money they do not owe (D.22.3.25.1);<sup>3</sup> the presumption protecting debtors from improvidence by establishing that a deed not showing the cause of debt indicates that there is none, unless the debtor explains the reason for executing the deed (D.22.3.25.4); the presumption that people handling others' money have purchased commissions for themselves or their sons with such entrusted money rather than with their own (C.8.13.27), thus protecting the depositors and shifting the proof of probity to those who can better effect it; and the presumption (*de facto* almost irrebuttable) that persons accused of adultery who later live together or get married do thereby confess to have committed adultery and thus are liable to severe punishment (C.9.9.33[34]), encouraging avoidance of even the appearance of extra-marital impropriety. It is significant that these last two rather presumptuous presumptions were established by imperial fiat, rather than by juristic opinion, and thus in a context where the pursuit of policy is even more definitely to be expected.

### III

After this overview of the interplay of probability and policy in the removal of factual doubts by the establishment of presumptions in Roman law, I would like briefly to draw attention to the fact that presumptions do not only remove uncertainties, but can also be introduced to make possible doubts where before the law had provided for certainty. And we will see that in these instances, too, policy concerns clearly come to the fore. In a way of course all the presumptions favoring intent over letter opened up room for doubt where earlier literalism had offered certainty. But here I propose to discuss some cases in which such policy shifts towards greater flexibility suggest the possible use of presumptions for particularly clear deviations from underlying assumptions and substantive principles of the traditional *ius civile*, deviations that may already occur in pre-Justinian times.

In D.26.2.16.2 Ulpianus states (in a passage taken from book 39 of his *ad Sabinum*) that

[i]f a man appoints tutors (guardians) for his children, or for his sons, and he has some who are in the hands of the enemy, he is held to have appointed tutors even for them, if it cannot be clearly proved that the testator had any other intention (*si non aliud aperte probetur testatorem sensisse*)

and this even though according to the traditional *ius civile* the son in the hands of the enemy was no longer in the *manus* (legal power) of the father, and thus the institution of a tutor would have been clearly invalid. This tendency to favor the institution of tutorships is also apparent in D.26.2.16 pr. (from book 39 of Ulpianus' *ad Sabinum*), where the institution of tutors *filiis meis* is held (*videatur*) to apply to the sons (*fili*) as well as the daughters (*filiae*). In this case, traditional assumptions may be violated by imputing to the testator equal solicitude for daughters as well as sons; but conservative interpretive notions are still satisfied, since the expression *filiis*

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<sup>3</sup> Even the jurists themselves recognized that the assumption that women have no head for business was not empirically confirmed: see Gaius, *Institutiones* 1.190.

applies linguistically to daughters as well as sons. This is not the case in D.32.93.3, where we find attributed to Scaevola (in book 3 of his *responsa*) the following opinion. It was asked whether what the heirs had been asked to restore to the brothers (*fratribus*) would also belong to the sisters (*ad sorores*). He replied that they would, unless the testator were proved to have meant otherwise (*nisi aliud sensisse testatorem probetur*); here we have a clear abandonment of literal interpretation, since *fratres* is clearly linguistically distinct from *sorores*.

Another category of presumptions significant in this context concerns the treatment of legacies to the testator's wife. In D.33.4.17 pr. (from book 3 of Scaevola's *responsa*) the question is whether the dowry (*dos*) is included in the phrase "whatever I obtained from her and what she gave me" (*quidquid ei comparavi et quod mihi dedit*), used in defining the extent of a legacy to the wife. We are told that "[h]e [Scaevola] replied that from the words used it appears that he was speaking [also] of a legacy of the dowry, unless it was proved that the testator intended something else" (*nisi aliud testatorem voluisse probaretur*). The *nisi* clause has been suspected to be a compilers' addition; but this seems unlikely to me, since without it, Scaevola would merely be stating the literally obvious, since the dowry was indeed "given" to the husband; only the admission of proof that the *dos* was not meant to be included makes his opinion noteworthy here. According to traditional principles, the inclusion of the dowry would have been certain, based on the wording of the will, but now it is put in doubt by admitting proof of a contrary intent.

