

FOREWORD:

THE POWER OF PRESUMPTIONS

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Once you start to notice it, you see it everywhere. Burden-shifting is pervasive. I suppose I began to notice the power of presumptions when examining how to protect the rights “retained by the people” referred to in the Ninth Amendment¹ without having to enumerate each one. I proposed the creation of a “presumption of liberty” that would extend the same protective presumption now accorded freedom of speech to all other rightful exercises of liberty. This presumption would shift the burden to the government to justify as necessary and proper any restriction on the rightful exercise of any liberty.²

This idea had been stimulated by my reconsideration of the constitutional theory embodied in Justice Stone’s opinion in *United States v. Carolene Products*.³ Although footnote 4 is committed to memory by most professors of constitutional law, less well-discussed today is the passage of the text it qualifies:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the *assumption* that it rests upon some rational basis within the knowledge and experience of the legislators.⁴

Footnote 4 then informs us that:

There may be a narrower scope for operation of this *presumption of constitutionality* when legislation appears on its face to be within a specific prohibition of the Constitution, such as those

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1. See U.S. CONST., amend. IX (“The enumeration, in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.”).

2. See, e.g., Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy E. Barnett ed., 1993); Randy E. Barnett, *Introduction: James Madison’s Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1 (Randy. E. Barnett ed., 1989).

3. 304 U.S. 144 (1937). This reconsideration had itself been stimulated by J.M. Balkin, *The Footnote*, 83 Nw. U. L. REV. 279 (1989).

4. *Id.* at 152 (emphasis added). Even less well-discussed is the fact that the legislation at issue in the case was a classic example of economic protectionism, in this case, of the dairy industry. See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.⁵

In this way, the Court presumes that the Constitution grants near plenary powers to Congress, unless that presumption is rebutted in a way that meets the standards set by Footnote 4. Thus did the power of presumptions effect a constitutional "revolution."⁶

Though it was famously qualified by him, this shift of presumptions did not originate with Justice Stone. The seeds of this constitutional revolution were sown by Justice Brandeis in *O'Gorman and Young v. Hartford Insurance Co.*⁷ The significance of this case, and the means that Brandeis employed to achieve his purposes, did not go unnoticed or unheralded at the time. It is worth quoting at length from the pages of the *Columbia Law Review* the gushing comments penned by Walton Hamilton, an admiring Yale Law School professor:

[T]he simple lines of [this] short opinion present a superb example of the jurist's art. The catalogue of precedents is left to the dissent; the technique of distinction would do no more than serve the current need. There is no attempt to make out a case; an elaborate argument, concerned with the insurance business, filled with citations, and buttressed in footnotes would save a single statute. The demand is to find an escape from the recent holdings predicated upon "freedom of contract" as "the rule," from which a departure is to be allowed only in exceptional cases. The occasion calls not for deft use of tactics, but for a larger strategy. The device of presumption is almost as old as law; Brandeis revives the presumption that acts of a state legislature are valid and applies it to statutes regulating business activity. The factual brief has many times been employed to make a case for social legislation; *Brandeis*

5. *Id.* at 152 n.4 (emphasis added). Of course, the presumption is also said to have a narrower scope when legislation "restricts . . . [the] political processes" or involves "prejudice against discrete and insular minorities." *Id.*

6. See, e.g., BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991) (contending that the "constitutional triumph of the activist welfare state" in 1937 was a genuine constitutional revolution).

7. 282 U.S. 251 (1931). This strategy for limiting the scope of judicial review was not his, however. It was proposed in 1893 by Harvard Law Professor James B. Thayer.

This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and whatever choice is rational is constitutional.

