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Presumptions as Moral Heuristics

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1. Introduction

Presumptions are reasoning devices that we deploy to help us reach the right decision in various domains; 'assumptions made ahead of time, in advance'.[1] When communicating, we do well to presume that the other party is attempting to be truthful, informative, clear etc.[2] We generally think that we should presume that we ought to treat people the same until it is shown that they are different in some relevant way that justifies differential treatment.[3] If I have arranged to meet you for coffee and you don't show up, I will and probably should presume that you forgot, and not that you deliberately no-showed to humiliate me.[4]

In law, presumptions are familiar. Adjudicative presumptions function as practical instructions for how a court or decision-maker should proceed unless and until a particular evidentiary burden is satisfied. There are various common law presumptions that put a 'thumb on the scales'.[5] The presumption of innocence is the one that most readily comes to mind for most. There is also the presumption that a child had no criminal intention.[6] In family law, there

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[1] Edna Ullmann-Margalit, 'On Presumption' (1983) 80(3) *Journal of Philosophy* 143.
[2] HP Grice, 'Logic and Conversation' in Donald Davidson (ed) *The Logic of Grammar* (Dickenson 1975).
[3] Louis Katzner, 'Presumptivist and Nonpresumptivist Principles of Justice' (1971) 81(3) *Ethics* 253; Louis Katzner, 'Presumptions of Reason and Presumptions of Justice' (1973) 70(4) *Journal of Philosophy* 89.
[4] Paul Faulkner, 'Giving the Benefit of the Doubt' in Maria Baghramiam (ed) *From Trust to Trustworthiness* (Routledge 2019).
[5] Barbara Underwood, 'A Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases' (1977) 86(7) *Yale Law Journal* 1299.
[6] This and several of the following examples are helpfully collated in Ullman-Margalit (n 1).

is a presumption that a child born during lawful wedlock is legitimate, and that a marriage regularly solemnized is valid. There is a private law presumption that a person who has been missing for a certain number of years is dead.[7] Each of these presumptions functions as a practical instruction to decision-makers: they are to act as if some state of affairs obtains, unless and until some evidentiary burden justifying acting another way is met. Act as if the accused is innocent, unless evidence establishing their guilt beyond reasonable doubt is presented, etc.

There are also what we might call 'statutory presumptions'; rules of statutory construction cast as 'presumptions' about the legal impact of statutes. *Cross on Statutory Interpretation* provides a helpful starting point:

> Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid . . . One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a 'presumption' that mens rea is required in the case of statutory crimes, and a 'presumption' that statutory powers must be exercised reasonably. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'. . . These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts.

[7] The traditional common law number was seven years. The UK and Ireland have each legislated to codify this rule, in, respectively, the Presumption of Death Act 2013 and the Civil Law (Presumption of Death) Act 2019. In the US, the jurisdiction to determine when a missing person may be declared dead falls to individual states.

They operate here as constitutional principles which are not easily displaced by a statutory text.[8]

These kinds of statutory presumptions abound. UK courts frequently invoke the 'principle of legality', according to which, judges must interpret statutory provisions consistently with common law rights and principles, unless the wording of the provision unambiguously licenses interference with them.[9] They must also presume that legislation is consistent with the European Convention on Human Rights,[10] and with EU law.[11] There is a presumption that statutory crimes come with a *mens rea* requirement, and a presumption that statutory powers must be exercised reasonably. EU courts are themselves required to presume that national legislation is consistent with unimplemented EU directives.[12] US courts are required, where possible, to presume that domestic law should be interpreted consistently with international treaty requirements,[13] and that a given statute is harmonious with other laws.[14]

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[8] Rupert Cross, John Bell and George Engle, *Cross on Statutory Interpretation* (3rd edn, OUP 1976), 142–43.

[9] Jason Varuhas, *'The Principle of Legality'* (2020) 79(3) Cambridge Law Journal 578; Conor Crummey, *The Principle of Legality: A Moral Theory* (OUP 2025) ch 2; Hayley J Hooper, *Key Ideas in Law: The Principle of Legality* (Bloomsbury 2025).

[10] Human Rights Act 1998, s 3.

[11] European Communities Act 1972, s 2(4); *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 All ER 70. The 1972 Act has now been formally repealed by the European Union (Withdrawal) Act 2018, however the European Union (Withdrawal Agreement) Act 2020 provides that the relevant parts of the 1972 Act will continue to have effect for the duration of the 'implementation period'.

[12] *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR 1–4135, Case C-106/89.

[13] *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64 (1804).

[14] 'Avoid interpreting a provision in a way that is inconsistent with the overall structure of the statute or with another provision or with a subsequent amendment to the statute or with another statute enacted by a Congress relying on a particular interpretation.' William Eskridge et al, *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy* (5th ed, West Academic 2014), 1198. See also *US v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001).

As with adjudicative presumptions, these statutory presumptions function as practical instructions with attached evidentiary burdens. Judges are to *proceed as if* a statute's legal meaning is *x*, unless and until sufficient evidence that the statute's legal meaning is not *x* is provided. What counts as 'sufficient evidence' in this context is the subject of debate. This may be determined by the clarity of the wording, evidence of drafters' intentions, or something else.

Both kinds of presumption give rise to difficult questions. What triggers their application? How strong should the relevant presumption be? What kind of evidence counts towards the presumption's rebuttal? Is 'beyond a reasonable doubt', for example, an appropriate test for the satisfaction of the presumption of innocence? How 'clear and express' does statutory language need to be before judges should interpret legislation in a way that permits the violation of common law rights? These questions depend on the answers to more basic questions, around how to understand exactly courts are doing when they deploy presumptions, and whether their use is justified. If we think that presumptions of statutory interpretation are presumptions about the communicative content of a statute, for example, we may come out with different answers to practical questions about the presumption's use than we would if we started with the idea that the presumptions actually concern the statute's moral impact.[15]

[15] One might at this point be tempted to say that this should be two papers. This is because the two categories of legal presumption I have pointed to – adjudicative and statutory – look like entirely different kinds of presumptions. Adjudicative presumptions, the objector might say, track principles of procedural fairness; principles concerning the acceptability of treating certain individuals in certain ways under certain circumstances. Statutory presumptions, on the other hand, seem to track what we might (loosely) call linguistic or communicative presumptions; presumptions about what certain words mean in a particular context, or about what their drafters intended to communicate. This, however, would be too quick. The objection rests on the disputable claim that a statute's legal meaning is determined by its linguistic meaning, or communicative content. We cannot without begging the question bake this model into our account of presumptions from the outset. My hope is that by considering presumptions outside of the legal context, we will be better equipped to answer precisely the question of whether statutory presumptions are like adjudicative ones.

In this paper, I suggest that we can make progress in understanding both kinds of legal presumption by paying greater attention to the operation of presumptions in the inter-personal context. My suggestion is that within interpersonal relations, presumptions are best understood as *moral heuristics* used to figure out the content of rights and obligations that obtain within particular kinds of relationship. These relationships are ones in which the vulnerability of one party to the other (or both parties to each other) gives rise to particular obligations grounded in a requirement that each party be restored to positions of moral equality within the relationship.

I then use this account of presumptions in the interpersonal context to motivate an account of legal presumptions that is tied to the vulnerability of citizens to state coercion through law, and the demand that this coercion be regulated in morally justifiable ways. Legal presumptions, on this view, can be understood as moral heuristics used to figure out the moral rights and obligations whose coercive enforcement is justified. I hope this will help shed some light on the notion of presumptions both within and outside law.

The paper proceeds as follows. In section 2, I look at accounts that place presumptions within a theory of action. I argue that these accounts, while identifying some important aspects of presumptions, pay insufficient attention to an important moral dimension of presumptions. In Section 3, I consider the use of presumptions in the interpersonal context, and try to draw out this moral dimension of presumptions. In Section 4, I apply this moralised account of presumptions to adjudicative presumptions, arguing that litigants have standing to demand that certain presumptions are deployed to determine the content of a subset of their moral rights: those whose coercive enforcement would be justified. In Section 5, I argue that it extends to statutory presumptions as well, making good sense of the ways in which courts apply such presumptions.

2. Presumptions and Theory of Action: Some Limitations

The language of 'presumption' is so familiar in law that philosophers trying to understand how presumptions operate in other domains have looked to the legal context for insight. Edna Ullmann-Margalit looks at legal presumptions in order to build an account of the place of presumptions in the philosophy of action.[16] Below, I set out some reasons why we might approach presumptions in a slightly different way, but Ullmann-Margalit's account is a rich one and it offers a helpful starting point for thinking about presumptions.