By contrast, it appears from D.34.2.3 (taken from book 19 of Celsus' *digesta*) that in a case where a testator left his wife the articles acquired for her benefit, and divorced her before his death, Proculus opined "that [the articles] are not due [to the wife from the inheritance], because they are regarded (*videantur*) as adeemed [i.e., the legacy is regarded as revoked]," thus apparently establishing an irrebuttable presumption against the continued validity of the legacy, even though it had not been explicitly revoked. This deviation from traditional formalism in favor of a presumed testator intent apparently went too far for Celsus, who insisted that "[d]oubtless it is a question of fact; for it is possible that he did not intend them to be adeemed even from a wife he repudiated," thus at least admitting proof of an intent to leave the legacy intact after all.

A final instance I would like to mention in the context of presumptions that significantly create as well as alleviate doubts concerns a legacy in which slaves are bequeathed. In D.32.73.3 (from book 20 of Ulpianus' *ad Sabinum*) we read:

[m]oreover, if someone had slaves of his own, but has hired out their services as bakers or players or the like, should he be held to have bequeathed them as "his" slaves? Yes, this should be presumed (*praesumi oportet*), unless the testator evidently intended the contrary (*nisi contraria voluntas testatoris appareat*).

Here it is noteworthy that in D.32.73.2 (from the same source) slaves pledged as security (*pignus* or *hypotheca*) are treated as indubitably bequeathed as "his" by the debtor, and this fact has been used as an argument to show that the rebuttable presumption established in D.32.73.3 must be an addition by Justinian's compilers, inconsistent with Ulpian's more definite position in D.32.73.2. But while from a traditional perspective the slaves are clearly included in what the testator would call "his" in both cases, since in both he retains ownership of them, it makes perfect sense to allow for doubt in the case of the leased slaves, but not in that of those pledged as security, since the hired-out slaves are in a significantly more apparent way under someone else's control.

## IV

I will now examine two areas of Roman law in which the pursuit of normative goals through the establishment of presumptions has been particularly intensive. One of these, the regulation of legal relationships between family members, has already been prominent in the preceding section. I will here try to show more broadly the extent to which in this context presumptions were used to enforce normative ideals of proper family relations. The second area I will focus on here has already come into view in the final example in the preceding section: the legal treatment of slaves, especially in wills. Here I will describe the promotion of the *favor libertatis* by means of presumptions that significantly expanded slaves' opportunities for gaining and successfully maintaining their freedom. And I will also highlight the not infrequent occasions on which jurists rather openly acknowledged the policy goals underlying their use of presumptions.

The tone for a concern with the preservation of familial proprieties, which was to become a major theme in the deployment of presumptions in Roman legal argumentation, was already set by the oldest undoubtedly original (rather than compilatorial) presumption, established in Republican times (around 100 BCE) by the jurist Quintus Mucius Scaevola, and reported to us in the Digest in an excerpt (D.24.1.51) from the writings (book 5 of the commentary *ad Quintum Mucium*) of the classical jurist Sextus Pomponius (2nd century CE), the so-called *praesumptio Muciana*. Pomponius relates to us that

Quintus Mucius says that when a controversy arises as to the source of property which has passed to a woman, when it has not been shown where the property has come from (*non demonstratur unde habeat*), it is more correct and decent (*verius et honestius*) to hold (*existimari*) that she got it from her husband or someone in his power. Quintus Mucius appears to have taken this view in order to avoid any disgraceful inquiry (*turpis quaestus*) involving a wife (*circa uxorem*).

The same presumption is also referred to in a passage from the Code of Justinian (C.5.16.6.1) which reports a statement ascribed to the emperor Severus Alexander (3rd century CE):

Nor is it unknown that, when it could not be proved from what source a woman honorably acquired something during her marriage, the ancient jurists believed her to have obtained it lawfully from the property of her husband.<sup>4</sup>

Pomponius' explanation makes it clear that moral propriety (or at least its appearance), rather than factual accuracy, is the ultimate concern here: an inquiry might unearth further information, but it is to be replaced by a presumption in favor of the wife, in order to spare her from embarrassment. A proper Roman matron does not accept gifts from strangers, and therefore the Roman jurists are prepared to assume without further investigation that unexplained property comes from the husband. It is not even clear whether those claiming otherwise are to be allowed to prove their contention, since the effort to do so would amount to just the sort of "disgraceful inquiry" that the presumption is supposed to forestall.

A similar reluctance to look behind the veil of family respectability is apparent in the presumptions concerning legitimacy and paternity. Paulus holds (in book 19 of his *responsa*) that

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<sup>4</sup> nec est ignotum, quod, cum probari non possit, unde uxor matrimonii tempore honeste quaesierit, de mariti bonis eam habuisse veteres iuris auctores merito credidissent.

it is to be presumed (*credendum*) that he who is born during the seventh month of a legitimate marriage is a legitimate son (D.1.5.12).

