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Commentary on Hohmann

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In Response To: Hanns Hohman's [Presumption in legal argumentation: from antiquity to the middle ages](#)

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Since neither the law in general nor post-classical Roman and later Medieval law in particular are within my areas of specialization, my comments do not address directly the more technical aspects of Prof. Hohmann's manuscript. But Prof. Hohmann's essay offers more than just technical considerations of legal presumptions. He offers to a reader like me an opportunity to think about and comment on historiographical method in the study of rhetoric and argumentation. I will focus my response on method, using it as a gateway to some very general considerations of Prof. Hohmann's conclusions about the development of presumptions in legal argumentation from antiquity to the Middle Ages.

In the opening line of Professor Hohmann's first analytical section he writes, "Even before the term 'praesumptio' was used to denote the concept, the Roman jurist Scaevola introduced a presumption into legal controversies." The move that Prof. Hohmann makes here is particularly attractive to someone who, like me, believes that cultural activities do not need to be named and codified in order for individuals to participate in them consciously and successfully. Of course this belief is not without opposition. At present a fashionable historiographical method in the study of rhetoric, for example, holds that prior to the coining of the term "rhetoric" and the development of a systematic and philosophical vocabulary for oratorical practice, along with codifications of this practice, cultures could not participate in this activity with full consciousness and sophistication. This way of thinking about history seems to follow in the tradition of early German philology, a tradition to which the famous Bruno Snell belongs. Snell argued that prior to the coining of the term "self" individuals were not conscious of one; thus, they lacked consciousness of agency. This view leads to the popular and readily drawn conclusion that Homeric people, for example, were mere vehicles for the will of the gods. This view also leads to conclusions that notions of probability were absent in such cultures. In a world where divine will shapes all action and where individuals have no access to this will, the argument goes, individuals are unable to say what is likely to happen. As one scholar has recently noted, if at any point Zeus' wrath could prevent the sun from coming up, no notion of the sun's likelihood to rise can enter fully into the consciousness of individuals.

Such critiques of the development of consciousness, either in general or in particular relation to rhetorical practices, set up hierarchies of cultures. Such hierarchies presuppose cultural development from the primitive to the sophisticated, from the naïve and accidental to the informed and purposive. Of course the latter points of each are the privileged points, the celebrated *teloi*. Such critiques not only seem to proceed with the arrogance of the superiority of the achievements of rationality (rationality here being very narrowly defined),

they seem to fly in the face of the evidence evidence that is of course largely overlooked because of the constraints of this ideological framework. Please indulge me a bit longer to present two pieces of evidence on this theme before making the connection to Prof. Hohmann's essay.

First, when Odysseus in the *Odyssey* sees his handmaidens flirting with the suitors his first response, fuelled by his anger, is to come out of hiding and kill each one. He checks his anger though and opts to wait for a better plan and a more opportune time, reminding himself that when in the cave of the Cyclops (a situation far more grave than his current one), checking his anger, thinking of a better plan, and waiting for a more appropriate time allowed him to escape successfully and achieve revenge. That Odysseus is thinking probabilistically seems evident. He thinks that since waiting worked in the case of the Cyclops, it is likely to work in his current situation.

Second, when in the heat of battle at the end of the *Odyssey*, Odysseus realizes that his enemies gained access to what he thought was a locked armory, he accuses (to himself) the handmaidens for what he thinks is an act of treason. Of course we know this is not the case, and Telemachus does confess to his carelessness in leaving the door open, but this outcome is not the interesting point here (though it holds interest for other reasons such as possibly being the first admission of guilt in the western literary tradition). Rather, the interesting point is Odysseus' presumption of the guilt of the handmaidens: a presumption we can guess is based on his having witnessed their lack of loyalty the night before.

Both of these examples seem to reveal that probabilities and presumptions are not beyond the intellectual range of Odysseus despite his having no knowledge of the formal terms "probability" and "presumption" nor the theories that would eventually be formalized for them.

