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The Legal Roots of Presumption

1. What Presumption Is All About

To *presume* in the presently relevant sense of the term is to accept something in the absence of the further relevant information that would ordinarily be deemed necessary to establish it. The term derives from the Latin *praesumere*: to take before or to take for granted.[1] Presumption has figured in legal reasoning since classical antiquity. There is nothing modern or cutting-edge about it: it is one of the oldest tricks in the book.

Presumption found its first and still most prominent role in the context of the law, where a presumption mandates a trier to accept a certain fact once some other correlative fact has been established. The French *Code civil* defines "presumptions" as "Consequences drawn by the law or the magistrate from a known to an unknown fact."[2] Legal presumptions provide a way of filling in – at least pro tem – the gaps that obtain in conditions of incomplete information. (The "presumption of innocence" provides a paradigm example here.)

Such a legal presumption (*praesumptio juris*) is an inference from a fact that, by legal prescription, stands until refuted. Presumption of

[1] There is also a different – presently irrelevant – sense of the term in which it means "to lay claim to a merit or good without having done anything to deserve it." This is akin to the sort of self-aggrandizement or self-assertion at issue with *hubris*.

[2] "*Conséquences qui la loi ou le magistrat tire d'un fait connu à un fait inconnu.*" Bk. III, pt. iii, sect, iii, art. 1349.

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this sort is a gap-filling resource: it comes into operation only in the absence of relevant information or evidence, and it leaves the scene once suitably strong evidential indications come to view. One authority has elucidated the conception of presumption in the following terms:

> A presumption in the ordinary sense is an inference.... The subject of presumptions, so far as they are mere inferences or arguments, belongs, not to the law of evidence, or to law at all, but to rules of reasoning. But a legal presumption, or, as it is sometimes called, a presumption of law, as distinguished from a presumption of fact, is something more. It may be described, in [Sir James] Stephen's language, as "a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth" (perhaps it would be better to say 'soundness') "of the inference is disproved."[3]

A legal presumption is thus a supposition relative to the given facts – a supposition that, by legal prescription, is to stand until refuted.

The tabulation of Display 1.1 lists some typical instances of legal presumption.[4] In every case the qualifying addendum "absent proof or evidence to the contrary" can and should uniformly be appended to the statement of such presumptive stipulations. The presumptions they specify can and should hold good until such time as counterindications come to view. For a presumption is not a fact but a provisional estimate of the facts. It is defeasible but nevertheless secure until actually defeated: it remains in place unless and until it is displaced by destabilizing developments.

Legal presumption specifies an inference that is to be drawn from certain facts in the absence of better information; it indicates a conclusion that, by legal prescription, is to stand until duly set aside, on the model of the "presumption of innocence." In many cases the legal presumption at issue can be defeated by appropriate evidence to the contrary. Presumption of this sort is sometimes called an argument *from* ignorance, but this is really not quite right; it is an argument *in* ignorance. For ignorance is not a ground or premise for which to reason but a circumstance in which one reasons as best one can, faute

[3] Sir Courtenay Ilbert, art. "Evidence," *Encyclopaedia Britannica,* 11th ed., Vol. 10 (Cambridge, 1910), pp. 11–21 (see p. 15).
[4] For one elaborate survey of legal presumptions, see Burr W. Jones, *The Law of Evidence, Civil and Criminal,* Vol. I, 5th ed. (San Francisco: Bancroft-Whitney, 1958).

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- That a person accused of a crime is innocent
- That a child born in wedlock is legitimate, as is one born within eleven months of the husband's death
- That a person missing for seven years or more is dead
- That a regularly solemnized marriage is valid
- That a younger and healthier decedent survived longer in a common fatal accident of otherwise unknown result
- That agents are sane
- That people acting deliberately intend the actual consequences of their actions
- That young children (under the age of seven) cannot commit a felony
- That a child under fourteen has no criminal intent
- That an incriminating object found on the premises of a suspect is something that belongs to this individual
- That a person is cognizant of a contention clearly stated within his or her earshot
- That a document over 30 years old is genuine

DISPLAY 1.1. Some legal presumptions

de mieux to the resolution of an issue that needs to be settled. Sometimes, however, legal presumptions are indefeasible – for example, that a mature agent knows the law ("ignorance of the law is no excuse") or that in criminal matters one spouse is incompetent to testify against the other. The idea of presumptions is principally procedural in serving to determine what has to be done in the course of developing a cogent case.

