# Bentham on Presumed Offences

FREDERICK SCHAUER
*University of Virginia*

In the *Principles of the Penal Code*, Jeremy Bentham described offences that he labelled presumed or evidentiary. The conduct penalized under such offences is punished not because it is intrinsically wrong, but because it probabilistically indicates the presence of an intrinsic wrong. Bentham was sceptical of the need to create offences, but grudgingly accepted their value in light of deficiencies in procedure and the judiciary. These days the scepticism is even greater, with courts and commentators in the United States, Canada, the United Kingdom and elsewhere believing that such 'proxy' offences deny a defendant the right to establish that he did not engage in the conduct that the presumed offence probabilistically but not necessarily indicates. On closer analysis, however, such scepticism appears unjustified. Almost all offences, and indeed almost all legal rules, are premised on a probabilistic relationship between the behaviour the rule encompasses and the behaviour that is the rule-maker's real concern. Presumed offences may make this relationship especially obvious, but it is a relationship that exists whenever the law operates by the use of rules.

In a little-noticed segment of the *Principles of the Penal Code*,[1] Jeremy Bentham discussed the category of crimes he labelled 'presumed offences'. These crimes, which Bentham also referred to as 'evidentiary offences', were deemed offences not because the prohibited behaviour is intrinsically wrong, and not even because a legislature has determined the behaviour to be socially suboptimal even if not morally reprehensible. Rather, presumed offences, for Bentham, were those in which some form of behaviour, innocent in itself, probabilistically indicates that the person engaging in the behaviour has also engaged in other and wrongful behaviour. What makes a presumed offence evidentiary, therefore, is that conduct is prohibited just because it provides evidence of other and wrongful conduct, even if the conduct providing the evidence is, in itself, and like much evidence in general, entirely blameless, and even if there is no causal relationship between the indicating conduct and the statistically indicated wrong.[2] We could also designate such offences as 'proxy' offences or 'surrogate' offences,

[1] Jeremy Bentham, *Principles of the Penal Code*, book 4, ch. 15, in *The Theory of Legislation*, trans. Richard Hildreth from Etienne Dumont, ed. C. K. Ogden (London, 1931), pp. 425–7.

[2] That indicators often do not cause what they indicate is obvious – smoke does not cause fires. And even statistically non-spurious indications are often not caused by the phenomenon they indicate. Slurred speech is an indicator of impaired driving even though impaired driving does not cause slurred speech. And although increased ice cream sales indicate increased bee stings, bee stings do not cause ice cream sales.

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both terms capturing Bentham's idea that the designated offence is at one remove from the conduct that is the state's genuine concern.

Bentham's treatment of presumed offences is cursory, seemingly because he viewed such offences not as central to the criminal law, but instead as epiphenomenal accommodations to the defects of procedural law and the failings of judges. A closer analysis of presumed offences, however, reveals them not only to be more prevalent, even now, than Bentham supposed and than we typically recognize, but also that presumed offences offer a valuable perspective on the operation and structure of criminal law, and indeed of law itself. Bentham's identification of presumed or evidentiary offences was an important insight, but even he may have underestimated just how perceptive the insight was.

## I

Bentham treats presumed offences as one of four types of accessory offence.[3] The first is the most familiar – the category of *attempts* to commit a 'principal offence'. The legal and philosophical issues surrounding attempts are complex and important,[4] but because an attempt necessarily involves what Bentham calls 'a formed intention to commit the principal offence', there is no question of the possession of a wrongful state of mind on the part of one who attempts to commit a crime. The essential presence of the wrongful state of mind thus excludes the possibility (evidentiary mistakes aside) of punishing truly innocent behaviour, and so the issues raised by attempts as accessory offences are considerably removed from those I discuss here.

The second type of accessory offence is described by Bentham as involving a person who is 'in a situation in which there is reason to fear that he may presently conceive a criminal design. Such are gaming,

[3] In using the term 'accessory', Bentham was not referring to individuals who are accessories to crime according to contemporary criminal law terminology. Rather, he meant only to distinguish those actions which are treated as offences because of some relationship with principal offences. Bentham's four types of principal offence are best understood as representing four different relationships between an accessory (or adjunct, or secondary) offence and a primary offence.

[4] Among the valuable contributions are Larry Alexander and Kimberly Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge, 2009); H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, 1978), pp. 126–31; Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford, 1997); Larry Alexander, 'Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles', *Law and Philosophy* 12 (1993), pp. 33–67; Larry Alexander and Kimberly D. Kessler, 'Mens Rea and Inchoate Crimes', *Journal of Criminal Law and Criminology* 87 (1997), pp. 1138–72; Douglas Husak, 'The Nature and Justifiability of Non-Consummate Offenses', *Arizona Law Review* 37 (1995), pp. 151–83.