Presumptions, she says, are instructions to proceed as if certain facts were true: 'What we have here is not the proverbial situation of gauging, preferably blindfold, which side of an evenly balanced scale turns out to tip the balance. Rather, we are deliberately putting the thumb on one side of the scale to begin with'.[17] The important point is that presumption rules are 'concerned not so much with *ascertaining* facts as with *proceeding* on them'.[18] This is articulated in a formula: 'Given that *p* is the case, you (= the rule subject) shall proceed as if *q* were true, unless or until you have (sufficient) reason to believe that *q* is not the case.'[19]

The justification for using a presumption proceeds, for Ullmann-Margalit, in two stages. First, at a very general level, it must be shown that *some* action is needed in the face of an unresolved deliberation.[20] We employ presumptions because we need to make a decision about something, but where we have not yet completed our deliberations on the issue to be decided. A

[16] Ullmann-Margalit (n 1). Others follow Ullmann-Margalit's lead and take the same approach. See for example Katzner (n 3).
[17] Ullmann-Margalit (n 1) 146.
[18] ibid. 147.
[19] This is expressed in the shorthand formula: 'pres (*P*,*Q*)'. ibid. For some suggested modifications to the formula, see Daniel Mendonca, 'Presumptions' (1998) 11(4) *Ratio Juris* 399.
[20] Ullmann-Margalit (n 1) 154-155.

presumption rule allows us to put our thumb on the scales, adopting a justifiable (though revisable) bias or prejudice towards one particular outcome. At the second stage, the *specific* presumption must be justified.[21] Again she points to legal presumptions to draw a lesson for broader practical reasoning. The presumption of innocence, she says, starts with the need for *some* resolution to the question of a person's legal guilt or innocence, in cases where that is inconclusive and there is no more deliberation to be done. A rule that obliges the jury to treat the person as innocent pending the meeting of a particular evidentiary burden will help, but so would a presumption of guilt.[22] At the second, justificatory stage, then, we ask which presumption is the more justifiable one. The rule be assessed along probabilistic lines (e.g. if fact *x* reliably obtains in circumstance *y*, then this will count in favour of a presumption that fact *x* reliably obtains in circumstance *y*), but also along moral or value-related lines. The traditional maxim that it is better that one hundred guilty people go free than one innocent person be convicted underpins a value judgement about the justifiability of the presumption of innocence.

To repeat, I think that there is much that is insightful and useful here. There are, however, two aspects of Ullmann-Margalit's approach that come with limitations if we are seeking to understand presumptions both in law and outside of it. First, as noted above, her strategy is to start with legal presumptions in order to learn how presumptions operate in our reasoning outside of law. This might be useful for developing an account of how presumptions fit into a theory of action, but there are limits to the approach, and good reasons, I think, for starting outside the legal context.

Whatever our general jurisprudential commitments, we generally hope that law will track moral principles, and we try to better understand certain domains of law by thinking about the

[21] ibid 155.
[22] ibid.

moral principles that underpin those domains. To reverse the order of inquiry seems to put the cart before the horse. Perhaps we might learn something about promising, for example, by first trying to understand contract law, but that would seem like a limited avenue of inquiry. Similarly, while we might learn something about presumptions by looking at how they operate in law, where they are used prominently, it seems to me that we might learn more about how presumptions work in law by first trying to understand them better outside of law.

Second, because Ullmann-Margalit is concerned primarily with the place of presumptions in our rational action, her analysis focuses on the role presumptions play in the mind of the *deliberator*. Presumptions, in this account, are reasoning devices deployed to help a person put an end to deliberation and take some action. While there is much to learn from this perspective, we might miss something about presumptions if we fail to pay adequate attention to the *subject* of a presumption in interpersonal interactions. Presumptions are often deployed in a *relational* context. They feature not just when we decide how to act but more specifically when we decide how to treat someone; when we decide what we owe them and what they owe us. If we focus solely on presumptions as devices for a deliberator to extricate themselves from a difficult decision, we may miss answers to important questions about whether and when we have standing to demand that others employ certain presumptions when dealing with us.

As we will see, when we approach presumptions from this slightly different direction, by examining how they operate in a relational context, our overall picture of presumptions will look different. Presumptions, I will argue, are not just devices designed to help us extricate ourselves from unresolved deliberative processes, though they might serve that function. Rather, they *moral heuristics*, designed to help us to work out what we owe one another in particular contexts.

3. Interpersonal Presumptions

In this section, I will consider the operation of certain 'presumptions' in an interpersonal context; presumptions we employ when trying to figure out how we ought to act in relation to others. I argue that in this context, presumptions do not function just as ways of deciding on a course of action in the face of uncertainty. Rather, they operate as heuristics for specifying the content of one another's rights and obligations, where we are tasked with engaging in complex processes of moral reasoning. In subsequent sections, I will argue that legal presumptions *of both kinds* operate in the same way; as heuristics for determining the content of a particular (legal) subset of our moral rights and obligations.

Some might object that I am cooking the books at this point by taking as my examples only presumptions that operate in an interpersonal moral context. Why not talk about communicative presumptions? Or canons of literary interpretation? Or presumptions employed when applying the rules in certain sports? I will try to draw out my explanation in more detail when I come to consider legal presumptions, and statutory presumptions in particular, but the short answer is that legal presumptions are employed where the content of particular rights and obligations is at issue.[23] It makes sense, then, to examine presumptions that are employed where other kinds of obligation are involved. If one wishes to argue that legal presumptions are like communicative ones, for example, that would rely on a more basic argument establishing that the content of legal obligations is determined by the communicative content of institutional

[23] I do not think this is a claim that only non-positivists can accept. One could, consistently with positivism, view legal rights and obligations as moral rights from the 'legal perspective'. Those who begin with this general starting point can still seek to better understand areas of law by looking to the inter-personal context. See e.g. John Gardner, *From Personal Life to Private Law* (OUP 2018).

actions.[24] Examples from interpersonal morality, for that reason, strike me as more immediately relevant than examples drawn from interpersonal communication.[25]

A: 'You've got to believe me!'

Consider the following scenario. While taking the train on her commute to work, Mary strikes up a conversation with a stranger, Jen. Jen tells Mary about a recent hurtful experience. She (Jen) went on a number of dates with a man she met through a dating app. Jen believed that things were going well. On their last date, the man spoke effusively about the connection he felt they had. However, after that date, he did not call her again, and subsequently ignored her messages. During the conversation, it emerges that the man in question, Steve, is actually a good friend of Mary's. Jen tells Mary that Steve acted wrongly by 'ghosting' her rather than explicitly ending their relationship, and advises her that such a person is not worth being friends with.

Later, Mary confronts Steve about this incident. He confirms that he went on 'a few' dates with Jen and, but he insists that it was clear to both at the end of their final date that, while they had had a pleasant time together, there was no romantic spark between them, and that neither thought the relationship was worth pursuing further. He denies that Jen sent him any subsequent follow-up messages. 'You have to believe me!' Steve insists.[26]

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[24] On this, see Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011); Mark Greenberg, 'The Standard Picture and Its Discontents' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law, vol 1* (OUP 2011); Nicos Stavropoulos, 'Words and Obligations' in A Dolcetti and L Duarte d'Almeida (eds), *Reading HLA Hart's 'The Concept of Law'* (Bloomsbury 2013).

[25] This will require some defence in the context of presumptions of statutory interpretation. I will return to this in section 5.

[26] I have deliberately made the incident in question here a relatively benign one rather than a more serious instance of, for example, sexual misconduct. What I want to explore here is the possibility of some kind of duty trust in the context of friendship, to see if we can say

There is a range of attitudes that Mary could take here. At one end of the spectrum, she could of course simply not believe Steve, thinking the case against him too strong. At the other end, she might decide, on weighing the various pieces of evidence, that she does believe him. Sarah Stroud argues that we often experience 'epistemic partiality' towards our friends as against third parties.[27] When told some damaging information about a friend, we are more likely to ask questions about the credibility of the information-giver and to entertain explanations that are more favourable to our friend, for instance, than we would if the same information pertained to a stranger. As a result, different doxastic outcomes result when the person at issue is a friend; we form different beliefs than we would if a stranger were the subject.[28]

Stroud claims that there are normative underpinnings to these doxastic dimensions of friendship. Friendship is valuable, she argues, in the Aristotelean sense, and it involves a particular kind of commitment which 'structures our deliberations, operating as (defeasible) fixed points or parameters within which we resolve the issues with which we are presented'.[29] Considering cases where a third party tells a story that paints one's friend in a bad light, Stroud argues that, 'you owe your friends something other than an impartial and disinterested review of the evidence where they are concerned', even where this seems to conflict with our ordinary epistemic ideals.[30]

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something what grounds such a duty and what work presumptions do in that context. I don't think that that same duty applies in more serious cases of sexual misconduct, or at least the content of the duty is weakened or nullified by competing principles, so it would muddy the analysis here to consider a more serious accusation against Steve.

[27] Sarah Stroud, 'Partiality in Friendship' (2006) 116(3) *Ethics* 498.