It is clear that there are various sorts of rationales for presumptions. Some are a priori matters of procedural convenience or propriety (e.g., that someone is "innocent until proven guilty"); others are empirically guided by evidential backing (e.g., that someone missing for more than seven years is dead.) But, irrespective of their *grounding*, the operative functioning of presumptions is substantially the same. In every case, a presumption is a plausible pretender to truth whose credentials may well prove insufficient, a runner in a race it may not win. The "acceptance" of a proposition as a merely presumptive truth is not acceptance at all but a highly provisional and conditional epistemic inclination toward it, an inclination that falls far short of outright commitment.

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Presumptions by nature provide a provisional surrogate for outright claims to the actual truth. As Lalande's philosophical dictionary puts it: "Presumption, speaking strictly and precisely, is an anticipation of something yet unproved."[5] A presumption is in tentative and provisional possession of the cognitive terrain, displaced by something that is evidentially better substantiated.[6] A presumption is a putative fact which, while in the circumstances perhaps no more than probable or plausible, is nevertheless to be accepted as true provisionally – allowed to stand until concrete evidential counterindications come to view. Presumption is thus typified by the idea of "innocent until proven guilty."

And so presumptions, though possessed of significant probative weight, will in general be defeasible – that is, subject to defeat in being overthrown by sufficiently weighty countervailing considerations. In its legal aspect, the matter has been expounded as follows:

> [A] presumption of validity . . . retains its force in general even if subject to exceptions in particular cases. It may not by itself state all the relevant considerations, but it says enough that the party charged should be made to explain the allegation or avoid responsibility; the plaintiff has given a reason why the defendant should be held liable, and thereby invites the defendant to provide a reason why, in this case, the presumption should not be made absolute. The presumption lends structure to the argument, but it does not foreclose its further development.[7]

The standing of a presumption is thus usually tentative and provisional rather than absolute and final. A presumption stands only until the relevant issues that "remain to be seen" have been clarified, so that it

[5] André Lalande, *Vocabulaire de la philosophie*, 9th ed. (Paris: Presses Universitaires de France, 1962), s.v. "présomption": "*La présomption est proprement et d'une manière plus précise une anticipation sur ce qui n'est pas prouvé.*"

[6] The modern philosophical literature on presumption is not extensive. When I wrote *Dialectics* (Albany: State University of New York Press, 1977) there was little apart from Roland Hall's "Presuming," *Philosophical Quarterly*, 11 (1961): 10–22. More recently there is Edna Ullmann-Margalit, "On Presumption," *Journal of Philosophy*, 80 (1983): 143–63. A most useful recent overview is Douglas N. Walton, *Argumentation: Schemes for Presumptive Reasoning* (Mahwah, N.J.: Lawrence Erlbaum, 1996), which does, however, overlook our present central theme of probability. I am also grateful to Sigmund Bonk for sending me his unpublished study "Vom Vorurteil zum Vorausurteil."

[7] Richard A. Epstein, "Pleadings and Presumptions," *University of Chicago Law Review*, 40 (1973–4): 556–82.

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becomes apparent whether the presumptive truth will in fact stand up once everything is said and done.[8]

The idea of potential defeasibility is critical for presumption. There are no indefeasible presumptions – whatever may seem to be such is in fact simply a stipulation or fiat. To be sure, certain legal principles are sometimes characterized as "conclusive presumptions" (for example, that a child of less than seven years cannot commit a crime or that a crime exists only with establishment of circumstances "beyond reasonable doubt"). But these indefeasible "presumptions" are presumptions in name only – in actual fact they are incontestable legal postulates. Strictly speaking, the idea of an "irrefutable presumption" is a contradiction in terms. Accordingly, such legal rules of ineligibility as

- that a wife is incompetent to testify against her husband

and

- that a minor is too immature to vote or to enter into a valid contract

are not presumptions but postulates or stipulations. Unlike presumptions, they are not defeasible but stand come what may. And while some legal theorists characterize such stipulations as conclusive (or irrebuttable) presumptions, this is unhelpful because it throws together items whose nature and function are altogether different.

[8] C. S. Peirce put the case for presumptions in a somewhat different way – as crucial to maintaining the line between sense and foolishness:

> There are minds to whom every prejudice, every presumption seems unfair. It is easy to say what minds these are. They are those who never have known what it is to draw a well-grounded induction, and who imagine that other people's knowledge is as nebulous as their own. That all science rolls upon presumption (not of a formal but of a real kind) is no argument with them, because they cannot imagine that there is anything solid in human knowledge. These are the people who waste their time and money upon perpetual motions and other such rubbish. (*Collected Papers*, VI, 6.423; compare II, 2.77 6–7.)