James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents, reverses the rules of presumption and proof in cases involving the control of industry; and sets up a realistic test of constitutionality. It is all done with such verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious—once Brandeis has shown how the trick is done. It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed, save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action. Yet an argument which degrades “freedom of contract” to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.⁸

Professor Hamilton also noticed the peculiar power of presumptions when he observed that:

Brandeis has, to serve judicial necessity, remade an old device. His presumption, rebuttable only by a recitation of fact, is a compound of the older presumption of constitutionality and Holmes’ formula “It is not unconstitutional.” *The use of the double negative may logically add nothing; but it has a high rhetorical value, and has come to furnish a basis for an ingenious procedural device.*⁹

In his paean, however, Hamilton appears to have missed the irony of the originator of the “Brandeis Brief”—the innovation heralded as compelling the Supreme Court to come out of its “formalist” shell and confront the hard facts of the real world¹⁰—having adopted a presumption that made his “Legal Realist” empirical inquiry obsolete. Never again would a defender of so-called “economic” legislation have to present facts and evidence

8. Walton H. Hamilton, *The Jurist’s Art*, 31 COLUM. L. REV. 1073, 1074-75 (1931) (citations omitted) (emphasis added).

9. *Id.* at 1074 n. 8 (emphasis added).

10. See John W. Johnson, *Brandeis Brief*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 85 (Kermit L. Hall et al. eds., 1992):

Louis D. Brandeis, then a well-known attorney and social activist, submitted a lengthy brief supporting the constitutionality of an Oregon statute that limited the hours per day that women could work in laundries and other industries. . . .

The *Muller* brief devoted a mere two pages to discussion of legal issues; the remaining 110 pages presented evidence of the deleterious effects of long hours of labor on the “health, safety, morals and general welfare of women.” . . .

The *Muller* brief’s analysis was consonant with the fact-oriented “sociological jurisprudence” of the Progressive era. It forced the Court to consider data that state legislatures employed in drafting reform laws.

I find it necessary to include this quotation because most law students I have asked who have taken constitutional law are unfamiliar with the tale. Perhaps the story is not trumpeted today because the merits of this admirably realist device are so incongruous with the unrealistic, but widely accepted, presumption of constitutionality.

(unless the qualifications of Footnote 4 are implicated). Such facts would simply be presumed—well-nigh irrebuttably—whether or not they were true. Indeed, such “facts” would even be made up by the Court itself.¹¹ So much for realism.¹²

Once I began to think seriously about the power of presumptions in constitutional theory, it began to affect my thinking about contract law as well. Contract scholars had long characterized as assent-based only those terms that were expressly assented to, or those to which assent could be implied-in-fact. In contrast, implied-in-law terms were thought to be *imposed* upon the parties by the legal system. Contract scholars associated with Legal Realism had emphasized the inevitable incompleteness of expressed or implied-in-fact contract terms based on consent, and therefore the pervasiveness of terms that were implied-in-law for reasons either of principle or of policy. Thus was it claimed that consent was marginal to contract law, since contract law only applied when there was a “gap” in assent. How that gap should be filled was therefore a matter of policy and certainly not, except wholly fictitiously, a matter of the parties’ consent. In sum, the law of contract had little, if anything, to do with contractual consent because contract law operated precisely when consent gave out—and this happened all the time.

The flaw in this picture was revealed by the metaphor of “default rules,” a concept recently imported by Law and Economics scholars from corporate law theory into contract theory.¹³ The default rule metaphor revealed that, except in rare circumstances, the law of contract applied only *presumptively*, and could be “rebutted” by the manifested assent of the parties. This com-

11. *See, e.g.,* Federal Communications Commission v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993):

[T]hose attacking the rationality of the legislative classification have the burden “to negative every conceivable basis which might support it.” . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

Justice Stevens took issue with this standard: “In my view, this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a ‘reasonably conceivable state of facts.’ Judicial review under the ‘conceivable set of facts’ test is tantamount to no review at all.” *Id.* at 2106 (Stevens J., concurring).

12. Is it too cynical to suggest that the philosophy of Legal Realism is dispensable when one has the votes? Or would this be the epitome of realism?

13. *See, e.g.,* Symposium on Default Rules and Contractual Consent, 3 S. CAL. INTERDISCIPLINARY L. REV. 1-444 (1993).

pletely reversed the image that had been widely accepted, until recently, that contract law was imposed on contracting parties. For it turned out that contract law was only “imposed” on those parties who chose to accept it by remaining silent.¹⁴ In this way, when parties who are rationally informed about the background default rules of contract law choose to remain silent on a matter governed by the default rules provided by contract law, we may conclude that they have consented to the use of these rules should a dispute arise.