[28] ibid 506.

[29] ibid 511.

[30] ibid 504. For an argument against such attitudes, see Nomy Arpaly and Anna Brinkerhoff, 'Why Epistemic Partiality is Overrated' (2018) 46(1) *Philosophical Topics* 37. Others, while accepting that obligations of epistemic partiality attach to friendship, deny that there is any conflict between these obligations and ordinary epistemic values. See Sandra Goldberg, 'Against Epistemic Partiality in Friendship: Value-Reflecting Reasons' (2019) 176 *Philosophical Studies* 2221

I will return to the question of how we figure out what we owe our friends in these circumstances in a moment. First, it is worth considering another attitude available to Mary. Pamela Hieronymi distinguishes between 'full-fledged' trust (forming actual beliefs that the other party will do *x*) and 'entrusting' (deciding to give a person the benefit of the doubt when you are in a state of doubt over what they will do).[31] The latter involves cases in which we 'decide to trust' someone. Perhaps we consider factors like the importance of friends trusting one another, or the importance that this particular relationship has had in our lives. In these kinds of cases, we are deciding to trust not just *because* we actually believe the person, but because we think that there are separate, 'backstop' reasons that count in favour of trusting them in this instance.

Mary, then, might have some attitude or response available to her that is less than the full-fledged trust that Steve wants. Hieronymi argues, however, that an attitude of 'entrusting' is not available in cases in which we are asked to believe the truth of someone's claim (as opposed to cases in which we are asked to believe that someone will perform a particular action).[32] This is because we cannot *choose* to believe someone in the face of doubt about the truth of their words in the same way that we can choose to fall backwards despite doubt about whether they will catch us.[33] Mary can still make a decision based on the kinds of 'backstop' reasons mentioned above, but she would be making an all-things-considered decision based on these various reasons; she would not be 'entrusting' her beliefs to Steve.

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[31] Pamela Hieronymi, 'The Reasons of Trust' (2009) 86(2) *Australasian Journal of Philosophy* 213. Hieronymi takes trusting in the truth of what someone tells you as a special, non-central instance of trust, focusing primarily on trust that a person will do something. I focus here on the 'trusting what someone tells you' case since it maps neatly onto the presumption of innocence in law, to which I will return in later section.

[32] It is worth noting that in Hieronymi's example of a friend's request for belief, the friend is explicitly charged making an 'important, but not immoral, error' (ibid 219). In my example, the friend is charged with immoral conduct, though in a relatively low-stakes way.

[33] ibid 221. Cf Richard Holton, 'Deciding to Trust, Coming to Believe' (1994) 72) *Australasian Journal of Philosophy* 63.

For present purposes, it doesn't matter a great deal whether we characterise the attitude available to Mary as 'entrusting' or not. We have a spectrum of responses open to Mary, with 'full-fledged' belief on one side and disbelief on the other, and in between a range of responses in which Mary will consider various reasons for or against giving Steve the benefit of the doubt. Mary, confronted with Jen's story and Steve's denial, must consider the strength of these various reasons and figure out what kind of response is appropriate.[34]

Obviously, the content of whatever obligation Mary owes here will be highly context-sensitive. But we can still try to pick out some morally salient aspect of friendship that might help to pin down the appropriate response. A promising strategy might start with the mutual

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[34] There are two possible objections to this framing that merit brief consideration. The first is that it is incoherent for Mary to ask whether she *owes* Steve belief in the full-fledged sense, since one cannot *choose* to believe someone. See e.g. Pamela Hieronymi, 'Believing at Will' (2009) *Canadian Journal of Philosophy, Supplementary Volume* 35. Regardless of whether believing at will is possible as a psychological matter, however, I think it still makes sense for Mary to ask whether she *owes* Steve belief. If it turns out that she does owe him full-fledged belief, then there would be something to regretted, from her perspective, if she does not believe him in the full-fledged sense, and Steve might feel justifiable resentment towards her. Any intuitive pushback we feel at the idea of Mary asking whether she owes Steve full-fledged belief is, I would speculate, likely due simply to the intuition that Mary doesn't owe that to Steve in this particular example, rather than due to scepticism at the possibility of her owing it to Steve at all.

A second objection might point out that if Mary is asking what sort of response is owed to Steve, then she is already outside the realm of 'full-fledged' trust, and is into the realm of weighing up reasons that are unrelated to the truth of her belief. If Mary was trying to figure out *what she actually believes*, then she might still be thinking about whether she believes what Steve said, or whether she thinks there are good reasons for believing what Steve said. But once she is asking herself what kind of belief she *owes* Steve, she is already approaching the question from the perspective of someone who does not trust Steve in the full-fledged sense. I am not sure of this characterisation. I am tempted to think that Mary could limit herself to an inquiry of whether the conditions of 'full-fledged' trust obtain. For example, she might think about how she believes that Steve is trustworthy, that he knows that Mary will rely on his word, and this together might make it appropriate to believe Steve in particular, not just for detached reasons about the importance of trusting friends generally. One might argue that even considering these reasons in a detached way means that Mary is not *really* trusting Steve in a full-fledged sense, but if there is any paradox here, I think it is a benign one. If it does turn out that even undertaking this kind of inquiry means that Mary does not trust Steve in the full-fledged sense, again she might think this a cause for regret, which seems to indicate to me that it is coherent for Mary to ask whether she *owes* Steve full-fledged trust.

vulnerability to which friends are subject. George Letsas argues for the recognition of 'status harms'; violations of obligations grounded in particular roles that are characterised by an asymmetry in power, where one party bears some vulnerability towards the other.[35] Status-based obligations are ones that obtain within certain asymmetrical relationships (e.g. landlord/tenant, doctor/patient, teacher/student), where the content of the obligation is determined by the broader requirement that moral equality between those parties be restored.

Letsas is primarily interested in relationships in which there is a power imbalance. He specifically excludes friendship from his analysis, as a relationship where both parties stand in positions of vulnerability in relation to the other.[36] It is true that unlike, say, the doctor/patient relationship, vulnerability within friendship will not be pervasively one-way. It is constitutive of friendship that the relationship is in important ways non-hierarchical. It is also true, however, that friends stand in relationships of mutual vulnerability as against one another, and this vulnerability is morally relevant to the rights and obligations that obtain within friendships. Our friends understand us better us than strangers do, their approbation stings more intensely than the approbation of strangers does, and losing the respect of a friend (or losing a friendship entirely) hurts. To end a friendship is to decide that a person is no longer a source of confidence, and that we need no longer have special care for their feelings.[37] In a proper friendship, this vulnerability will be a two-way street and not pervasively one-way, but the vulnerability exists nonetheless.

This position of vulnerability might serve as a starting point for thinking about the requirement to give friends the benefit of the doubt where a reasonable degree of uncertainty

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[35] George Letsas, 'Offences Against Status' (2023) 43(2) *Oxford Journal of Legal Studies* 322.
[36] ibid 335, fn 41.
[37] TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (HUP 2008), 129-130. See also Matthé Scholten, 'Blaming Friends' (2022) 179 *Philosophical* Studies 1545,1554.

exists. The vulnerability to which friends are subject can give rise to special obligations of either full-fledged trust, or weaker requirements to give the benefit of the doubt. Friendship is a relationship which, as well as bringing pleasure and fulfilment, involves accepting vulnerability to being hurt or disappointed in ways that only friends can hurt or disappoint us. Friendship, it goes without saying, requires trust, and trust gives rise to vulnerability.[38] In the example of Mary and Steve, then, we can identify two different kinds of vulnerability. Steve is vulnerable to a loss of Mary's respect or friendship, and so he asks Mary to place herself in a position of vulnerability with him by trusting him. Mary, in turn, is vulnerable to 'betrayal' or disappointment by Steve. What Steve claims, when he insists 'You've got to believe me', is a right to a kind of vulnerability-equalization as part of the package of rights and obligations that obtain among friends.[39]

The question of whether Steve is owed full-fledged trust or some weaker benefit of the doubt is also a question about how much vulnerability Mary is required to take on. We may be disappointed if we give someone the benefit of the doubt and they let us down, but full-fledged trust makes us vulnerable to a particular kind of betrayal.[40] The relevant question then (the answer to which, again, is too dependent on context for us to prescribe an answer to Mary and

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[38] According to Annette Baier's influential definition, trust is 'accepted vulnerability to another's possible but not expected ill will (or lack of good will) toward one'. Annette Baier, 'Trust and Antitrust' (1986) 69(2) *Ethics* 231. See also Annette Baier, 'Trust and Its Vulnerabilities', *Tanner Lectures on Human Values, Vol 13* (University of Utah Press 1986); Lawrence Becker, 'Trust as Noncognitive Security about Motives' (1996) 107(1) *Ethics* 43;.