Peirce is very emphatic regarding the role of presumptions in scientific argumentation and adduces various examples – for example, that the laws of nature operate in the unknown parts of space and time as well as in the known, or that the universe is inherently indifferent to human values and does not on its own workings manifest any inclination toward being benevolent, just, or wise. Peirce saw one key aspect of presumption to revolve about considerations regarding the *economics of inquiry* – that is, as instruments of efficiency in managing time and money. On this section of his thought, see N. Rescher, *Peirce's Philosophy of Science* (Notre Dame, Ind.: University of Notre Dame Press, 1978).

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A presumption is not something that certain facts *give* us by way of substantiating evidentiation: it is something that we *take* through a lack of counterevidence. A presumption is more akin to a theft than a gift. It is not authorized by what we know about a particular matter; it is something eminently useful to which we help ourselves because we can get away with it. In the legal context, Wigmore puts the matter as follows:

> If they [the jury] find the fact of absence for seven years unheard from, and find no explanatory facts to account for it, then *by a rule of law they are to take for true the fact of death*, and are to reckon upon in accordingly in making up their verdict upon the whole issue.[9]

As this indicates, the matter of *taking for granted* is pivotal for presumption.

Accordingly, presumption is certainly not knowledge: we do not *know* what we merely *presume* to be so. As an informative resource its standing is quite different from that of knowledge acquired by learning. But it nevertheless is an informative resource – and a highly useful one at that, since it serves to close up an otherwise debilitating gap.

On this basis, the idea of presumption is also closely linked to that of a default position in information science. Suppose you are confronted with a variety of alternatives A_1, A_2, . . . A_n. And you take the stance that alternative A_1 is to be adopted in the absence of a clear-cut demonstration that some other alternative is appropriate. Then this is standardly designated as the *default position* for this choice of alternatives. And this is effectively tantamount to presuming the appropriateness of A_1, retaining it in place unless and until a specific reason for change comes to view.

Presumptions will vary in point of their probative weight. Some legal presumptions stand until overturned by a conclusive refutation even as the presumption of innocence in criminal matters requires refutation "beyond a reasonable doubt." Still others merely impose a burden of persuasion that reflects a balance of probability (e.g., that the parties to an agreement are sane). And so there are weaker and stronger presumptions.

[9] John Henry Wigmore, *The Principles of Judicial Proof: A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, Vol. 10 (Boston: Little, Brown, 1904–1905; 3rd ed. 1940), sect. 2490. Issues relating to presumption and burden of proof are extensively canvassed in this classic work on legal reasoning.

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The conception of a prima facie case is intimately connected with that of burden of proof. To make out a prima facie case for one's contention is to adduce considerations whose evidential weight is such that in the absence of countervailing considerations, the "reasonable presumption" is now in its favor, and the burden of proof (in the manner of an adequate reply that "goes forward with [counter] evidence") is now incumbent on the opposing party. What is at issue with cognitive presumption is a social process of dialectical interaction, a practice in information management that provides for socially sanctioned entitlements whose appropriateness is substantiated by the efficacy of established practice in matters of communal inquiry and communication.

Their inherent defeasibility means that appropriate presumptions are impervious to occasional failure. However, what is defeasible about a presumption is not the general rule (e.g., that people missing for seven years are dead) but its application in a particular case (that Smith who has been missing for seven years is indeed dead). Presumptions thus stand secure against occasioned failures in point of successful application. They are safeguarded by that explicitly protective clause: unless and until there are indications to the contrary.

2. Presumptions as Procedural Resources

Presumptions are inherently in *procedural* injunctions. This is illustrated by the presumption of innocence-in-the-absence-of-proven-guilt which is, in effect, a conditional inferential mandate taking the following form:

> Whenever the (antecedent) premises *P* obtains one is authorized to infer the conclusion *C* in the absence of explicit indications to the contrary.

Legal presumptions are generally mandates based on rules that do not merely authorize but require. B. W. Jones puts the matter as follows:

> A presumption may be defined to be an inference *required* by a rule of law drawn as to the existence of one fact from the existence of some other established basic facts – It is a true presumption of fact in the sense that another fact is

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assumed from established basic facts. It is a presumption of law in the sense that a rule of law requires the assumption to be made.[10]

Elsewhere, however, rules of presumption are often mere inference licenses. The practice at issue, be it mandatory or an authorization, will differ in its nature from context to context, operating within the limits of appropriate practice of the domain of praxis that is in question (law, communication, rational inquiry, or whatever). Honoring these presumptions is in each case a matter of "the rules of the game" that define the project at issue.

Presumptive reasoning in general has a very definitive structure along the following lines:

- A presumptive principle of generic import
- A particular case subsumed under this principle
- A specific, particularized presumption
- A determination of nonexceptability
- A specific conclusion

This general pattern is illustrated by the following inference:

- There is a standing presumption that a person missing for seven years is dead.
- John Smith has been missing for seven years.
- John Smith may be presumed dead.
- There is no reason to see this presumption as defeated (say, by evidence of deception or fraud).
- John Smith is dead.