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prodigality, and idleness, when poverty is added to it.'[5] Again, Bentham provides little detail about the nature of this category, but his examples are revealing. While gaming, prodigality[6] and idleness may not in Bentham's mind rise to the level of independent or primary offences, nor do they describe praiseworthy behaviour. We can understand Bentham's second type of accessory offence, therefore, as a category of minor wrongs which might not by themselves justify criminalization, but which Bentham thought are criminalized, and for him properly so, because of their tendency to lead to major wrongs by those who engage in them. In modern times, some arguments for criminalizing marijuana use are of this variety, as are many arguments for prohibiting the possession of obscenity or child pornography.[7] For present purposes, however, the important aspects of the crimes in this category are, first, that the criminalized conduct is thought to be causally related to more harmful behaviour, and, second, that the prohibited conduct, although of minor wrongfulness when taken in isolation, is still thought to be somewhat short of morally praiseworthy.

In Bentham's third category of accessory offences, conduct is prohibited because of the possibility that even innocent or valuable forms of the conduct may accidentally cause socially undesirable consequences. Bentham says that some sales of poison or gunpowder fall into this category because they are prohibited, even in the absence of criminal intention, in order to 'prevent calamities'. Unlike the first two categories, crimes in this category punish conduct that is wrong only because the law makes it so, and the law does so for reasons not touching the motives of the actor or the intrinsic moral quality of the prohibited act. And although Bentham was characteristically acerbic in mocking the category of crimes that since Blackstone[8]

[5] Bentham also included 'cruelty to animals', on the basis of it being 'an incentive to cruelty towards men'. Cruelty to animals may or may not be an incentive to or otherwise causal of cruelty towards humans, but it is curious that Bentham, who famously included all creatures capable of suffering within the utilitarian calculus (Jeremy Bentham, *Principles of Morals and Legislation*, ch. XVII, sect. 4 (1789; 1988), p. 311), did not treat cruelty towards animals as a wrong in itself, independent of its propensity to cause cruelty to humans.

[6] The *Oxford English Dictionary* defines 'prodigality' as 'reckless extravagance in expenditure, wastefulness'.

[7] In this article I bracket the empirical questions whether marijuana use is a causal contributor to the use of so-called hard drugs, whether being a consumer of obscene material increases the likelihood that the consumer will engage in acts of sexual violence, and whether users of child pornography are, because of that use, more prone to become sexual abusers of children.

[8] William Blackstone, *Commentaries on the Laws of England*, vol. 1 (London, 1765), pp. 54–8. Blackstone understood *malum in se* crimes, such as murder, theft and perjury, as those acts that are prohibited by 'a superior law', meaning the law of God, and *malum prohibitum* crimes, such as the unlawful killing of game animals, as those involving the transgression of 'positive duties' but not a 'moral offence'.

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have been referred to as *malum prohibitum* (in contrast to those that are *malum in se*),[9] his third category seems to capture many of the crimes that, because they are not intrinsically immoral but are nonetheless contingently socially suboptimal, are characterized according to Blackstone's distinction as *malum prohibitum*.

## II

Bentham's second and third categories are germane to the present discussion, but it is the fourth category that is my principal interest here. This is the category of presumed or evidentiary offences, and Bentham provides a series of intriguing, albeit quaint, examples. In one, he observes that '[b]y an English statute, the concealment by the mother of the birth of an illegitimate child, is punished as murder, because such conduct is regarded as a sure proof of infanticide'.[10]

Bentham does not give an exact reference, but the law to which he was referring might have been any of three different English statutes dealing with infanticide in this manner, each targeted principally at the mothers of illegitimate children who concealed their pregnancy (often with the flowing clothes characteristic of the times) and then attempted further to conceal the birth by killing the newborn child.[11] One 1623 statute, formally entitled An Act to Prevent the Destroying and Murthering of Bastard Children, commonly known as the Jacobean Law of 1623, treated as murder the act of concealing the death of an illegitimate newborn child. A 1693 statute made it a capital offence to bury the body of a child whose birth had been concealed. And an 1803 law, which superseded the earlier infanticide statutes, made it an offence (albeit not a capital one) to conceal the birth of an illegitimate child who was subsequently found to have died.[12]

All these statutes were premised on the frequency (or believed frequency) with which mothers of illegitimate children killed their newborns in order to conceal the fact of having given birth to an

[9] The distinction between *malum in se* and *malum prohibitum*, 'being so shrewd, and sounding so pretty, and being in Latin, has no sort of occasion to have any meaning to it: accordingly it has none'. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed. J. H. Burns and H. L. A. Hart, 2nd edn. (London, 1996), p. 63.

[10] In Bentham's time, 'sure' meant trustworthy or reliable, but not necessarily certain.

[11] See Michelle Oberman, 'Mothers Who Kill: Coming to Terms with Modern American Infanticide', *American Criminal Law Review* 34 (1996), pp. 1–91, at 6–20; K. Wrightson, 'Infanticide in English History', *Criminal Justice History* 3 (1982), pp. 6–37.

[12] *Principles of the Penal Code* was written around 1789 and published in French in 1802, both dates preceding the enactment of the Infanticide Act of 1803. Nevertheless, proposals for such a law were widely circulated and discussed from the 1770s on, and Bentham may have been thinking of these statutory proposals in addition to the statutes already on the books.