He tells us that this is based on the received view, due to Hippocrates' authoritative pronouncement, that a child can be born fully formed in the seventh month. It is remarkable how the presumption promotes a medical possibility to a legal probability, and we should also note that proof to the contrary is not invited here. Nor is it in the case of rules concerning the propriety of summoning people to court. The general principle is that children cannot summon their parents to court without the praetor's permission (D.2.4.4.1). D.2.4.4.3 then clarifies that this also applies in the case of a son born out of wedlock when he tries to summon his mother, and D.2.4.5 explains that this is so “because she is always identifiable (*certa*), even if she conceived [the child] in promiscuity (*vulgo*).” But then we are told that “[t]he father indeed is declared (*demonstrare*) by the marriage,” so for purposes of this rule the husband of the mother is presumed to be a father who cannot be summoned without special permission, regardless of biological paternity.

Repeatedly, the Roman law uses presumptions based on notions about the loving care expected to be the norm among husbands and wives as well as parents and children, sometimes quite regardless of probabilities. Thus a father is presumed to have left property acquired through his marriage to the children, even if he does not name them as heirs in his will; he can only avoid this by explicitly providing to the contrary (Nov.22.20.2). When a woman marries the father of a *filius familias* and declares as part of her dowry to her new husband “whatever your son owes me,” we are told (in D.23.3.57) that “the presumption is likely (*praesumptionem [...] verisimile est*) that she meant the son's [entire] debt,” as opposed to that part of it that the father would have to cover, “unless the contrary can be clearly shown (*nisi evidentissime contrarium adprobetur*)”; so the new wife's generous feelings are assumed to extend automatically beyond her husband to her step-son.

Nephews and heirs in general are also supposed to be objects of solicitude. An heir is freed from the requirement of returning the inheritance to another “if he (the heir) dies without sons” if at his death he has no son, but a nephew born by his daughter. The initial testator's intent to have the existence of such a nephew (and not only the existence of a more immediate male descendant, a son of the heir) prevent the condition for restitution from being triggered is regarded as manifest, unless a contrary intent is proved (C.6.46.1). And a special legal agreement (*pactum*) is presumed to apply to heirs also, even if this was not explicitly stated:

the plaintiff must show that the agreement applied only to the other party and not to his heir, and the one who raises the defense does not have to prove this (*non qui excipit probare debet*).

Again a caring intent is presumed: “we generally (*plerumque*) provide for our heirs as well as ourselves.”

In return, children are also supposed to have given legal expression to their filial piety, even if it may be quite strained. When a son has included in his will a clause releasing the testator's father, who at one point was his tutor, from an action on the tutelage, D.34.3.28.3 requires this clause to be interpreted broadly, so that it extends even to monies the father converted to his own use. Although this does not show the father to have been a model *pater familias*, and the son may

not have known about these dealings and might have been quite shocked and angry if he had, we are told by the jurist (Scaevola again)<sup>5</sup> that

there is a presumption (*praesumptio*) in favor of the father's being released in all respects on the ground of natural affection, unless the heirs prove a contrary intention on the part of the testator (*nisi aliud sensisse testatorem ab heredibus eius approbetur*)."

Wives are expected to want their husband to have the benefit of their dowry. Even when upon remarriage the partners forget to transfer the *dos* to their renewed relationship explicitly, presumptions do it for them (D.23.3.30, D.23.3.64). And a gift to the wife is to be presumed to have been stipulated by her to become part of her *dos*, unless the contrary can be specifically proved (C.5.13.13). In turn, husbands are assumed to want to maintain their wives in the style to which they have become accustomed. When a husband has paid off a debt of his wife and then returns to her the jewelry that she had deposited as a pledge, D. 32.33.2 establishes "[i]t must be presumed (*praesumptum esse debet*) that the payment was a gift," and thus cannot be reclaimed from the wife by the heir of the husband, "unless the heir can prove the contrary (*nisi contrarium ab herede approbetur*)." In a similar vein, D.34.2.18 pr. tells us that if a testator has asked his heirs to hand over to his wife "her rings and clothing" and it turns out that these did not legally belong to her, and thus were not strictly speaking "hers," Scaevola "has given it as his opinion that [the testator] is regarded as having made the gifts with the intention of leaving them as a bequest (*legandi animo dedisse ea videri*)," and thus of requiring the heirs to transfer ownership of these items to the widow, "unless the opposite is proved by the heirs (*nisi contrarium ab heredes approbetur*)."