Here of course the status of the conclusion is not that of an established fact but rather just exactly that of a valid presumption.

As the preceding illustrations indicate, presumptive reasoning represents a process that moves from a generic presumption of general principle via a specific (principle-instantiating) situation to a factual conclusion of presumptive standing. And so without general principles of presumption there can be no presumptive claims whatsoever and specific presumptions must necessarily be "covered" by such generic rules.

[10] Burr W. Jones, *The Law of Evidence, Civil and Criminal*, Vol. I, 5th ed. (San Francisco: Bancroft-Whitney, 1958).

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A rule of presumption contrasts with a corresponding universal generalization. Compare (a) the presumption that a person missing for seven years is dead, and (b) the factual generalization "People missing for seven years are always dead." Note that this presumption is valid (legally appropriate) even though the universal generalization is incorrect. Universality is dispensable for presumption, nor does presumptive appropriateness even require statistical generality. Thus contrast (a) the presumption that the accused is innocent of a crime until proven guilty of it with (b) the proposition that people accused of a crime are usually innocent of it unless their guilt can be proven in a court of law. It may well be – indeed presumably is – actually the case that most of the time the people accused of a crime did actually commit it. Nevertheless that presumption remains a perfectly appropriate legal principle. Presumptions are validated by their functional efficacy within their operative context and not by their statistical accuracy.

Legal presumption exists to foster the functions of law or the interests of social management. As instrumentalities effective in facilitating public ends they need not directly reflect matters of empirical fact. The presumption of innocence does not rest on the fact that accused individuals are generally innocent. Nor does the presumption that a person absent for seven years dies immediately upon the expiration of this period reflect the determinable facts of the matter.[11] Presumptions have a life of their own determined correlative with the objectives in whose service they are operative.

3. Presumption beyond the Law

From its role in the courtroom, presumption migrated into the area of disputation, which served as an important process in the teaching method of medieval universities. It was pivotal for the theory of academic disputation via the obligations (*obligationes*) seen as incumbent upon a disputant to support his assertions by appropriate argument

[11] These considerations cast a large shadow of doubt over the U.S. Superior Court's contention that a presumption is "an inference as to the existence of a fact not actually known arising from its *usual connection* with another which is known" (Jones, The Law of Evidence, p. 16). For adequacy in the case of presumptions of law, that italicized phrase should be changed to *legally mandated connection*.

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- That a newly introduced contention requires substantiation.
- That the substantiation provided is the best and most plausible that there is.
- That an uncontested contention is conceded as true.
- That a proposition attested by established authorities is true.
- That in a context of contentions the stronger arguments prevail.

DISPLAY 1.2. Dialectical presumptions

(*agenti incumbit probatio*).[12] On this basis we encounter such presumption as are listed in Display 1.2. And thus employment of the mechanisms of presumption in disputation finds an ongoing resonance in its role in the exercise of debating that continues popular in schools and colleges to the present day.[13]

Of special importance here is the governing idea that the supporting argument provided in a disputation must strive for maximum plausibility. In consequence, the presumption is that the grounds a disputant adduces in support of his or her contentions represent, as this disputant sees it, the strongest arguments there are.

With disputation and dialectics serving as an intermediary, the use of presumption then moved on to find application in a wide variety of further cognitive contexts including the theory of communication, of rational inquiry, and of the methodology of scientific investigation. It is, in fact, one of epistemology's most fruitful conceptions for there is, in most probative contexts, a standing presumption in favor of the usual, normal, customary course of things. And so with presumption we *take* to be so what we could not otherwise manage to *establish*. And presumptions set the stage for many of our interpersonal actions and activities. In general we presume that one's interagents are pursuing in good faith the aims and objectives of whatever project we are

[12] See Eleonore Stump and P. V. Spade, "Obligations," in Norman Kretzmann (ed.), *The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1998), pp. 315–41. And on the logical underpinnings of medieval disputation see Hajo Keffer, *De Obligationibus: Rekonstruction einer spätmittelalterlichen Disputationstheorie* (Leiden: Brill, 2001). Keffer rightly stresses the connections that link medieval disputation with the dialectics discussed in Aristotle's *Topics*.

[13] See for example Gerald H. Sanders, *Introduction to Contemporary Academic Debate*, 2nd ed. (Prospect Heights, Ill.: Waveland Press, 1983); F. H. Van Eeinemen, *Fundamentals of Argumentation Theory* (Mahwah, N.J.: Lawrence Erlbaum, 1996).

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