[39] Presumptions have a similar function, then, to that of promises in Shiffrin's account, where promises allow those in intimate relationships to 'manage and assuage vulnerabilities'. Seana Valentine Shiffrin, 'Promising, Intimate Relationships, and Conventionalism' (2008) 117(4) *Philosophical Review* 481, 508. An important difference between promises and presumptions, however, is that the latter are voluntary ways of generating obligations. On the account of presumptions developed here, presumptions are devices for figuring out what obligations *already* obtain. They are heuristics for figuring out the shape of existing moral obligations that are grounded in those vulnerabilities.

[40] Hieronymi (n 31) 228.

Steve) is how the vulnerability that obtains between friends is to be *regulated* in such a way that friends maintain a position of moral equality.

This somewhat vague sketch of how we might work out obligations of friendship can give us a starting point for thinking about presumptions in the interpersonal context. Suppose that Mary, with no way of gathering any further evidence (let's stipulate), decides that, since Steve is her friend, she should believe him. After all, over the many years of their friendship, Steve has given her no reason to think that he would behave in this manner. She resolves, however, to remain vigilant for any pattern of behaviour that might make her rethink this position.[41]

Against the backdrop set out above, we can understand this presumption as a heuristic that Mary employs to work out a provisional conclusion to a difficult moral question. The presumption here is shorthand for a conclusion about what she owes Steve, obligations grounded in the requirement that friendship-vulnerabilities be regulated in such a way that friends remain moral equals within their relationship.

There is one final puzzle here, before we move on to other presumptions. I have been casting Mary's deliberation process as one about what she owes Steve, but there is an important sense in which this seems misleading. What Steve himself has standing to demand of Mary depends, intuitively, on whether he is actually telling the truth. We are not entitled to demand that friends believe our lies. The puzzle arises because, while I have discussed the example in terms of trust, we generally trust people to do something in the future – we put ourselves in their

[41] Again, I am unsure how consistent this presumption is with 'full-fledged' trust. It probably depends on the reasons that Mary is taking into account. If she weighs up the value in trusting friends generally, for example, then she seems to have moved away from fully-fledged trust. If she limits herself to considerations that bear on Steve's trustworthiness, then her use of the presumption might still be consistent with that stronger form of trust. Even full-fledged trust in our friends is sensitive to further evidence, after all. I don't think this need detain us any further. If one thinks that something less than full-fledged trust is the only response available to Mary (as distinct from the claim that full-fledged trust would be inappropriate), the analysis here can proceed on that basis.

hands and hope they will not let us down – but in this case the relevant action has already happened. Steve is either worthy of Mary's trust or he isn't – no future action of his has a bearing on the issue.[42] And yet, it feels intuitively that Mary could still wrong Steve, or leave something to be regretted, if she didn't believe him under certain circumstances. There could be a sense in which, if Mary doesn't believe Steve and it turns out that Steve was lying, *both* friends have failed *each other*.

I'm not sure that I can resolve this puzzle in an entirely satisfactory manner here, but there are a couple of strategies we might adopt, with the proviso that further work on this point would be required. First, we could make sense of Mary's obligations formally. That is, we might say that these are the obligations she has, *provided* Steve is telling the truth. Whether these obligations actually obtain would depend on that further conditional.[43] But this doesn't feel quite right. Intuitively, it seems to me that there could be a set of circumstances where, as a result of the information available to her, Mary *really should* give Steve the benefit of the doubt, even though, unbeknownst to Mary, Steve has no right to demand that of her. Mary is still responsible for her own response, whose appropriateness depends on her epistemic situation. Mary could still be the subject of appropriate criticism, then, if she does not give Steve the benefit of the doubt, by failing to follow the reasons that she believes apply to her.

A better strategy might be to say simply that in some circumstances, we have standing *as members of a moral community* to hold one another to account when we act in certain ways towards our friends, even where our friends lack standing to make the same demands themselves.[44] The

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[42] This is perhaps why Hieronymi characterises these kinds of cases as non-central ones when thinking about trust. For present purposes, however, this feature actually makes this kind of example particularly useful, since it maps neatly onto way that the presumption of innocence operates in law.

[43] One could draw an analogy with the Razian view of legal obligation as obligations from the 'legal perspective'.

[44] Stephen Darwall, *The Second-Person Standpoint* (HUP 2006), 102.

demand that we 'air on the side of caution', trust friends or give them the benefit of the doubt where we have imperfect information, is one that members of a community of equals can reasonably make of one another. The shape of this obligation would, following this explanation, still then be determined by the vulnerability to which friends are subject. The presumption Mary uses, then, may be best viewed as a heuristic for working out the content of *this* obligation, owed to the political community as a whole.

B. 'Finders Keepers'

It may be helpful to consider the operation of a presumption in a context where there is doubt about some *future* event, rather than a case like that of Mary and Steve, where the presumption concerns trusting someone's account of events that have *already* occurred. Consider the following example. Two children – Liam (5) and Milo (3) – run to their parents, Daniel and Laura, with exciting news: they have found a ten-dollar bill on the footpath outside their house. They begin to list off the many things their windfall will pay for, but their parents tell them to pump the brakes; that money is not theirs and they must try to return it to its rightful owner. The house is next to a path that sees a reasonable footfall each day, and someone has dropped their ten dollars. 'But finders keepers!' they urge. Recognising that there is some force in this argument, but wanting to instil an important moral lesson, the parents make a deal with the boys. They will put a note on the fence outside the house, stating that some money has been found (without specifying how much), and providing a phone number. If no one has called within a week, Daniel tell the boys, they will presume that no one is coming for it, and they can spend the money.

There is an element of arbitrariness to this presumption. The parents could as easily choose six days or eight days. Or they could simply give the boys the money and declare that they

will 'presume' that whoever lost the money probably has no idea where they lost it and is unlikely to return. How should we characterise this kind of loosely arbitrary 'presumption'? On the face of it, it seems like a classic example of the kind Ullmann-Margalit was interested in; namely, an unresolved deliberation process, extrication from which via *some* decision is called for. Approached from the perspective of philosophy of action, the presumption serves as an extrication device; a way to take practical action, while leaving room for course correction if more information comes to light. This, however, leaves much unsaid about this interpersonal situation. The question is not just how the parents can make a decision, but what various parties to the situation are owed.

As with 'You've got to believe me', it seems to me that the 'presumption' employed by the parents here is best characterised as a moral heuristic; a shorthand whose function is to help them work out the content of particular rights and obligations. First, there is a basis for the boys' 'finders keepers' claim. In the absence of the owner's reappearance, and without reasonable prospects of identifying them, it seems reasonable to think that the children have standing to demand some say over how the money is used. Perhaps this might not extend to an entitlement that they spend the money on themselves, but they do seem to have some rights over the range of options available to their parents. It would seem less justifiable for their parents to spend the money on candy for themselves (and not the boys), for example, than it would be to tell the boys that they will donate the money to charity. As with the previous subsection, we can also identify a set of rights and obligations grounded in the position of vulnerability in which certain parties (children) stand in relation to others (parents).[45] Daniel and Laura are responsible for the boys' moral development. They stand to learn important lessons here about entitlement and

[45] Letsas (n 35) 326 identifies parent/child as a paradigmatic relationship in which 'status obligations'.

responsibility, ownership and integrity. This responsibility shapes his obligations towards the boys. There is, as Letsas puts it, an 'asymmetrical relation between parents and children and [an] imperative to balance it'.[46]

Certain obligations are also owed to the owner of the money, but we can set those aside as a separate concern.[47] The precise content of the boys' rights is not obvious, but the situation is not one in which any method of proceeding will do. The presumption that the parents employ is not entirely arbitrary, nor is it supererogatory. They are doing what they think morality requires of them, fulfilling obligations that they hold towards their children. The number chosen is somewhat arbitrary, but once it is chosen, it specifies and concretises their more abstract parental obligations. The presumption they employ is shorthand for a conclusion reached after a process of moral reasoning; an attempt to specify the content of their obligations as parents. If more information becomes available (if the boys later confess to pickpocketing the next-door neighbour, for example), then the parents' will realise that the moral situation is not what they thought it was, and so this presumption will no longer function as a helpful moral heuristic.

C. House Rules

We can add an additional wrinkle to the previous scenario. Suppose that when they suggest the presumption rule to the boys, that Daniel and Laura are not just seizing an opportunity to teach a lesson about respecting the property of others, but rather enforcing a rule that the family has already set out. Let's say that the parents are in the habit of holding family meetings with the two

[46] ibid 340.

[47] Let's say that Daniel and Laura resolve among themselves that if someone turns up after the seven day deadline, they will give them the money from their own pocket. The scenario now isn't a zero-sum game and the 'presumption' is purely a device for figuring out how to figure out the question of what the boys are entitled to.

boys, where 'family rules' are laid out. One of these rules is 'respect other people's property', a rule agreed upon after a fraught morning in which Liam tried to steal another child's toy at the local playground. What bearing does this have on the current situation? Does the money that Liam and Milo found count as another person's property, or, given that they found it on the ground, is it now their property?