In addition, when contracting parties are not rationally informed about the background default rules of contract law, their silence may still be meaningful enough to influence the selection of default rules adopted by a legal system. Lon Fuller had long ago observed that even when persons are not “conscious” of a particular fact, they pervasively make what he called “tacit assumptions” about these facts:

Words like “intention,” “assumption,” “expectation” and “understanding” all seem to imply a *conscious* state involving an awareness of alternatives and a deliberate choice among them. It is, however, plain that there is a psychological state which can be described as a “tacit assumption” that does not involve a consciousness of alternatives. The absent-minded professor stepping from his office into the hall as he reads a book “assumes” that the floor of the hall will be there to receive him. His conduct is conditioned and directed by this assumption, even though the possibility that the floor has been removed does not “occur” to him, that is, is not present in his mental processes.¹⁵

Another term for a tacit assumption is a *presumption*. We all presume a great deal about the world—far more than we could ever articulate, even to ourselves. The fact that these presumptions are not always present in our “consciousness” does not make them any less real.¹⁶ Nor does it make our manifestations of assent any less conditional on their turning out to be accurate. Consciousness itself is a bit more complicated than those con-

14. The analysis presented here is explained at greater length in Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

15. LON L. FULLER, *BASIC CONTRACT LAW* 666-67 (1947).

16. See Paul J. Heald & James E. Heald, *Mindlessness and the Law*, 77 VA. L. REV. 1127, 1137 (1991) (“Decisionmaking proceeds from both conscious and nonconscious states of awareness.”).

tract scholars who limited the notion of contractual consent to conscious assent appear to have assumed.¹⁷

Moreover, once this is recognized, if contractual consent is to be facilitated, the substance of contract law should be determined with at least one eye on those circumstances that would prevent parties from "contracting around" those rules of contract law with which they might disagree. So, for example, if it would be rational for one-shot players in a small transaction to remain ignorant about the background default rules of contract law, then contract law perhaps should reflect what most such parties would have wanted, in an effort to discern what these parties did implicitly want.¹⁸ And should rationally ignorant one-shot players do business with rationally informed repeat players, the default rules of contract should be chosen to reflect the likely tacit assumptions of the rationally ignorant. In this way, the rationally informed would be induced to reveal to the other party when they might wish to deviate from the tacit understanding of the other party, thus informing the rationally ignorant by their bargaining behavior that they wished to play by counter-intuitive rules.¹⁹ By this process, the manifested assent of both parties would be brought into closer correspondence to their actual assent.

In sum, parties who are rationally informed about the background rules of contract can be said to have consented to *any* default rule regardless of its content. However, given that many persons are rationally ignorant, the default rules of contract law should be chosen to reflect the conventional tacit assumptions of rationally ignorant parties. In this way, when two rationally ignorant parties are contracting with one another, such "conventionalist" default rules are likely to represent their actual intentions; and when a rationally ignorant party is contracting with a rationally informed party, such conventionalist default rules will induce the rationally informed party to reveal by its bargaining behavior that it wishes to deviate from the norm and thereby educate the rationally ignorant party of this fact. In either event, the objective manifestation of assent is brought into closer alignment with the subjective assent of the parties.²⁰

17. See DANIEL C. DENNETT, *CONSCIOUSNESS EXPLAINED* (1991).

18. See Barnett, *supra* note 14, at 880-83.

19. *Id.* at 886-92.

20. I have defended and elaborated this view in . . . and *Contractual Consent*, 3 S. CAL. INTERDISCIPLINARY L. REV. 421 (1993).

Thus was the traditional Legal Realist image of contract law reversed by the concept of presumptions. The law of contract was ordinarily not simply to be imposed on the parties by the legal system for reasons of principle or policy wholly unrelated to the parties' consent, as generations of realist and post-realist contract scholars had maintained. Instead, the default rules of contract law operate presumptively. Contractual consent is served rather than displaced when default rules are formulated either to reflect the tacit assumptions of most contracting parties, or to induce bargaining behavior that serves better to inform the parties about the rules by which their relationship will be governed.