On the other hand, divorce is assumed to destroy such bonds of familial love and solicitude. We have already seen that dissolution of a marriage is presumed to invalidate legacies made in his will by the husband in favor of his now former wife (D.34.2.3). And if a woman contemplates a second marriage and revokes gifts she has given to her son from the first marriage, justifying this by the son's supposed ingratitude, it is to be presumed that this is merely a pretext, and that the revocation is merely due to her desire to increase her property in view of her new marriage plans, unless she can prove specific serious misbehavior on the part of her son (Nov. 22.35).

Another area of Roman law that shows a prominent use of presumptions in pursuit of normative goals is the juristic treatment of slavery, which often expands opportunities for freedom, even if this requires transcending the bounds of likelihood. Just as the concern for family integrity outweighed medical probability when it came to determining legitimate conception, so did the *favor libertatis* in ascertaining birth into freedom. In D.38.16.3.12 Ulpianus states that if a child is born 182 days (six months) after the mother's manumission, the child is to be presumed (*videri*) to have been born at the right time, and not to be presumed (*videri*) to have been conceived into slavery; again the authority of Hippocrates is invoked, but also a rescript of the emperor Antoninus Pius to the priests. A related provision concerns the freedom promised to a slave woman if her firstborn should be a son; D.34.5.10(11).1, also taken from Ulpianus' works, establishes that if twins are born, one of whom is a son, and the sequence of births cannot be ascertained even by careful judicial investigation, then the son is to be presumed to have been born first, so that the mother will be freed and the daughter consequently

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<sup>5</sup>. Possibly, this is a compiler's interpolation.

also freeborn. The openly policy-oriented justification for this decision does not imply that the earlier birth of a son is more likely, but states straightforwardly that “in ambiguous situations, the more humane course should be followed.”<sup>6</sup>

Many liberty-oriented presumptions concern the interpretation of clauses in wills that pertain to the freeing of slaves. D.40.7.40.7, commenting on a decision ascribed to Scaevola, states that if a testamentary condition (in this case concerning the rendering of accounts to the heir) for the manumission of a slave who has been named steward (*actor*) is ambiguous, the “better view is that there is a presumption in favor of the slave's freedom,”<sup>7</sup> and that the condition should be interpreted accordingly, rather than letting the judge make various factual determinations, as Scaevola's initial opinion had suggested. This attitude also finds expression in D.40.4.17.2, taken from Iulianus, interpreting a clause granting freedom “after years” (*post annos*) without specified number as taking effect after two years. Again the underlying policy is highlighted; this result is declared to be

both required by favoring liberty and permitted by the words [...] unless the person on whom lies the responsibility for granting freedom has proved by the most manifest considerations that the head of the household had a different intention.<sup>8</sup>

D.40.5.41.15, ascribed to Scaevola, establishes a presumption of liberty in a case involving a similar clause: Titius institutes his son, aged nine at the time of the making of the will, as heir, and grants freedom to some slaves “after eight years,” so that they can still serve the son; Titius dies two and a half years later. Presented with the question whether the deferment of liberty runs for eight years from the time of the making of the will or from the time of death, Scaevola reportedly replied that it might appear that the testator had fixed a total period of eight years for the deferment of freedom, which were to be counted from the date of the will, unless it were proved that he had wished something different (*nisi aliud voluisse testatorem probaretur*).

Ulpianus reports in D.40.5.24.7 that if the testator requested that Stichus should cease to be a slave

it has been decided [in order to avoid the consequence of invalidity due to failure to observe the required form for manumission] that [less formalized] fideicommissary freedom is deemed to have been given (*placuit fideicommissariam libertatem datam videri*); for by requesting that he should cease to be a slave, he [the testator] seems to be requesting (*videtur petere*) that freedom should be conferred on him [the slave].

And the next passage, D.40.5.24.8, also from Ulpian, emphasizes the weight of the presumption of liberty for a slave in the interpretation of a *fideicommissum* by stating that it can only be overcome by the heir's specific proof of a contrary intention of the testator.<sup>9</sup>

By the time of C.6.27.2, the concern for form has been weakened to the extent that naming slaves as freedmen (*liberti*) and heirs (*heredes*) is presumed to amount to manumission. And in

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<sup>6</sup> in ambiguus rebus humaniorem sententiam sequi oportet, ut tam ipsa libertatem consequatur quam filia eius ingenuitatem, quasi per praesumptionem priore masculino edito.