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illegitimate child. But the very phenomenon that in Victorian and earlier times provided the incentive for infanticide – the shame of illegitimacy, for both mother and child – also provided an incentive to conceal a pregnancy. But when the fact of the shame of illegitimacy is coupled with the frequency of stillbirth in those times, we can see that a statute designed to deal with the killing of a baby who was born alive could also snare within its net the mothers of stillborn children who both before and after the birth still had a strong desire to conceal what would have then been considered a highly shameful act. Moreover, the same fear of social condemnation often led mothers of illegitimate children to give birth in secret, thus rendering unlikely the availability of a witness who might testify in court that the child was stillborn. The secrecy surrounding illegitimate birth, with the consequent effect on legal proof, thus provided the basis for statutes creating presumed offences – statutes that punished the indicating act of concealment rather than (or in addition to) the criminal act of killing, even though on some (and perhaps many) occasions – an illegitimate stillborn birth – the indications of the indicating act might well have been false.

Bentham's other examples display the same characteristic of a probabilistic relationship between the prohibited conduct and real wrong, especially the example of a statute making it 'an offence to obliterate the marks upon shipwrecked property, because such an act indicates intention of theft'. Such statutes, which still exist in the United Kingdom and its former colonies, typically make it a crime to 'deface[] or obliterate[] the marks on any ship or boat wrecked, or abandoned, or in distress',[13] or to do the same to the marks on any property being transported on such a vessel. In an era when shipwrecks and missing ships were common, when many ships resembled each other, and when communicating the exact characteristics of a ship lost at sea was difficult, one who unlawfully took a ship or appropriated a wrecked one outside the laws relating to salvage of abandoned vessels could often avoid apprehension simply by changing the name of the ship and, perhaps, by repainting it. But because it would have been difficult to prove unlawful taking of, for example, a ship that left no survivors,[14] statutes such as this made criminal an act that would in almost all cases have indicated unlawful possession. Once again, however, the 'almost' is important. The markings of a shipwreck lawfully possessed might have been changed to conceal its identity from pirates, or from

[13] Merchant Shipping Act of 1854, §2 (UK).

[14] Few ships literally went down with all hands. More commonly, the crew would abandon a ship in distress, and if the ship never actually sank (if, for example, it ran aground on an island, or floated aimlessly without masts or steering apparatus) it might well be found some time later.

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an enemy, but the statute criminalized the indicator without regard to the possibility – admittedly slight, but not non-existent – that the indicator could give a false indication.

## III

Bentham's examples[15] of shipwrecks and infanticide seem dated, but numerous contemporary crimes fit the category he identified. Consider, for example, the crime of entering or leaving the United States while carrying $10,000 or more of unreported cash or cash-equivalents.[16] Unlike countries that control currency exports and imports as part of their financial policy, the United States does not limit the amount of money, in whatever form, that people may bring into or take out of the country. The crime consists not in importing or exporting cash, but only in failing to declare to the customs authorities the amount of cash being imported or exported.

Once we understand that the crime is not the import or export of cash, but rather the import or export of unreported cash, we can see that criminalization is not premised on there being anything intrinsically or necessarily wrong about carrying large amounts of cash into or out of the United States. Instead, criminalization is based on the belief – seemingly well-founded – that those who carry large amounts of cash across borders usually do so in aid of other crimes, typically money laundering, drug dealing or tax evasion. As with the presumed offences that Bentham identified, the offence is based not on the intrinsic wrong of the criminalized conduct, but instead on the view that such conduct probabilistically indicates other conduct, with the indicated and not the indicating conduct being the real concern. Just

[15] Bentham provides two other examples, but neither is as clear as those of infanticide or concealing shipwrecked property. One is the capital crime of 'meet[ing] together armed and disguised, because this is supposed to be a proof of a formed design to offer violent resistance to the officers of the customs'. It is true that the indicating act of meeting armed and disguised might indicate an illegal plan, but it might also constitute a preparatory offence in itself, making the example more complicated. Similarly, the example of the offence of 'hav[ing] stolen goods in possession without being able to render a satisfactory account of how they were obtained' is complicated by the element of the actor not 'being able to render a satisfactory account'. Because it is difficult to imagine an innocent explanation for being unable to render a satisfactory account, the example is less clearly a true presumed or evidentiary offence.

[16] 31 U.S.C. §5316 (2006). Implementing and clarifying regulations are in 31 C.F.R. §103.23(a)(2008). The regulations were at the centre of *United States v. Bajakajian*, 524 U.S. 321 (1998), in which the United States Supreme Court concluded that the penalty of forfeiture of all undeclared money – $357,144 – was an 'excessive fine' in violation of the Seventh Amendment to the Constitution. Interestingly, the Court concluded that Bajakajian was 'not a money launderer, a drug trafficker, or a tax evader', a conclusion curiously based on an unwillingness to consider the intentional failure to report such a large sum, despite knowing of the reporting requirement, as *any* evidence of drug dealing, money laundering or tax evasion.