Again, there are a number of factors that Daniel and Laura must consider. What did they actually say to the children when they articulated the rule? Even if they did not communicate the precise rule they meant to, the children may be entitled to demand that their case is dealt with under the rule as articulated. Is the current case (money found on the ground) similar in some morally relevant way to the case that prompted the articulation of the rule (playground thievery)?[48] Do any other principles (the value in giving to charity, for example) have a bearing on the impact of that rule? Are there other house rules that need to be taken into account (for example, 'Give to charity when you can')?

The parents here are required to work out the moral impact of the rule they had set out. In order to do this, they need to figure out which of these various moral principles are relevant in this scenario. What principles are most relevant to the rule's impact, in turn, will be determined by morally salient facts about the parent-child relationship. Most obviously, the dependency on and vulnerability towards their parents that children have triggers specific moral principles that determine the moral impact of parents' actions. For example, we might think that because learning to follow rules is an important part of growing up to live in society with others, and parents are responsible for teaching their children how to do this, children are generally required follow the rules that their parents set out.[49] The same vulnerability (whether to growing

[48] On relevant similarity in the moral sense, see Nicos Stavropoulos, 'Why Principles?' *(2007) Oxford Legal Studies Research Paper, No 28/ 2007.*
[49] Scott Hershovitz, *Law Is a Moral Practice* (HUP 2023), 4-5.

up incapable of living with others, or with a dysfunctional moral compass etc.) also makes other principles relevant – that one should help those in need etc. That vulnerability may also trigger a demand of principled consistency grounded in broader principles of equality.[50] If Liam was allowed to keep a ten-dollar bill that they found the previous week, and Milo finds a ten-dollar bill this week, then Milo might be able to demand that he keep his ten-dollar bill. At the very least, the demand of principled consistency will form part of that moral calculation.

Parents are tasked with tricky moral calculations all the time. Appealing to a rule of the house does not override moral calculations; it merely adds another fact whose moral impact needs to be figured out. One thing that Daniel and Laura could do here is employ a presumption to help interpret their own rule. If they interpret the 'respect other people's property rule' such that the boys can keep the mystery ten dollars, then the rule might be in tension with the 'Give to charity when you can' rule. Therefore, Daniel and Laura might interpret the 'respect other people's property' rule to mean that the boys cannot keep the money, so as to maintain consistency with the 'give to charity' rule. More broadly, they might think that the reading of the rule that allowed the boys to keep the money might conflict with other important values, like generosity, non-materialism etc. Therefore, they 'presume' that any rule they set in the past should be interpreted consistently with those other principles.

Are these kinds of approaches to interpreting the rule best thought of as 'presumptions' of the kind discussed in the last two subsections? One similarity between this scenario and those ones is that, as with the scenarios above, Daniel and Laura's conclusion about the proper interpretation of the house rules is sensitive to further evidence. Suppose, for instance, that Laura suddenly remembered that in fact they had been quite clear at the time that this rule applied only to deliberate thievery and that any money they found on the ground was theirs to keep. This

[50] Ronald Dworkin, 'Hard Cases' in *Taking Rights Seriously* (Duckworth 1977), 89.

would change the moral calculus. The boys may in that case have standing to demand that they be allowed to keep the money. Background moral principles make the family meeting rule-making procedure relevant when determining their rights and obligations in cases like these.

In interpreting the rule, then, Daniel and Laura will rely on certain principles concerning the relevance of 'institutional' action (the family meeting). Whatever principles make the edicts of family meetings relevant will play a role here. But so too will the other principles identified in the previous sub-section: principles around their own parental obligations, the 'finders keepers' principle, the proprietary rights of the bill's owner etc. These principles determine the moral impact of the family rule's enactment. What principles are relevant in all of this will depend on morally salient facts about the relationship between parents and children. I have suggested, following Letsas, that the most relevant fact concerns the power imbalance between parents and children, and the vulnerability of the latter towards the former. This fact is made vulnerability salient by the requirement that both parties to the relationship – parents and children – be restored to positions of moral equality with one another, and this requirement shapes the obligations that obtain within the relationship.

The upshot of this way of looking at this scenario is that there really isn't a meaningful difference between the 'presumption' used to interpret the family rule and the 'presumption' used to decide the case without the aid of family rules. In interpreting the 'respect other people's property' rule, Daniel and Laura are tasked with figuring out the content of the boys' rights. As part of that process of moral reasoning, they must consider the relevance of their own previous actions. They work out the relevance of that action, and the precise bearing it has on the present situation, by considering the relevant moral principles in play. The 'presumption' operates as a heuristic, a way of arriving at a provisional conclusion about the impact that the previous action has on the rights and obligations whose content they are tasked with determining. There is no

difference in kind between this presumption and the presumptions considered in the previous two subsections, where no articulated rule was at issue. The only difference is that where an articulated rule is at issue, particular moral principles about the relevance of that rule's articulation come into play. But the rule's enactment is just another social fact whose moral impact demands interpretation.

4. Adjudicative Presumptions Reconsidered

A. Law and Vulnerability

In the previous section, I argued that in an inter-personal context, presumptions operate as shorthand for provisional conclusions about the content of obligations that restore parties to positions of moral equality in relationships characterised by vulnerability. How can this help us think about presumptions in law?

A starting point is to think of legal practice as characterised, like friendship and parenthood, by morally salient vulnerability. The most obvious vulnerability in the legal domain is the vulnerability citizens face to the deployment of official coercion.[51] The question of how to justify public coercion is central to a great deal of classical political philosophy. According to Kant's postulate of public right, for instance, we are under a moral obligation to enter a juridical state in which persons stand 'in relations of rights with one another', leaving a situation in which we are vulnerable to the arbitrary use of coercion by others.[52]

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[51] Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22(3) *Ratio Juris* 339.

[52] Immanuel Kant, *The Metaphysics of Morals* (L Denis ed, M McGregor tr, rev edn, CUP 2017), 93; B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (CUP 2010), 87–90.

What the postulate of public right calls for is a move from one kind of vulnerability to another. Everyone's innate right to self-mastery can only be consistent with everyone else's enjoyment of the same right in a juridical state. We leave a situation in which all are vulnerable to being made subject to the will of others and we enter a state in which the power to deploy force is centralised. We are now vulnerable to this new monopoly on force being deployed against us. Law, then, regulates the force that is an inescapable aspect of living in civil society.

The notion of constituting a morally valuable kind of community through centralising coercive force is central to myriad classical articulations of the rule of law. Gerald Postema offers a neat summary and synthesis of these accounts:

> The rule of law imposes a moral demand upon political communities and their governments. It demands that they be structured in such a way that those who are subject to power, from whatever quarter, are provided protection and recourse against its arbitrary exercise through the law's distinctive features, tools, and mores of operation. In sum, when law rules in a political community, it *provides protection and recourse against the arbitrary exercise of power through law's distinctive tools.*[53]

The moral value in this kind of community lies in the protection that it offers members from exercises of arbitrary power by others and the constitution of a community in which members enjoy equal status. That it does so by centralising the power to enforce rights and

[53] Gerald Postema, *Law's Rule: The Nature, Value and Viability of the Rule of Law* (OUP 2022), emphasis in original.

obligations, however, gives rise to a new kind of vulnerability, and therefore to a demand that this centralised power be constrained.

Dworkinian non-positivism takes as its starting point this insight about the moral value in the regulation of coercion through law, and the resulting requirement that such coercion be constrained.[54] When we win in court, we are entitled to call on the state to use its monopoly on coercive force on our behalf against other members of our political community. When we lose, we are made vulnerable to that coercive force being brought to bear on us on behalf of the political community. Legal practice, for Dworkin, is the practice of *centralising* coercion and *regulating* its use in morally justifiable ways.[55] Any conception of law, it follows, is partly an attempt to explain the conditions of moral justification for the use of this coercion.

On this kind of theory, vulnerability to state coercion gives rise to a distinct subset of moral obligation: those whose enforcement by the state would be justified.[56] The content of these obligations depends on principles drawn from a moral argument about what would justify this kind of coercion. For Dworkin, vulnerability to coercion gives rise to a constraint on permissible government action: a demand that coercion be exercised consistently with the equal status of all.

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[54] Ronald Dworkin, *Law's Empire* (HUP 1986), ch 6. This aspect of Dworkin's theory is brought out and developed most clearly in Stavropoulos (n 51).

[55] ibid 93.