Having observed the power of presumptions in both the public and private law spheres, the publication of Richard Gaskins's new book, *Burdens of Proof in Modern Discourse*,²¹ seemed to me unusually timely. In it he documents the use of presumptions in political and legal discourse, including constitutional law:

Although the authority of federal courts to review legislative and executive actions was effectively asserted early in the nineteenth century, bitter struggles have continued into the present day on whether federal and state legislation enjoys a *presumption of constitutionality*. After decades of intricate manipulation, this phrase has become virtually meaningless, but the underlying concept figures heavily in contemporary debate over judicial activism. Under Chief Justice Warren in the 1950s and 1960s, the United States Supreme Court to inject more authority and flexibility into judicial review, while trying to maintain the Court's traditional image as an impartial tribunal. Much of that flexibility came from adjusting the presumption of constitutionality.²²

Gaskins maintains that this phenomenon is pervasive.

Legislatures and administrative bodies build presumptions into legal standards as way of structuring the inevitable uncertainties of implementation. . . . By allocating in advance certain procedural and evidentiary burdens among relevant interest groups, legislation favors substantive outcomes that defy the bland and balanced rhetoric one finds in many statutes. . . .

Controversies about proof and metaphors of sensory verification occur at all levels of the judicial hierarchy, frequently masking deeper conflicts over public values. Appeals courts derive conclusions of law from the fact that no evidence in

21. RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* (1992).

22. *Id.* at 21-22.

contradiction was introduced at trial, or at least insufficient evidence. In most such cases, the nature and salience of evidence are more important than sheer quantity. To close the gap between quantity and quality of evidence, a structure of presumptions must cut through complex social ambiguities. For example, the defendant in a discrimination suit may have to prove an absence of subjective bias. The opponent of pornography may be forced to demonstrate a causal connection between the printed page and social behavior.

The rationale for judicial decisions in such cases can be stated in terms of evidence, but the underlying issue is about presumptions: what conclusions can be drawn from controversial or indeterminate evidence—that is, from ignorance in its many guises? When exactly is evidence good enough to meet the implicit burdens lurking in legal rules? In short, where is the dividing line between proof and ignorance, and what follows from inconclusive data? The institutionalized procedures of law force us to confront these questions rather than treating them as painlessly settled by nature or custom.²³

And the same phenomenon is pervasive in legal scholarship as well.

Participants in this Symposium address different implications of the pervasive reliance on presumptions that Gaskins describes. Ronald Allen and Dale Nance approach these issues as evidence scholars. As Ron Allen explains,²⁴ evidence scholars, more than any other group, have attempted to analyze the concept of presumptions and the appropriate allocation of burdens of proof. He contends that “[e]ver since evidence emerged as a discipline, its very point has been to administer the problems that result from the interaction of data with the background and experience of the decision maker.”²⁵ In his article, Allen provides a useful bibliography of evidence scholarship on this issue. He then summarizes the fruits of this research and faults Gaskins for not adequately taking this body of learning into account. Allen identifies the different functions performed by presumptions and burdens of proof, and how these functions have influenced the particular allocation of such burdens in different contexts. He notes that “the problem can be just as much complexity as ignorance. The concern is not just with some limited data set, but with the virtually infinite data sets represented by the human

23. *Id.* at 22-23 (citations omitted).

24. Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627 (1994).

25. *Id.* at 640.

decisionmakers. . . .²⁶ Allen's contribution is a wonderfully concise introduction to the complexities of evidence scholarship that bears on the issue of presumptions, arguments from ignorance, and burdens of proof.

Dale Nance moves the discussion in another, intriguing direction.²⁷ Ronald Dworkin long ago argued that all of law is not reducible only to "rules," but that it consists also of "principles."²⁸ In many doctrinal fields today, however, the challenge would be to sort through the principles to find any rules at all. Still, perhaps because it is developed by judges and lawyers to govern their own conduct, rather than that of ordinary citizens, evidence law remains a bastion of legal rules. As part of his project of identifying the major principles lurking beneath these rules,²⁹ Nance identifies, explains, and normatively defends what he calls the "principle of civility":

One ought to presume, until sufficient evidence is adduced to show otherwise, that any given person has acted in accordance with serious social obligations. As a corollary, how much evidence is "sufficient" depends upon the nature and severity of the alleged breach, as well as the nature and severity of the contemplated consequences of a determination of breach.³⁰

He contends that this principle is superior to competing theories of evidence, such as those based solely on empirical accuracy or on statistical probability, in explaining how the law allocates burdens of proof. To establish this claim, he applies his analysis to both the criminal and civil law contexts. Moreover, Nance argues that the adoption of such a principle is at the heart of a liberal or pluralist community.³¹ And, like the phenomena of presumptions, once this principle is identified, one notices its application everywhere.