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as the unreported birth of a subsequently dead child was believed to constitute strong evidence of infanticide and thus prosecuted as infanticide, and just as the presence of altered markings on wrecked ships was thought to be evidence of theft and criminalized as such, so too is the unreported carrying of cash into or out of the United States believed to be strong evidence of tax evasion, money laundering or drug dealing. The cross-border transportation of large amounts of unreported cash is accordingly prosecuted as a serious crime because of the difficulties involved in proving the primary crime that the indicating crime probabilistically indicates.[17]

Even more obvious examples of presumed crimes are those laws treating possession of more than a specified amount of a controlled substance as drug dealing. Under Florida law, for example, anyone in possession of more than 28 grams of cocaine is considered to be a trafficker in cocaine and is punished accordingly.[18] Note that the relevant statute does not simply treat possession of more than the specified amount as evidence that one is a dealer.[19] Rather, one simply *is* a dealer according to Florida law if one possesses 28 grams or more, even if one is not in (non-legal) fact a dealer, just as one was guilty of the crime of infanticide by not reporting the birth of a subsequently dead infant even if one had not committed infanticide at all. Unlike the previous examples, however, whether from Bentham's day or the present, there is no totally innocent explanation for the proscribed behaviour. Under Florida law, possession of any amount of cocaine is a crime, and thus the indicating behaviour is always itself criminal. Nevertheless, the indicating behaviour might still be innocent with respect to the crime of actually being a drug dealer, because some non-dealer might simply be hoarding large amounts for personal consumption. But because such (sort of) innocent behaviour is statistically unlikely, even if not impossible, Florida treats the statistical indication as sufficient to treat all possessors of greater than the specified amount as drug dealers, even if in actual fact they are not.

The relationship between the genuine concern and the definition of the presumed offence is similar in the United Kingdom's Sexual

[17] Consider in this regard the frequency with which public officials and others in responsible positions are punished for 'appearances of impropriety'. In such instances is it the appearance that is actually the problem, or instead are appearance offences simply shortcuts taken to avoid the problems of proof and identification involved in apprehending those who have been guilty of actual and not just apparent impropriety?

[18] Fla. Stat. §893.135(1)(b) (2008).

[19] In contrast to Florida, Illinois treats possession of more than a statutorily specified amount as evidence of dealing or trafficking, but in Illinois such possession is evidence of the primary offence and not treated as the primary offence itself. See *People v. Munoz*, 432 N.E.2d 370 (Ill. App. 3rd Dist. 1982); *People v. Atencia*, 446 N.E.2d 1243 (Ill. App. 1st Dist. 1983).

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Offences Act 2003.[20] Sections 9 and 13 of that act make it an offence for any person aged eighteen or older to engage in consensual sexual conduct with someone under the age of sixteen. But unlike the concerns about morality or age of consent that underlay traditional statutory rape laws, this law was targeted at overtly manipulative or coercive sexual conduct. Believing that such manipulation or coercion would be too difficult to prove, however, Parliament prohibited conduct that it believed was easier to prove but which typically indicated that actual coercion had taken place.[21]

## IV

Describing such indicating or evidentiary offences as presumed offences exposes the close connection between presumed offences and presumptions in general. In law, but not only in law, presumptions play a substantial role in our epistemic judgments.[22] When we look out of the window and see cars with windscreen wipers moving, we presume it is raining, even though it might not be. If we see a man running out of a bank with mask and gun, we presume him a bank robber, although it is possible he is simply crazy or a movie actor. And if we encounter someone in a police car wearing a police uniform, we presume her to be a police officer, even though the uniform and the car may be fraudulent.

Presumptions are as much a part of law as of everyday epistemic experience.[23] The common law and numerous modern statutes presume a husband to be the father of a child born during marriage,[24] and the common law has long presumed that an unexplained death is not a suicide.[25] In the criminal law, an American federal statute presumes that any illegal drug seized at the border is imported, although it is

[20] 2003 c. 42.

[21] I am grateful to James Edwards for the reference and description.

[22] See Roderick Chisholm, *Theory of Knowledge*, 2nd edn. (Englewood Cliffs, 1977), p. 7; Edna Ullman-Margalit, 'On Presumption', *Journal of Philosophy* 80 (1983), pp. 143–63; Edna Ullman-Margalit and Avishai Margalit, 'Analyticity by Way of Presumption', *Canadian Journal of Philosophy* 12 (1982), pp. 435–52.

[23] A good overview in civil context is Ronald Allen, 'Presumptions in Civil Actions Reconsidered', *Iowa Law Review* 66 (1981), pp. 843–78. For the criminal law, where rights or constitutional concerns are implicated, see John Calvin Jeffries, Jr., and Paul B. Stephan, III, 'Defenses, Presumptions, and Burden of Proof in the Criminal Law', *Yale Law Journal* 88 (1979), pp. 1325–1404.

[24] *Goodright v. Moss,* 2 Cowp. 519, 98 Eng. Rep. 1257 (1777) (Mansfield, L.J.); Cal. Evid. Code §621. This presumption might serve multiple purposes. One, my primary concern here, is evidentiary, but the law might treat support for a child as sufficiently important to justify assigning responsibility to certain husbands even when they are not in fact the fathers.

[25] See, for example, *United States National Bank v. Underwriters at Lloyd's, London*, 396 P.2d 765 (Or. 1964).