[56] Dworkin calls these 'legal' rights in Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011), 405-406. Elsewhere, I have defended this use of labelling as coherent by the lights of Dworkin's own theory. See Conor Crummey, 'One-System Integrity and the Legal Domain of Morality' (2022) 28(4) Legal Theory 269; Conor Crummey, 'On (Not) Setting Boundaries' in Nicos Stavropoulos (ed) *Interpretivism and Its Critics* (Bloomsbury, forthcoming). Cf Mark Greenberg, 'The Moral Impact Theory, The Dependence View, and Natural Law' in George Duke and Robert George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (CUP 2017); Lawrence Sager, 'Thank You, Hercules' in Nicos Stavropoulos (ed) *Interpretivism and Its Critics* (Bloomsbury, forthcoming). Whether or not we view this subset as 'legal' should not matter too much for present purposes. The substantive claim – that courts using presumptions are trying to work out the content of the rights and obligations to which coercion applies – can be assessed on its own regardless of whether attributes the label 'legal' to this subset.

This triggers a requirement of principled consistency, or integrity.[57] The content of obligations that come with enforcement attached is determined by principles drawn from relevantly similar past decisions. In this way, force is deployed consistently with a broader conception of the equal status of members of a political community.

We don't need to worry too much here about whether we buy Dworkin's conception of law as integrity as an account of the relationship between state coercion and legal obligation.[58] What is helpful for us is that the theory identifies a morally salient form of vulnerability that obtains between citizens as part of legal practice.[59] Just as the vulnerability that children have towards parents is a morally salient fact that shapes the content of the obligations that obtain within that relationship, so does the vulnerability to coercive enforcement to which citizens are subject shape the content of the obligations that come with such enforcement attached. Both kinds of relationship give rise to obligations that restore the parties involved to positions of moral equality.

I suggested that in inter-personal relations, presumptions operate as heuristics for reaching provisional conclusions about our moral obligations towards one another. In relationships characterised by vulnerability of one party towards another (or of both parties towards each other), obligations arise that restore parties to positions of moral equality within the relationship. Often, these conclusions are arrived at in circumstances where the moral problem to be worked out is difficult or complex; where the rights of various parties are

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[57] Dworkin (n 54) ch 6.

[58] Elsewhere, I defend this view against critiques and deploy it to explain aspects of UK public law. Crummey (n 9) ch 6.

[59] I say 'between citizens' because legal obligations, in Dworkin's view, are associative in character. We call on the state to use coercion on our behalf. The relevant vulnerability, then, is to the community as a whole. If one prefers to think of this as a relationship between the citizen and the state understood as a corporate entity, I don't think that would affect the arguments in this paper.

involved and need to be specified, where the principles to be applied are not obvious, or where there is uncertainty about the relevant facts that have a bearing on the correct conclusion.

Legal practice, we have said, gives rise to a distinct subset of obligation characterised by the vulnerability of citizens to state coercion. Our vulnerability to coercive enforcement is a morally salient fact that determines the content of these rights and obligations. What courts are tasked with determining, on this view, is whether the deployment of the state's monopoly on force would be justified in the case before them. They are asked to specify the content of this subset of the litigant's rights and obligations.

It goes without saying that this task is complex. It requires judges to come to provisional conclusions, often with imperfect information available to them. When judges invoke presumptions in adjudication, we might view them not just as seeking a way to put an end to a deliberative procedure, but as expressing a conclusion about this subset of the rights and obligations of the litigants before them.

B. The Presumption of Innocence

The presumption of innocence sits neatly within this view. That presumption articulates a constraint on the deployment of coercive force: criminal sanctions may not be deployed unless a certain evidentiary burden is met. The accused is in a position of vulnerability as against the state (or their fellow members of the community, on whose behalf the state operates). In order to restore them to a position of equal status within this relationship, particular moral principles constrain the permissible use of force to which the accused is vulnerable.

The presumption of innocence is a moral heuristic in that it helps us to work out whether the deployment of coercive force on behalf of the community would be justified. This heuristic

directs us to another question: is evidentiary burden ø met? When this question is answered, we have an answer to the question of whether the deployment of coercive force would be justified.

On the view I have set out, citizens have standing to demand that such coercion only be deployed consistently with their status as moral equals within a political community. The presumption of innocence, on this view, operates as a heuristic that allows the court to reach a provisional conclusion on the question of whether the deployment of force would be justified against this standard. It is not primarily a device to help the court extricate itself from an unresolved deliberative process. Rather, seen from the perspective of the *subject* of the presumption rather than the deliberator, the presumption of innocence is a moral heuristic whose use we have standing to demand of state.[60]

I will not dwell on the presumption of innocence since, as noted already, it seems to sit particularly neatly, within the view that I have said out. It is concerned in a particularly direct way with the deployment of state coercion, and one might be tempted to conclude that there are no further lessons about legal presumptions generally to be drawn from its analysis. A more

[60] There is one possible divergence between law and the inter-personal case discussed in section 3. In 'You've Got to Believe Me', I argued that we might be required to believe a friend even when that friend is deceiving us. I said that it seems implausible to think that the deceitful friend has standing to demand this of us, but that the community as a whole might have such standing. In the legal context, it seems more plausible to argue that, as well as the community having standing to demand that the presumption of innocence be applied, a guilty person *themselves* has standing to make that demand. If that is the case, such a conclusion would follow from an argument about the particular kind of vulnerability to we are all subject in our status as citizens before the law. For example, one could argue that because legal power is monolithic and because our participation in it is non-voluntary, we have personal standing to demand certain procedural protections that a friend, for example, might not. This would mark a moral difference between friendship obligations and legal ones. I do not think that this affects any of the analysis of presumptions in the domains of either friendship or law explored here.

relevant question might be whether legal presumptions can be viewed as moral heuristics even where the presumptions seem arbitrary.

C. 'Arbitrary' Presumptions

Writing of the presumptions concerning survivorship in a common disaster, Edmund Morgan writes:

> There are a few presumptions which have no reason for existence save a purely procedural convenience. For example, the statutory presumptions as to survivorship among persons meeting death in a common disaster seem to be grounded only upon the need of a satisfactory expedient for the solution of a perplexing problem, any uniform solution of which will have no necessary relation to considerations of experience, fairness, or social policy in the particular case.[61]

The common law presumption of survivorship to which Morgan refers is a set of rules governing situations in which more than one person dies and it is unclear who survived whom.[62] Often this may be in inheritance cases. Tracy and Adams set out a helpful example:

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[61] Edmund Morgan, 'Some Observations Concerning Presumptions' (1931) 44 *Harvard Law Review* 906, 924-925. Analysing the same presumption, Chapman writes: 'A presumption in the old sense of the word is merely a logical inference, usually from circumstantial evidence, or it may be regarded as a fixed rule of law. Francis Chapman (1914) 62(8) *University of Pennsylvania Law Review* 585.

[62] Tracy and Adams sketch the variety of cases in which this presumption has operated: 'Thus where two or more persons were killed in a cyclone, in an automobile running off the road or colliding with a train, in a train wreck, in a shipwreck, in a flood, in an earthquake, in a fire, in an airplane crash," in an explosion, in the Boxer and Sepoy rebellions, in the collapse of a

> For example, *A* devises all his property to *B*, and then *A* and *B* die in a common disaster. If *B* survived, then *B*'s heirs will inherit, but if *A* survived then *A*'s heirs take by intestacy. Here the question may arise when the estate is distributed or in some other action. Or for another example, *A* and *B* are husband and wife and die intestate in a common disaster. If *B* survived, *B*'s daughter will inherit *B*'s statutory share of *A*'s estate. If *A* survived, she will not.[63]

The rule adopted by the courts to deal with these cases was that unless evidence to the contrary was brought forward establishing survivorship, the courts would act as though both persons died at the same time.[64]

I confess I find it puzzling that such a presumption could have been thought to have had 'no necessary relation to considerations of experience, fairness, or social policy'.[65] The presumption of common survivorship seemed obviously to track moral considerations. Take the example Tracy and Adams give above: *A* devises all his property to *B*, and then *A* and *B* die in a common disaster. If *B* survived, then *B*'s heirs will inherit, but if *A* survived then *A*'s heirs take by intestacy. Unless evidence to the contrary can be provided, it would be unfair to the survivors of either *A* or *B* to proceed as if one had survived the other.

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house or bridge, by gas fumes, or by freezing, and the survivorship of one or more was in issue, the court considered the event a common disaster.' John Tracy and John Adams, 'Evidence of Survivorship in Common Disaster Cases' (1940) 68(1) *Michigan Law Review* 801, 802.

[63] ibid 804.

[64] ibid 807.

[65] Morgan (n 61) 585.