Whereas Dale Nance's article is at the intersection of evidence law and more normative analysis, the contributions by Lawrence Solum, Mark Rosen, and Gregory Klass and Gustavo Faigenbaum rest squarely in the arena of deontological moral theory. In par-

26. *Id.* at 641.

27. Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL'Y 647 (1994).

28. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1966).

29. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

30. Nance, *supra* note 27, at 648.

31. See Nance, *supra* note 27, at 653 ("[T]o presume that someone has breached his or her duty fails to accord that person the dignity associated with the status of *membership* in the community that is governed by the norms whose breach is at issue.").

ticular, they each examine whether the use of presumptions or arguments from ignorance either commits one to a transcendental realm of values or permits one to avoid recourse to such a realm.

Lawrence Solum applies rational choice or decision theory to reveal how burdens of proof assist decisionmaking confronted by two distinct problems of uncertainty: risk and ignorance.³² The problem of risk concerns the ability to make rational decisions when probabilities can be assigned to various outcomes of our decisions. In contrast, the problem of uncertainty is the problem of making rational decisions in the face of ignorance or an absence of information—even about the probabilities of outcomes. According to Solum, when dealing with the problem of risk, rational choice theory suggests that burdens of proof should be chosen to minimize the chances of an erroneous decision. When burdens of proof are used to deal with uncertainty, however, our ignorance of the probability of error prevents such a strategy.³³ Drawing upon his previous scholarship concerning the destruction of evidence,³⁴ Solum suggests that under conditions of ignorance, burdens of proof should be allocated to facilitate some end, such as deterrence or fairness.³⁵ Solum also contests Gaskins' claim that when assigning burdens of proof to deal with uncertainty, we are necessarily making a transcendental truth-claim. He argues that neither the presumptions adopted to deal with risk nor those intended to deal with ignorance need make such claims.³⁶ Solum concludes by denying Gaskins's contention that using constructs, such as Dworkin's metaphor of Hercules³⁷ or John Rawls' "original position," entail a commitment to discovering transcendent truths.³⁸

Mark Rosen examines the issue of whether the judicial allocations of burdens of proof can be justified on the grounds that such allocations reflect a transcendent truth. While accepting Gaskins's thesis that when judges allocate burdens of proof they implicitly claim for their decisions the status of transcendent

32. Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691 (1994).

33. *Id.* at 697.

34. JAMIE S. GORELICK, STEPHEN J. MARZEN & LAWRENCE B. SOLUM, *DESTRUCTION OF EVIDENCE* (1985).

35. *Id.* at 699.

36. *Id.* at 671.

37. *Id.* at 702-704.

38. *Id.* at 704-706.

truth, Rosen questions the institutional competence of the judiciary to make such a claim.³⁹ Rosen contends that judicial resolutions of social disputes are "reified" as transcendental truths for two reasons. First, viewing judicial decisions as morally right legitimates the use of governmental power. Second, it seems to avoid the positivist problem of obeying whatever laws may happen to be enacted. Nonetheless, Rosen argues that "courts should be divested of their generally-perceived authority to identify transcendental truth."⁴⁰ Contending that "the project of coexistence is the most that can be collectively pursued at the national level in a noncoercive pluralistic State,"⁴¹ he argues that judicial decisions should be viewed as containing an implicit disclaimer:

The justification for allowing/proscribing the activity in question is merely that this outcome is consistent with society's consensus that a diverse citizenry should coexist without undue coercion. This is a practical resolution that makes no claims to clarify disputed transcendental issues.⁴²

Ending the section on the relationship between the allocation of burdens of proof and the issue of transcendence is the contribution by Gregory Klass and Gustavo Faigenbaum.⁴³ They examine critically and attempt to elaborate upon the Hegelian analysis of the problem of arguing from ignorance that is offered by Richard Gaskins in his book.⁴⁴

The Symposium concludes with two papers that seek to use the concept of presumptions to illuminate different bodies of substantive law. Tamar Frankel attempts to explain how presumptions are used in corporate law to achieve the difficult balance between stability and change.⁴⁵ She identifies and then applies four categories of presumptions that are used for this purpose:

(i) experience-based presumptions, for example, the presumption that in financial matters, most people will act in their own self-interest rather than in the interest of others; (ii) tradition-based presumptions, for example, that people will follow the trodden path, which undergirds the rule that direc-

39. Mark D. Rosen, *Defrocking the Courts: Resolving "Cases or Controversies," Not Announcing Transcendental Truths*, 17 HARV. J.L. & PUB. POL'Y 715 (1994).