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possible that the drug is entirely domestic.[26] And in much of the law of evidence and proof, judges and juries are allowed and often required to presume the existence of an unknown fact on the basis of proof of a known one.[27]

Although presumptions are a ubiquitous component of legal evidence, their widespread acceptability seems largely a function of their typical defeasibility. When we see moving wipers but also observe a broken fire hose spewing water, we relinquish our presumption of rain, just as seeing a movie camera and accompanying crew in the vicinity of the front door of the bank would cause us to give up our presumption that the man with the mask was a real bank robber. And in law, the typical evidentiary presumption is rebuttable. Presumptions of paternity can be overcome by DNA tests, and the presumption against suicide is not conclusive, but rather shifts the burden of persuasion to the opposing party, often in this context a life insurance company, to provide evidence to the contrary. Presumptions in law and in life typically provide useful and statistically reliable evidentiary shortcuts, but the fact that they are ordinarily not conclusive appears to have forestalled most worries about injustice.

## V

Although evidentiary presumptions are common, making such presumptions a part of the definition of an offence, as with Bentham's presumed offences, seems often to generate a far more hostile reaction.[28] It is one thing, after all, to conclude that where there is smoke there is fire, but the soundness of that epistemic conclusion does

[26] See *Leary v. United States*, 395 U.S. 6 (1969).

[27] In the United States, there are circumstances under which such presumptions in criminal cases are held to violate the constitutional requirement that the prosecution bear the burden of proving each element of an offence, and proving it in accordance with the 'beyond a reasonable doubt' standard constitutionally required in most criminal cases. For the shifting nature of the constitutional doctrine on criminal presumptions, compare *Mullaney v. Wilbur*, 421 U.S. 684 (1975), with *Patterson v. New York*, 432 U.S. 197 (1977), with *Sandstrom v. Montana*, 442 U.S. 510 (1979), with *County of Ulster v. Allen*, 442 U.S. 140 (1979), with *Dixon v. United States*, 126 S. Ct. 2437 (2006), with *Clark v. Arizona*, 126 S. Ct. 2709 (2006).

[28] Of some relevance here is the United States Supreme Court's fortunately brief foray into the so-called irrebuttable presumption doctrine in constitutional law. For a time, the Court considered statutes that created irrebuttable evidentiary regulatory presumptions as creating problems of due process, as with a Connecticut statute invalidated because it presumed irrebuttably that students who had recently moved into the state were not genuine residents for purposes of tuition rates. *Vlandis v. Kline*, 412 U.S. 441 (1973). As the Court soon recognized, however, the creation of an irrebuttable presumption that some act reflects some broader underlying justification is an inevitable component of any rule and any regulation (see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford, 1991)), and the irrebuttable presumption doctrine was scrapped. *Weinberger v. Salfi*, 422 U.S. 749 (1975).

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not lead us to *define* fire by the presence of smoke, and collapsing the distinction between the evidence for an act and the definition of that act[29] is what presumed or evidentiary offences typically do.

Or at least that seems to be what Bentham thought. Although he identified the class of presumed offences, and did not suggest that they should be eliminated from the law as he knew it, Bentham viewed presumed offences as grudging accommodations to the procedural imperfections of English law rather than as aspects of law to be admired or embraced. His analysis deserves to be quoted in full:

> These offences, founded upon presumptions, suppose two things: – 1st, Distrust of the system of procedure; 2nd, Distrust of the wisdom of the judge. The English legislature fearing that juries, too prone to lenity, would not see in these presumptions a certain proof of guilt, has thought fit to erect the Act which furnishes the presumption into a second offence, an offence distinct from every other. In those countries in which a perfect confidence is placed in the tribunals, these Acts may be arranged under their proper head, and be considered merely as presumptions, from which the court is to draw such inferences as the circumstances warrant.

Bentham's view that there is something dubious about presumed offences turns out to be widely shared. The Supreme Court of Canada, for example, in the 1986 decision that established the structure of inquiry for conflicts between rights protected under the Charter of Rights and Freedoms and governmental claims of the need to restrict those rights, held that there was no 'rational' basis for presuming, even rebuttably, that a possessor of narcotics was trafficking in those drugs.[30] And consider the 1961 decision of the New York Court of Appeals in a case called *People v. Bunis*.[31] A New York law had made the resale of books and magazines without covers a crime. Underlying the law is the widespread industry practice, then and now, of allowing retailers to return unsold copies to the wholesaler and ultimately to the publisher for full credit. In order to save shipping costs, however, only the covers are returned to the publisher, with the retailer or wholesaler destroying the remainder of the book or magazine. Because unscrupulous dealers could resell the coverless copies for which they had already received full return credit, however, New York enacted the law in order to discourage this form of fraud.

As with the statutes that Bentham described and the prohibition on unreported currency movements, the prohibition on the sale of coverless books was entirely indicative. There is nothing inherently

[29] On the distinction between evidence and what evidence is evidence for, in legal context, see Charles Nesson, 'The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts', *Harvard Law Review* 98 (1985), pp. 1357–92, at 1378–85.

[30] *R. Oakes*, [1986] S.C.R. 103.

[31] 172 N.E.2d 273 (NY 1961).

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wrong with selling a coverless book or magazine, but because such sales usually if not inevitably indicate a hard-to-discover fraudulent act, New York treated the inherently innocent act that typically pointed to an underlying wrongful one as a distinct crime. When the law was challenged, however, the New York Court of Appeals, the state's highest court, invalidated the law, concluding that punishing the imperfect indication without allowing an individual to show that she was not within the class of the genuinely guilty violated that norm of fairness and justice that in American law typically goes by the name of 'due process'.