Once again, we can view this presumption as a heuristic designed to help us come to a provisional conclusion about the content of obligations grounded in our vulnerability to state coercion. In the absence of a legal order, persons involved in disputes like these would be vulnerable to arbitrary exercises of power or domination by others. Law regulates such situations by retaining a monopoly on force, and deploying that force in a way that treats the parties involved as moral equals. The presumption of survivorship in common disaster gives expression to a moral conclusion: that it would be inconsistent with each party's moral status as equals for the state's monopoly on coercion to be deployed on behalf of either.[66]

When deciding the point at which a person who has been missing for several years without making contact should be presumed dead, the number chosen will inevitably be somewhat arbitrary.[67] Equally obviously, however, the number is not entirely arbitrary. Treating a person who has been missing for a week as dead would seem as wrong as waiting until that person has been missing for seventy years.

In the 'Finders Keepers' example, we saw that presumptions can function as moral heuristics even if the specific content of the presumption is somewhat arbitrary or conventional. What this points to is the fact that conventional practices can act to specify or concretize broader moral requirements.[68] For example, we have broad obligations to treat one another with respect, obligations that obtain independently of any practice. When a practice of shaking hands as a way

[66] There is of course a further question about whether it would be fair to award the inheritance to one party even if somehow it could be proved that *A* died slightly before *B* or vice versa.
[67] The rule originates in *Doe d. George v Jesson* (1805), and before this the Bigamy Act of 1604 excluded from its ambit persons who remarried after their spouse had been missing for seven years. See James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1896), 319.
[68] George Letsas, 'The DNA of Conventions' (2014) 33(5) *Law and Philosophy* 535.

of conveying respect emerges, we this narrows and gives more specific content to that obligation of respect, so that we now have a more specific obligation to shake hands.

The 'Finders Keepers' example showed that a somewhat arbitrary cut-off point (if no one returns after seven days you can keep the money) served to concretise and specify the parents' obligations towards their children. We can think of the missing person presumption as operating in the same way. In situations like this, the courts are asked to figure out whether an individual before them is entitled to the state's monopoly on force being deployed in their favour. Suppose a person wants to remarry. On the view I have been outlining, that person is making a particular kind of moral claim: that they are entitled to the state's recognition of their new marriage (and all the rights to the deployment of state force that go along with that, in taxation, inheritance etc). Just as in Finders Keepers, this is a complex moral question, which requires the courts to specify the rights of various parties: the litigant before them, other potential inheritors, the missing person etc.

The presumption is a heuristic that allows them to arrive at a provisional conclusion: in these particular evidentiary circumstances, X is entitled to have state coercion deployed on her behalf. The number chosen is somewhat arbitrary, but once it is chosen, it further specifies the rights and obligations grounded in the broader requirement that coercion be deployed consistently with the equal status of all. A presumption being somewhat arbitrary, then, does nothing to unsettle the view of presumptions as moral heuristics.

5. Statutory Presumptions Reconsidered

In this section I suggest that statutory presumptions – those deployed by judges when working out the legal impact of a statute – can also helpfully be viewed as being underpinned by a concern with restoring citizens to positions of moral equality in the face of vulnerability to state coercion. This, I argue, makes good sense of the judicial practice, and can help us to answer some difficult questions about how such presumptions should be employed.

A. Statutory Presumptions, Legislative Intentions, and General Jurisprudence

According to one influential group of theories, when courts employ statutory presumptions, they are attempting to determine the content of a particular set of social facts, such as facts about the intentions of the enacting legislators, or the 'public understanding' of a legal text at the time of its enactment. For example, when faced with an ambiguously worded statute, the courts will interpret that statute consistently with fundamental rights because they believe that the legislature did not intend to legislate inconsistently with fundamental rights.[69] When applying the 'harmonious construction' rule, judges presume that legislators intended to legislate in such a way that the laws they create do not conflict. While it would be implausible to attribute to each enacting legislature specific intentions in relation to every statute, the thinking goes, the legislature has 'meta-intentions' about how such statutes are to be properly interpreted.[70]

[69] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999); Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40(1) *Statute Law Review* 53.

[70] Some prefer the labels 'interpretive intentions' or 'standing commitments'. Dworkin argues, at length and in my view persuasively, about why the strategy of appealing to meta-intentions fails. Ronald Dworkin, *A Matter of Principle* (HUP 1985), 54. Put briefly, the appeal to meta-intentions is supposed to explain how judges can discriminate between conflicting legislative intentions at different levels of abstraction, but this simply gives rise to a demand that the relevance of meta-intentions themselves be accounted for.

If this line of thinking were correct, we would do better to think about communicative presumptions in order to gain a better insight into statutory presumptions in law. This view, however, rests on a controversial theory of legal obligation that must be defended. Statutory interpretation is, at the most basic level, a method for figuring out what contribution a statute makes to the law.[71] Statutory presumptions are devices used as part of this task. Since the nature of legal rights and obligations themselves is a matter of deep philosophical dispute, it follows that any theoretical account of presumptions will depend on a more abstract account of the relationship between the actions of institutions like legislature and courts and the obligations that obtain in virtue of the actions of those institutions.

The view of statutory presumptions as presumptions about legislative intention, then, relies on the claim that the content of legal obligations is determined by the intentions of the legislature. Space precludes me engaging with this view at any length here.[72] All that I will point out is that it is not enough for proponents of that view to point out that legislating *involves* communication.[73] There are plenty of obligation-generating practices, such as promising, in which the relationship between the act of communication and the obligation generated is theoretically up for grabs. Even if legislating is a form of communication, the linguistic content of what is communicated may not by itself determine the statute's contribution to the law. If a statute's legal meaning is constitutively determined by its linguistic meaning, then of course

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[71] Mark Greenberg, 'Beyond Textualism' (2019) *Public Law & Legal Theory Research Paper No. 19-41*; Mark Greenberg, 'Legal Interpretation' (2021) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation> accessed 27 January 2025.

[72] Elsewhere, I argue that intentionalist theories of statutory interpretation are unsupported by any of the dominant theories of general jurisprudence, including the positivist ones on which they implicitly rely. Crummey (n 9) ch 4.

[73] This is setting aside all of the difficulties in viewing legislating as analogous with ordinary communication discussed in For difficulties with the model of legislation as communication generally, see Greenberg, 'Legislation as Communication?' (n 24).

judges must identify the statute's linguistic meaning. But this connection must be argued for. This holds regardless of whether we characterise those obligations as genuine moral ones or obligations from a legal point of view.

This has been a long-winded way of saying that I do not feel obliged to argue at length against the view of statutory presumptions as communicative presumptions here, because we cannot without begging the question assume that a statute's legal impact depends on the intentions of the enacting legislature (or any other particular way of cashing out the communicative content of the statute). My strategy in this paper has been to examine how presumptions operate in the interpersonal context and then see whether this can help us to determine whether legal presumptions operate in the same way. This leads me to the suggestion that statutory presumptions may share a structure with presumptions that underpin the interpretation of rules in the interpersonal context. Specifically, presumptions can be thought of as devices that help us to work out the content of obligations grounded in a requirement that persons in relationships characterised by vulnerability or power imbalance be restored to positions of moral equality. In the legal context, this picks out a distinct subset of moral obligation: those whose coercive enforcement would be justified. Some might argue that I am wrong because in fact statutory presumptions are concerned with figuring out the content of acts of communication, but this must be argued for, not assumed.[74]

[74] The account I develop here may, in principle, be reconcilable with a version of intentionalism. I have argued that legal presumptions are moral heuristics whose function is to work out the content of obligations whose enforcement in court would be justified. One could plausibly argue that, for democratic reasons, the content of these rights is determined by the intentions of the legislature, in which case presumptions operate in the same way as communicative presumptions. This would be a non-positivist rearticulation of intentionalism that might be hard in substance to justify, but would be on the table. Elsewhere, I consider this kind of strategy for rescuing intentionalism. Crummey (n 9) ch 4.

B. Statutory Presumptions as Moral Heuristics

In the discussion of the 'House Rules' scenario in section 3, I considered a situation in which parents, in the course of figuring out what their children are entitled to in a particular set of circumstances, had to work out what bearing their own enactment of a previous rule had on the situation. I suggested that to figure out the rule's impact on their own and their children's obligations, the parents had to appeal to moral principles specific to the domain of parenting. These principles, in Scanlon's words, 'assign relevance to non-normative facts'.[75] More specifically, principles derived from the position of vulnerability children stand in as against their parents, and the requirement that parents and children be restored to positions of moral equality, assign relevance to the non-normative fact of the house rule's enactment. The content of the obligations grounded in such principles will change depending on the factual circumstances, the information available etc. The enactment of the rule is just another fact about the world whose moral impact needs to be interpreted as part of this process of moral reasoning.

The 'presumption' employed to interpret this rule, on this view, is a moral heuristic used to reach a provisional conclusion about the rule's moral impact. This does not rule out the possibility that the communicative or linguistic content of the rule plays an important or even determinative role in this process, but this would need to be argued for, and other accounts of the rule's impact are on the table.