Now returning to Prof. Hohmann's essay we can see the significance of the way he frames his project by saying that even before the term "praesumptio" was used to denote the concept, a Roman jurist introduced presumption into legal controversies. Not only does Prof. Hohmann seem to reject privileging the formal appearance of "praesumptio" as the proper place to begin his study of presumptions in legal argument, he goes on to write that the early use of presumption in legal argument already shows the subtle interplay of empirical and normative considerations that characterizes the treatment of presumptions in the Roman law of the *Corpus Iuris* as a whole. The phrase of particular interest to me that Prof. Hohmann uses here is "subtle interplay." Prof. Hohmann seems to affirm that in the absence of the word "praesumptio" and the later formal treatment of it in Roman law, it not only played a role in legal controversies but it was capable of showing subtlety, which seems to be a mark of sophistication.

From the start of his analysis then, Prof. Hohmann seems to qualify carefully his project so as to avoid the pitfalls of the fashionable historiographical method I

addressed earlier. This seems to me to be a particularly important move for Prof. Hohmann to make because his project is to trace the *development* of legal presumptions from antiquity to the middle ages. Any such project risks the teleological thinking characteristic of those employing that fashionable historiographical method. But Prof. Hohmann seems to resist treating development as achievement on several occasions, not just the opening line to which I have already referred. At one point when he addresses the report of the jurist Ulpian that it was preferable that the crime of a guilty man should go unpunished rather than that an innocent man be condemned, my mind immediately went to earlier signs of such privileging of normative rather than empirical presumption like perhaps in Antiphon's *Murder of Herodes*. Lucky for me, Prof. Hohmann reduced some of my work in looking for such a reference with a footnote to Antiphon's work at 91 in *Murder of Herodes* where the defendant urges the jury to give him the benefit of the doubt with the words, "If then you must make any mistake, it would be less of an outrage to acquit me undeservedly than to condemn me without just cause; for the former is only a mistake, while the latter is also an eternal disgrace." Prof. Hohmann writes, "Such passages show that the idea of presumption on innocence is not a creation of the Common Law."

Another relevant point at which Prof. Hohmann seems to resist the critique of development as achievement comes in his discussion of the contrast between the ancient rhetor and the medieval jurist. Prof. Hohmann writes that in the classical tradition of rhetoric it was the common sense (*doxa*) of the community which undergirded the artistic arguments of the rhetor. But, he writes, in the more technically complex and increasingly professionalized legal system, the lawyer's argumentative art focuses on the law as the primary foundation of forensic arguments. With this contrast defined, Prof. Hohmann cautions us not to overstate it: "On the one hand the juristic sources themselves are to a considerable extent a codification of common sense; on the other Pilius' treatment of these arguments shows very clearly, the authorities cited do not completely determine either the advocate's argument or the judges decision. And what links the ancient rhetor and the medieval jurist is the search, among premises endorsed as persuasion or even recognized as binding by the audience for arguments which can support both sides in a controversial case." Such a caution seems to work against interpretations of development as achievement and instead invites an interpretation of development as difference (though not to the exclusion of some key similarities).

Still again, Prof. Hohmann seems to resist treating development as achievement by disabusing us of the idea that Richard Gaskins' discussion of the rhetorical uses of burden of proof is a uniquely contemporary discussion. Prof. Hohmann's project shows us that such rhetorical argumentative procedures can already be found in ancient law. And again, he disabuses us of the idea that Richard Whately should be attributed as the author of the legal conception of presumption. Rather we can see now a much earlier appearance of this conception in Pilius' *Libellus Disputatorius*. Moreover, Prof. Hohmann makes a powerful case for regarding this earlier treatment as

better than the latter ones, once again undermining any notions of development as achievement.

I would like to emphasize, in conclusion, that my enthusiasm for Prof. Hohmann's project arises primarily from my respect for his historiographical method. I look forward to learning more about the technical analysis which forms the heart of this project, and the issues surrounding this analysis which will enable a critique of it, since I presume such insight will allow my enthusiasm for his project to grow.