The New York decision was hardly atypical in its scepticism of evidentiary offences. A Florida law had prohibited possession of spear guns within an area designated as prohibiting spearfishing, but the Supreme Court of Florida invalidated the law, even while acknowledging its statistical reliability, for punishing those whose possession of such equipment might not be in the service of illegal activities.[32] Another Florida court some years later struck down a law prohibiting the repackaging of legally obtained narcotics, again because although such repackaging almost always indicated illegal reselling, the imperfection of the indication rendered the law constitutionally impermissible.[33] In Louisiana, the state's highest court found constitutionally defective a law that had prohibited the possession of hypodermic needles without prescription by any person without formal medical qualifications, once again because of the possibility of lawful use, and again in the face of strong evidence that the overwhelming proportion of such possessions accompanied and thus indicated illegal use or sale of drugs.[34] Even more recently, British commentators have harshly attacked a wide variety of laws – including laws dealing with sexual assault, terrorism and immigration – that do not allow a person charged with an offence as defined in the statutes to argue that he has not committed the deeper wrong that the statute is in reality designed to combat.[35]

The concern embodied in these decisions and academic observations is not, or at least not directly, a worry about the conflation of epistemic with ontological issues. It is indeed a mistake to understand the evidence for $x$ as constitutive of $x$, and the lack of evidence for something's existence is hardly conclusive of its non-existence. That neither I nor anyone else, to my knowledge, has any evidence for the

[32] *Delmonico v. State*, 155 So. 2d 368 (Fla. 1963).
[33] *State v. Walker*, 444 So. 2d 1137 (Fla. App. 2nd Dist. 1984).
[34] *State v. Birdsell*, 104 So. 2d 148 (La. 1958).
[35] See James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts', *Oxford Journal of Legal Studies* 30 (2010), pp. 725–48; Victor Tadros, 'Crimes and Security', *Modern Law Review* 71 (2008), pp. 940–70.

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colour of the core of the planet Neptune does not entail that it does not have a colour. What exists and what evidence we have for something's existence are distinct issues, and it would be grounds for legitimate worry if the law fell into this all-too-familiar trap. But most presumed offences recognize the distinction between the evidence and what the evidence is evidence for, and for Bentham, for many courts and for some modern commentators the concern appears to lie elsewhere.

Although Bentham viewed presumed offences as necessary accommodations to a world of imperfect procedures and even more imperfect judges, he appears implicitly to have believed that without these imperfections the criminal law in particular and law in general ought not to rely on probabilistic indications of primary offences, but should instead seek to punish only the primary offences. And that seems to have been the view of the courts and modern commentators as well. If the primary offence is illegal spearfishing, then *that* is what should be proscribed, and if the genuine concern with respect to selling books without covers is fraud, then it is fraud that should be punished, and it is proof of fraud itself that should be required to be proved. If the primary offence is coercing juveniles into sex, then that is what should be prohibited, and not those sexual contacts that are highly likely but not necessarily to be coercive. Bentham may have had a more generous view of the second-best necessity of presumed offences than did many courts, but Bentham, some modern courts and some commentators appear to have shared the view that presumed offences are in some way undesirable. More particularly, for many courts and commentators, the defect in presumed offences appears to be that they are probabilistic, and consequently incorporate the possibility of punishing those who in fact have done nothing genuinely or intrinsically wrong.

## VI

The view that the probabilistic and indirect nature of presumed offences renders them worrisome appears to be at odds with the probabilistic nature of evidence itself. It is true that prosecuting Mr Bunis for selling magazines without covers runs some risk of prosecuting someone who is not engaged in a fraud on publishers and wholesalers, but the probabilistic nature of criminal conviction would not evaporate were the presumed offence to be eliminated. If Bunis were prosecuted directly for fraud, the possibility would still remain that he would be found guilty – faulty evidence might be admitted, or the jury might simply make a mistake – even if he had not engaged in any fraud at all. It is often supposed that this possibility is minimized by use of the 'proof beyond a reasonable doubt' standard in criminal cases, and such a high burden of proof provides some protection against erroneous convictions,

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but there is a difference between 'proof beyond a reasonable doubt' and 'proof to an absolute certainty'. Moreover, such standards are subjective standards of confidence that a decision-maker is expected to have, rather than objective measures of actual probabilities, and as a result even a judge or juror who is absolutely certain might still be wrong. Witnesses sometimes lie and are often innocently mistaken. And various other imperfections of the trial process produce the inevitable possibility that those who are found guilty, directly, of $\varphi$-ing did not in fact $\varphi$ at all. We strive to reduce the frequency of such events, and in the criminal process we recognize, as did Blackstone centuries ago, that the errors of erroneous conviction are more serious than the errors of erroneous acquittal.[36] But the only way to eliminate all possibility of erroneous conviction is to eliminate conviction entirely, and because we are properly unwilling to do this we accept the fact that at least some people who are convicted of crimes did not in fact commit the crimes of which they are convicted.