40. *Id.* at 729.

41. *Id.* at 727.

42. *Id.* at 729-30.

43. Gregory M. Klass & Gustavo Faigenbaum, *The Enlightenment of Dialectics: Strategies Involved in Burdens of Proof*, 17 HARV. J.L. & PUB. POL'Y 735 (1994).

44. See GASKINS, *supra* note 21, at 240-272.

45. Tamar Frankel, *Presumptions and Burdens of Proof as Tools for Legal Stability and Change*, 17 HARV. J.L. & PUB. POL'Y 759 (1994).

tors must properly inform themselves and deliberate before making decisions; (iii) presumptions of legality, legitimacy, and orderliness, for example, that corporate directors were legally elected, and that fiduciaries hold and manage other people's money in accordance with the law; and (iv) initial presumptions in favor of defendants.⁴⁶

Richard Gaskins, whose book provoked this Symposium, closes it by applying his analysis of presumptions to the legislation creating administrative agencies charged with dealing with problems of children and of families.⁴⁷ He argues that when such statutes are viewed as creating multiple competing default rules—as opposed to rules *simpliciter*—to govern inevitably complex problems, they are not as contradictory as to some they may seem.

Au Revoir to the I.H.S. Annual Symposium on Law and Philosophy

For the past ten years it has been both my responsibility and my pleasure to serve as the intermediary between three outstanding institutions: the *Harvard Journal of Law and Public Policy* at Harvard Law School, the *Institute for Humane Studies* at George Mason University, and the *Veritas Fund, Inc.*, of Wichita, Kansas. Starting at a time before symposium issues of law reviews were in vogue, we have worked together to produce nine annual issues devoted to law and philosophy. Over the years, we have featured writings by both senior and younger scholars, including graduate and law students, and have drawn attention to the seminal work of such theorists as Jules Coleman,⁴⁸ Frederick Schauer,⁴⁹ and Ernest Weinrib.⁵⁰ We have also tackled the thorny issue of reconciling moral rights and consequentialist modes of analysis.⁵¹

Some years ago, when the annual expenses of this publication began to exceed the income being produced by the trust, it was decided by the trustees of *Veritas* that this project was so important that it should be funded out of the corpus. This meant, of

46. *Id.* at 760.

47. Richard H. Gaskins, *Default Presumptions in Legislation: Implementing Children's Services*, 17 HARV. J.L. & PUB. POL'Y 779 (1994).

48. See *Symposium on Risks and Wrongs*, 15 HARV. J.L. & PUB. POL'Y 621-963 (1992).

49. See *Symposium on Law and Philosophy*, 14 HARV. J.L. & PUB. POL'Y 615-852 (1991).

50. See *Symposium on Legal Formalism: American Association of Law Schools Section on Law and Interpretation*, 16 HARV. J.L. & PUB. POL'Y 579-682 (1993).

51. See, e.g., *Symposium on Law and Philosophy*, 11 HARV. J.L. & PUB. POL'Y 597-836 (1988).

course, that one day our funding would elapse. And now it has. Thus it is time for me to thank one final time the *Institute for Humane Studies*, the trustees of the *Veritas Fund*, and the editors of the *Journal*. In particular I wish to express my appreciation to Jason Levine, this year's Editor-in-Chief. I have had the good fortune to deal with nine incredibly bright and capable Editors-in-Chief, and Jason has been among the very best of an impressive group. Finally, I want to thank my old friend Walter Grinder of the *Institute*. It was Walter's initiative and encouragement that got this project off the ground so many years ago, and whatever success we have achieved was made possible by his patient and far-sighted guidance.

We have had a good run.