<sup>7</sup> melius autem est praesumptionem pro statuliberi esse.

<sup>8</sup> idque et favor libertatis exigit, et verba patiuntur [...] nisi si aliud sensisse patrem familias manifestissimis rationibus is, a quo libertas relicta est, probaverit.

<sup>9</sup> cum ex praesumptione libertas praestita esse videtur, heredis est contrariam voluntatem testatoris probare.

exploring the scope of this benefit, D.28.7.2 pr. (from Ulpianus) discusses the question whether the phrase *meus* used in a will to designate a slave who is to be heir applies only to a slave who is in the exclusive control of the testator; it is taken as certain that it applies to a slave in whom the testator has granted someone else a usufruct, since that slave remains the testator's property; but the issue remaining is whether in the case of a slave a share in whom has been alienated by the testator the institution as heir fails. We are told in what may be a later addition to the passage, that

the more correct view is (*verius est*) that the condition has not failed unless it has appeared by the most evident proofs that the testator intended (*nisi evidentissimis probationibus testatorem voluisse*) these words to have been inserted as a condition meaning this: 'if the whole slave remained in his ownership'; for then if a share has been alienated, the condition fails.

Again the insistence on “most evident proofs” highlights the significance of the *favor libertatis*. D.34.4.15, from a work by Paulus on freedmen, also favors liberty in a case “where a slave is legated by a testator and is then alienated and reacquired by the latter,” by holding that

the claim of the legatee can be defeated by a defense of fraud (*exceptio doli mali*). Of course, if the legatee proves a renewed intention on the testator's part (*si probet legatarius novam voluntatem testatoris*) that he should have the slave, he will not be debarred from receipt.

Absent such proof, the legacy can no longer be enforced, and the slave may become a freedman as the beneficiary of a general provision to that effect. Such general grants of liberty did in fact become increasingly frequent in imperial times.

The solicitude for freeing slaves extends to providing support for them once they are freedmen. In D.50.16.243 it is held that the phrase “freedmen” in a clause of a will also refers to those who are freed later in the same will; which means that these, too, benefit from the earlier clause. D.34.1.13 pr., attributed to Scaevola, deals with a case in which a testator had first left in his will a sum of three hundred *aurei* to Seius, to provide food and clothing for the testator's freedmen from the interest on that sum; in a codicil, the testator then forbade the sum to be given to Seius, and provided that it should be given to Maevius instead. Asked whether Maevius is now charged with the *fideicommissum* in favor of the freedmen, Scaevola is reported to have replied

I have given it as my opinion that unless Maevius makes plain that the testator had enjoined on him some other burden about which there is no doubt (*nisi aliud, de quo non deliberaretur, doceat sibi a testatore iniunctum*), he is regarded in accordance with the testator's wish (*videri secundum voluntatem testatoris*) as having taken on the burden attributable to the sum transferred to him in the codicil.

The desire to ensure support for freedmen is not unlimited; where freeborn heirs need to be maintained, these are given their due, as is shown in three other passages, also attributed to Scaevola: D.33.1.18 pr. reports on a case in which a testator left a farm to his freedmen and after them to their children, and required them to pay ten each year to his heir from the farm revenue “to the thirty-fifth year from the day of my death” (*usque ad annos triginta quinque a die mortis meae*). The question is whether this obligation expires already with the heir's thirty-fifth year. We are informed that

[h]e replied that it was owed [until thirty-five years after the testator's death], unless it was shown by the freedmen that the testator was referring to the heir's thirty-fifth year (*nisi ostendatur a libertis testatorem ad heredis trigesimum quintum annum respexisse*).

And in D.33.1.19 Titia appointed Seia her heir and left a usufruct in her farm to Maevius, imposing a *fideicommissum* on him to pay six hundred a year to Arrius Pamphilius and Arrius Stichus (typical freedmen's names) from the income of the farm for the duration of their lives. The question is if the heirs of the legatee Maevius owe the payment after the farm has reverted to Seia after Maevius' death. Scaevola reportedly

replied that there was no obligation on the legatee's heirs, unless it was plainly proved that the testator wished (*nisi testatorem manifeste probetur voluisse*) payment to be made even after the usufruct had been terminated, provided that the yield of the usufruct was sufficient for the purpose.

This approach is confirmed in a parallel decision in D.34.1.20.2.