Once we recognize, however, that erroneous conviction is the inevitable even if not desirable by-product of a system that punishes people for wrongdoing, then we can understand why there is no fundamental difference between the probabilistic nature of indirect prosecution under laws creating presumed offences and the probabilistic nature of direct prosecution for the primary offences. In both cases there is some possibility of error, and the way in which errors might arise because of the probabilistic nature of presumed offences is little different from the way in which errors might arise from the probabilistic nature of judicial proof itself.

## VII

Scepticism about presumed offences is even more curious once we understand the way in which many primary offences are themselves, in reality, presumed offences. Consider the offence of driving at a speed greater than the posted speed limit. Speeding is an offence not because it is intrinsically wrong. Rather, it is wrong because it is dangerous, but danger – like risk – is itself probabilistic. Not only is a speed limit a crude measure that collapses distinctions in driving skill, weather conditions, traffic and road surface, among many others, but even a speed limit individuated across all these variables is still only an assessment of the probability of dangerous driving, and dangerous driving is itself only an assessment of the probability of an actual accident.

[36] '[I]t is better that ten guilty persons escape, than that one innocent suffer' (Blackstone, vol. 4, p. 358).

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For a committed utilitarian like Bentham, the same point would be even more generalizable. Non-utilitarians might well see murder, theft, fraud and various other offences as premised on non-utilitarian values, and thus might be able to distinguish presumed from primary offences in terms not that different from those of the classic distinction between *malum prohibitum* and *malum in se*. But the utilitarian cannot avail himself of such a distinction, and must understand all state-created offences as assessments of the probabilistic tendency of the prohibited conduct to decrease utility and punishment for engaging in that conduct as an assessment of the concomitant probabilistic tendency of the punishment to increase utility. Bentham certainly understood this, and thus, just as he understood the imperfect relationships between concealing a birth and infanticide and between altering a shipwreck's markings and piracy, he also must have understood at the next remove the imperfect relationships between infanticide and utility and between piracy and utility. Consequently, Bentham would have had no reason – except a reason grounded in utility itself, but nowhere explained in *Principles of the Penal Code* or anywhere else in the Bentham corpus – to view presumed offences as occupying a discrete and marginal corner of the criminal law. For Bentham, especially, the probabilistic nature of presumed offences would have, or at least should have, been understood as a largely undifferentiated aspect of the probabilistic nature of the criminal law itself.

Indeed, the foregoing is not only about the criminal law, but about all legal rules. Few legal rules are in any sense morally ultimate or primary, and for the committed utilitarian no legal rules are ultimate or primary. As Bentham well understood, and as he discussed in explaining his important distinction between conduct rules and decision rules,[37] we do not have a legal system in which the only conduct-regulating legal rule is a prohibition on reducing aggregate utility (or a mandate to increase aggregate utility). But if utility is the ultimate touchstone, then any rule of conduct can be seen as having as its target an under- and over-inclusive approximation of conduct predicted to increase or decrease utility. And with respect to the criminal law, the specific prohibitions of the criminal law can similarly be understood as the under- and over-inclusive (with respect to utility) prohibitions on utility-reducing behaviour. Aggregate obedience to a concrete legal rule under aggregate circumstances can thus be expected

[37] Jeremy Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation*, ed. W. Harrison (Oxford, 1948), p. 430. Two seminal analyses are Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford, 1986), pp. 403–8, and Meir Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law', *Harvard Law Review* 97 (1984), pp. 625–77.

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to produce an aggregate maximum (when combined with the same for all other legal rules) of utility, but the necessary generality of any rule, legal or otherwise, will ensure that on some particular occasions following the rule will produce an outcome other than, and worse than, the outcome that would have been produced under ideal conditions and perfect information by a perfect decision-maker seeking only and directly to maximize utility.[38]

That Bentham viewed presumed offences as second-best accommodations to a legal system he despised for its inefficiency and corruption comes as no surprise. More surprising is that he saw presumed offences as different from other offences and different from all of law. If presumed offences would have been unnecessary with better procedures and better judges, as Bentham explicitly suggested in these passages of *Principles of the Penal Code*, then so too, even with perfect procedures and perfect judges, would have been all specified crimes and all specified legal rules. Presumed offences are indeed second-best accommodations to an imperfect world and limited human capacity, but for a utilitarian and certainly for Bentham the designation of specific offences can only be understood in precisely the same way.

Obviously Bentham did not believe that a mandate to maximize utility would have been sufficient, for he was well aware of the cognitive failings of citizens and judges.[39] Indeed, that is precisely why he so celebrated and actively promoted precisely drafted legal codes and, in part, why he so abhorred the common law. But the Bentham who thought judicial law-making discretion anathema should also have recognized that presumed offences are no more an accommodation to a world of flawed human decision-makers than is codified law in general,

[38] In describing Bentham in this way, I am understanding him as an important precursor to, or perhaps even a founder of, an indirect or rule-based version of utilitarianism. Although Postema plausibly understands Bentham's *decision* rules – the instructions to judges in adjudicating disputes – as embodying a sophisticated and rule-sensitive version of act-utilitarianism, Bentham's strongly rule-based view of conduct rules, and his unwillingness to grant the subjects of those rules licence to depart from them even on the basis of their own assessment of whether aggregate utility would be benefited by the departure, represents a commitment to a form of rule-utilitarianism preceding the one by John Stuart Mill famously explicated in J. O. Urmson, 'The Interpretation of the Moral Philosophy of J.S. Mill', *Philosophical Quarterly* 3 (1953), pp. 33–9. For discussion of what this understanding of rules in Bentham and the utilitarian tradition says about the nature of rules in general, compare Frederick Schauer, 'Rules and the Rule of Law', *Harvard Journal of Law & Public Policy* 14 (1991), pp. 645–94, with Gerald J. Postema, 'Positivism, I Presume? . . . Comments on Schauer's 'Rules and the Rule of Law', *Harvard Journal of Law and Public Policy* 14 (1991), pp. 797–822.