Legal practice gives rise to a specific kind of vulnerability to state coercion, which makes it the case that specific principles determine the justifiability of such coercion's deployment. One starting point for thinking about statutory presumptions, then, is with the idea that the role of

[75] TM Scanlon, *Being Realistic About Reasons* (OUP 2014), 41–42.

courts is to figure out what impact a statute has had on the subset of our rights and obligations to which coercion attaches.[76] Statutory presumptions, on this model, are heuristics used to come to provisional conclusions as part of this process of moral reasoning.

This is rather abstract, so let me sketch what such a process would look like with reference to the 'principle of legality'. This, by way of reminder, is a presumption articulated by the UK courts, according to which they will interpret legislation consistently with common law rights and principles, unless the statute uses 'clear and express' wording licensing the violation of such rights and principles.

In *R v Secretary of State for the Home Department, ex p Pierson*, legislation empowered the Home Secretary to fix a 'tariff' for prisoners serving a life sentence; this is the mandatory part of a life sentence that must be served before release can be considered.[77] Both the trial judge and the Lord Chancellor recommended a tariff of 15 years. The Home Secretary, ignoring their recommendations, set the tariff at 20 years. When asked by the defendant's solicitor for the reasons for the higher tariff, he cited two mistaken claims: that the prisoner's offence was not an isolated incident (it was) and that the crime was premeditated (which had not been argued or established). The applicant then sought review of this decision, claiming that the decision to 'increase' his tariff was unlawful.[78]

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[76] This is compatible with the claim that legislators deliberately try to alter the conditions of justifiable coercion through their actions. The act of legislating, on this view, is precisely an effort to effect a particular moral change. But morality will determine what impact the legislation has had. Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123(5) *Yale Law Journal* 1118.

[77] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539. This was the first case to refer to the presumption as 'the principle of legality'.

[78] The judges talked throughout of an 'increase' in the sentence, although this was not in a literal sense the case. Rather, because of the importance of the principle at stake, the Home Secretary's decision was treated as a de facto increase. Bingham MR in the Court of Appeal set this out clearly:

> The applicant's penal term was originally fixed at a period five years longer than the term recommended by the judges (which was already said by the trial judge to be

Lord Steyn, in the course of holding the Home Secretary's decision to increase the prisoner's tariff was unlawful, noted that the Home Secretary's statutory power must be read consistently with the principle that punishment not be retrospectively increased. In a now well-known passage, he articulated the 'principle of legality':

> There is no ambiguity in the statutory language. The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable. A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.[79]

It seems to me that Lord Steyn is here making a connection between the principle of legality as a method of statutory construction and the broader *value* of legality as an ideal of political morality.[80] The court is tasked with figuring out what impact this statute's enactment has had on the question of when state coercion is justified (i.e. whether it empowers the Home Secretary to set the prisoner's tariff at twenty years) by considering the effect of various principles drawn from this broader value.

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substantially longer than the average period of custody for murder) because the Home Secretary considered the case to have serious aggravating features. It is now accepted that the Home Secretary was wrong to think that the case had those serious aggravating features. But the penal term remains the same. In substance that amounts to an increase in the penal term.

R v Secretary of State for the Home Department, ex p Pierson [1996] 3 WLR 547, 560B.

[79] [1998] AC 539, 587–88.

[80] Crummey (n 9) ch 1.

One of these principles will be a democratic principle that assigns a great deal of law-determining weight to the communicative content of legislation.[81] Just as they do with the House Rules, moral principles make legislation relevant to the determination of the particular set of rights and obligations at issue. However, there is no reason to think that this will not be the only principle in play.

When applying the 'presumption' that Parliament will legislate consistently with common law rights, the courts have appealed to a series of rights and principles drawn from the 'rule of law'.[82] On the account developed in this paper, we can understand that this 'presumption' is shorthand for a more complex process of moral reasoning, wherein judges try to work out the content of our enforceable obligations by interpreting statutes in line with various principles drawn from a broader theory of the value of legality, i.e. the value of regulating coercion consistently with the moral equality of all.

This account does a good job of explaining important aspects of doctrinal practice. For example, it accounts for the pervasive disagreement among judges as to the correct interpretation of statutes when the principle of legality is invoked. Judges disagree regularly about the rights that trigger the principle of legality's application, as well as how 'clear and express' statutory wording needs to be before it is interpreted in a way that licenses the violation of common law

[81] Dworkin, 'Hard Cases' (n 50) 108. In Crummey (n 9) ch 7, I argue at length that the UK constitutional principle of parliamentary sovereignty is best understood as an expression of a similar democratic principle, though I argue that legislative intention is something that can only be reconstructed through normative reflection on the sort of institution a legislature is and the sort of intentions that it *should* have. Hershovitz (n 49) ch 2, makes a similar argument in relation to textualism in constitutional interpretation.

[82] As with the 'principle of legality', there is potential for confusion here in that the UK courts frequently invoke the 'rule of law' as a principle of the UK constitution. The precise relationship between this doctrinal sense of the rule of law and the broader value of the rule of law is debated.

principles. Theories which cast the principle of legality as a communicative presumption struggle to account for such disagreement.

In *R (Privacy International Ltd) v Investigatory Powers Tribunal*, the UK Supreme Court was asked to interpret a so-called 'ouster clause' in s 67(8) of the Investigatory Powers Act 2000, which sought to shield decisions of the Investigatory Powers Tribunal (IPT) from judicial review.[83] The majority found that, notwithstanding the fairly explicit language of the statute, the provision should be interpreted as leaving the right to seek judicial review of the IPT's decisions intact.

Lord Carnwath, writing for the majority, emphasised the strong presumption against reading a statute as ousting judicial review. In so doing, he explicitly decentred the role of parliamentary intention in determining the proper reading of the statute, arguing that focusing only on unearthing Parliament's intention 'treats the exercise as one of ordinary statutory interpretation, designed simply to discern "the policy intention" of Parliament, so downgrading the critical importance of the common law presumption against ouster'.[84] The standard of clarity demanded of a legislative provision will be higher, Lord Carnwath indicated, where an important separation of powers concern like the jurisdiction of the High Court is at issue.

Lord Sumption and Lord Reed, dissenting, took the view that 'the rule of law is sufficiently vindicated by the judicial character [of the Investigatory Powers Tribunal (IPT)]'.[85] It is difficult to see how we could cast the disagreement here as one about legislative intention. The legislative wording was fairly clear: '[Except as provided by virtue of s 67A], award, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court'. Despite this fairly unambiguous wording, the majority held that the right to judicial review was not displaced.

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[83] *R (Privacy International Ltd) v Investigatory Powers Tribunal* [2019] UKSC 22.
[84] [2019] UKSC 22, [107].
[85] [2019] UKSC 22, [172].

The disagreement between majority and dissenters is easy to explain if we view it as moral disagreement; one that turns on competing conceptions of the right of access to the courts, and competing accounts of the weight to be afforded to the principles that flow from those conceptions. Lord Sumption and Lord Reed because of their view of the judicial nature of the IPT, do not view the statute's interference with access to justice as particularly serious. The statute, on their view, did 'no more than exclude review by the High Court of the merits of decisions made by a tribunal performing, within its prescribed area of competence, the same functions as the High Court'.[86] The majority, led by Lord Carnwath, felt that Lords Sumption and Reed miscalculated the weight to be assigned to the principle of access to justice. The greater weight afforded to the separation of powers principles diminished the weight of the democratic principle (parliamentary sovereignty) in determining the legal effect of the provision.

6. Conclusion

Presumptions help us to extricate ourselves from difficult decision-making processes, but this is not all they do. When we examine how presumptions operate in inter-personal relations, we see that they do not just help us reach *some* decision; rather they help us reach the *right* decision. They help us to figure out what we owe one another. They might not always successfully do so, but a presumption is defective to the extent that it does not.

I have argued here that in the interpersonal context, presumptions help us to work out the content of obligations grounded in relationships characterised by some morally salient vulnerability. Vulnerabilities within particular relationships give rise to obligations that restore parties within that relationship to positions of moral equality.

[86] [2019] UKSC 22, [211].

This motivated a focus on the vulnerability to official coercion that citizens are exposed to under legal practice, and the demand that this coercion be regulated in a way that maintains the moral equality of citizens. Law delivers us from a state of affairs in which coercion can be deployed arbitrarily, but it does so by making us vulnerable to a new form of centralised, state coercion. We are entitled to call on the state to deploy this coercion on our behalf to enforce certain rights, and are subject to the same force being deployed to enforce our obligations. The vulnerability that we all have towards this coercion gives rise to a constraint. This coercion must be deployed in a way that is restores us to positions of moral equality within our political community.

Legal presumptions, seen against this backdrop, are heuristics that courts use to determine what citizens are owed. I have tried to show that this makes good sense not just of adjudicative presumptions, but statutory presumptions as well. I hope this account can help act as a metric against which to measure the justifiability of particular presumptions, and a starting point for answering difficult questions about the application of those presumptions.