Freedmen continue to owe debts of gratitude to their former owner, and their patron may become their heir when they die before him. A very clear instance of legal policy-making by means of a presumption is D.34.5.9(10).2, already mentioned above in conjunction with presumptions concerning death. Usually, an adult son who dies with his intestate father is presumed to have survived his father and thus to have become his heir (D.34.5.9[10].4); but if the father was a freedman, the law presumes him to have survived his son, and therefore makes the former owner the heir, unless it is specifically proved that the son outlived the father. The jurist Tryphoninus emphasizes quite explicitly that “we hold this view under the influence of the respect due to a patron (*hoc enim reverentia patronatus suggerente dicimus*).”

A particularly interesting group of presumptions relates to the liberating effect of testamentary clauses appointing a slave as *tutor*. Since such a guardianship could only be carried out by a free person, such a clause might be considered void from a strictly formalistic point of view. But legal pronouncements over time evinced a more liberal attitude. In D.26.2.10.4, Ulpianus states that

[a] slave who is the property of another can be appointed tutor in this way: 'If he is free, let him be tutor.' Furthermore, indeed, if he has been appointed without qualification, this condition 'if he is free,' is understood (*videtur*) to be included [thus avoiding invalidity of the clause]. [...] [T]hrough favor of the *pupillus* and the public good, freedom is arrogated (*adsumpta*) to the person of the man who was named as tutor. Therefore, freedom through *fideicommissum* can be claimed for this man also, if the will does not clearly oppose it (*si voluntas apertissime non refragetur*).

Here freedom is granted by way of the more informal *fideicommissum*, bypassing the lack of a formal manumission.<sup>10</sup> In addition to the concern for the slave, the interests of the minor and the public good are invoked to justify the decision. While in this case the testator's intent to free the slave is presumed, in D. 26.2.22 (and also in D.40.5.24.9) freedom is not granted when the testator falsely believes the slave whom he appoints as *tutor* to be free already. There the absence of an intent to grant freedom is apparently regarded as decisive. But of course one can define the intent of the testator more broadly as that of establishing a valid guardianship. Such a wider

<sup>10</sup> Cf. also D.40.5.24.7, discussed above.

notion may have led Paulus to decide in D.26.2.32.2 that “it is right that a man who has been appointed tutor by his master seems also to deserve his freedom”<sup>11</sup> in the case of a slave under twenty-five whom the testator has appointed as *tutor* without specifically freeing him. He held that the manumission takes effect when the inheritance is accepted, but the burden of tutelage only goes into effect at the required age of twenty-five for the tutor so named. Here the form requirement for manumission is no longer an obstacle, and contrary proof is not specifically provided for. This ultimate triumph of the *favor libertatis* over formal obstacles is further confirmed by C.6.27.5.1, where it is explicitly presumed that institution of a slave as tutor *eo ipso* frees the slave, again without mentioning the possibility of proof to the contrary.<sup>12</sup>

## V

In conclusion, I will briefly point to aspects of Roman conceptions of law and to features of the Roman jurist's special social and institutional position that may help explain why they apparently found it somewhat easier to acknowledge such normative commitments than do judges in our contemporary society.

To begin with, the overwhelming majority of presumptions that jurists established were part of the *ius civile*, a domain of the law which was regarded as peculiarly their own. At the same time, this civil law was regarded as susceptible to discovery, and when earlier jurists such as Scaevola discussed certain goals and values, these would rather readily be accepted as inherent in the law. Such acceptance would also be made more likely by the fact that the *ius civile* almost exclusively concerned the members of upper strata of society, since generally only they had the kind of property requiring the elaborate legal machinery maintained and developed by the jurists, who themselves belonged to the same circles and could thus invoke assumptions grounded in a shared consensus.

Moreover, initially their pronouncements were regarded as merely advice to the actual decision-makers, who in civil cases were judges appointed with the legitimating consent of both parties, even if the *praetor* might somewhat constrain the litigants' choice with his authority. Later, when emperors gave certain jurists the right to provide official legal responses (*ius respondendi*), imperial authority supported their judgments. And in the later stages of the empire, invocations of moral principles of *humanitas*, such as the *favor libertatis*, actually became part of the imperial rhetoric that sought to enhance the acceptance of law by persuasion.

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<sup>11</sup>. placet eum, qui a domino tutor datus est, libertatem quoque meruisse videri.

<sup>12</sup>. [...] cum igitur invenimus a nostro iure hoc esse inductum ut [...] ex ipsa tutela datione praesumatur etiam libertatem [...].

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