[39] Bentham would indeed have authorized judges to ameliorate, in the service of utility, the occasional negative consequences of inflexible rules (see Postema, *Bentham and the Common Law Tradition*, pp. 408–21), but in doing so within a framework of rules the judges would still be operating in the shadow of an unwillingness to grant to judges the power to make unmediated calculations of aggregate utility in every case.

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and the fact that he seemed to distinguish the two phenomena remains a curiosity in need of explanation.

## VIII

Presumed offences, primary offences and law itself are all, as we have seen, probabilistic, but it would be a mistake to assume that for that reason they are all equivalent. Probabilities vary, and so does the likelihood that any legal rule will produce the all-things-considered correct outcome on any particular occasion. The rule about altered markings on shipwrecks and shipwrecked property may well properly identify stolen property on almost all occasions, but, given the cultural dimensions of illegitimacy in the eighteenth and early nineteenth centuries, the presumption of infanticide would probably have had a higher error rate. And given the possible existence of secondary and tertiary markets in books and magazines without covers,[40] the New York law invalidated in the *Bunis* case may also have had an intolerably low accuracy rate, at least in the context of criminal law. That all of these laws deal in probabilities does not mean that all probabilities are equivalent.

The instinct that so many courts have had, and to which Bentham appears also to have fallen prey, might be thought of as not only an admirable instinct towards accuracy, but also a more debatable instinct towards individuation. Even those of us who reject the view that moral judgement is necessarily particularistic[41] recognize that moral, legal and policy judgments may still be understood as more or less particularistic, or, conversely, more or less general. But it does not follow from this recognition that particularism or individuation is acontextually superior to generalization and the use of coarser rules. As the debates about act- and rule-consequentialism make clear,[42] maximally act-based decision-making has its normative competitors. And even if act-based decision-making is hard to fault in an ideal world,

[40] Especially the sexually explicit ones almost certainly at issue in the *Bunis* case.

[41] The most prominent defence of particularism is Jonathan Dancy, *Ethics without Principles* (Oxford, 2004); Jonathan Dancy, *Moral Reasons* (Oxford, 1993). My own anti-particularist views are scattered throughout Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge, Mass., 2003). The debates about particularism are best captured in the various contributions in Brad Hooker and Margaret Olivia Little (eds.), *Moral Particularism* (Oxford, 2001).

[42] For an overview of the debates, see Brad Hooker, 'Rule Consequentialism', *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/consequentialism-rule/> (2008). And compare, for example, the defences of rule-utilitarianism in Brad Hooker, *Ideal Code, Real World* (Oxford, 2000), and Conrad Johnson, *Moral Legislation* (Cambridge, 1991), with the sophisticated act-utilitarianism in Donald H. Regan, *Utilitarianism and Co-operation* (Oxford, 1980), and J. J. C. Smart, 'Extreme and Restricted Utilitarianism', *Philosophical Quarterly* 6 (1956), pp. 344–54.

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as a matter of non-ideal theory in a multi-decision-maker environment – one in which those who make the rules are not necessarily the same as those who are expected to follow them – maximum particularism or individuation may come at a cost, and the cost may at times be high.

Thus emerge both empirical and normative questions. Empirically, do people have an instinct (a term I intend as agnostic among whether that instinct is genetic, biological or simply learned) towards the particular? Does the Aristotelian view that justice is individual and particular reflect deep preferences among people, including the people who happen to become judges in cases involving coverless magazines and spearfishing equipment? And if – a big if – this penchant for more individuation and smaller rather than larger categories of decision, for context above all, and for taking everything into account, is a deep and widespread human desire, is it something that can be modified by education or training? And if people can be trained to think and decide in larger rather than in smaller units, in classes rather than in individuals, is that a good thing, and, if so, when and where? These are the normative questions that ultimately emerge from recognizing that the probabilistic and indirect nature of presumed offences is less different from the rest of law and the rest of decision-making than even Bentham may have recognized, but tackling these normative questions must wait for another occasion.[43]

schauer@virginia.edu

[43] Earlier versions of this article were presented to the Department of Philosophy at McMaster University, at the University of Virginia School of Law Faculty Workshop, at the Radzyner School of Law, Interdisciplinary Center Herzliya (Israel), Faculty Colloquium, and in the University of North Carolina School of Law Faculty Enrichment Series. I have benefited not only from the audience questions on those occasions, but also from the written comments and suggestions of Richard Bonnie, Josh Bowers, James Edwards, Jason Johnston, Tom Nachbar, Dan Ortiz and Stefan Sciaraffa.

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