

Commentary

Offence Definitions, Conclusive Presumptions, and Slot Machines

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Canadian evidence scholars frequently claim that conclusive presumptions are nothing more than substantive offence definitions. This position reflects a persistent confusion, not about the function of legal presumptions in the law of evidence, but about the function of offence definitions beyond the law of evidence. Offence definitions, unlike conclusive presumptions, serve the normative function of defining wrongful conduct for citizens. This commentary argues that the language of conclusive presumptions allows us to distinguish the gravamen of a criminal offence from a means of facilitating proof of that wrong. It is, to that extent, worth preserving the distinction between conclusive presumptions and offence definitions.

Les spécialistes canadiens de la preuve font fréquemment valoir que des présomptions irréfragables ne sont rien de plus que des définitions de fond d'une infraction significative. Cette position reflète une confusion persistante, non au sujet de la fonction des présomptions légales du droit de la preuve, mais relatives aux définitions de la fonction d'infraction au-delà du droit de la preuve. Contrairement aux présomptions irréfragables, les définitions d'infraction favorisent la fonction normative de la définition de la conduite transgressive pour les citoyens. Ce commentaire fait valoir que le langage des présomptions irréfragables nous permet de distinguer le fondement de l'infraction criminelle dans le but de contribuer à la preuve de cette transgression. Dans cette optique, il est valable de maintenir la distinction entre les présomptions irréfragables et les définitions d'infraction.

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SECTION 201(1) OF THE CRIMINAL CODE STATES: “Every one who keeps a common gaming house ... is guilty of an indictable offence.”¹ Section 198(2), in turn, provides that “a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house.”² There are few other examples of “conclusive presumptions” in the *Criminal Code*.³ It is likely for this reason that Canadian evidence scholars, in the course of discussing conclusive presumptions, almost invariably mention section 198(2). They do so typically to illustrate the point that, strictly speaking, conclusive presumptions do not exist; that they are actually nothing other than offence definitions. We will refer to this view of conclusive presumptions as the “orthodox position.”

The orthodox position, at least in its stronger form,⁴ is wrong. It reflects a persistent confusion, not about the function of legal presumptions in the law of evidence, but about the function of offence definitions *beyond* the law of evidence. Offence definitions do more than tell us what the Crown must prove in a criminal trial. They also serve the normative function of defining wrongful conduct for citizens. It is less obvious that conclusive presumptions serve a like function. This commentary argues that the language of conclusive presumptions allows us to distinguish the gravamen of a criminal offence—the wrong it is intended to address—from a means of facilitating proof of that wrong. To that extent, we should not be too quick to decide that conclusive presumptions are simply elliptical or duplicitous means of (re)defining offences, or that provisions

1. *Criminal Code*, R.S.C. 1985, c. C-46, s. 201(1).

2. *Ibid.*, s. 198(2).

3. One possible example is contained in *ibid.*, s. 421(2). This section applies where the accused is charged with engaging in an unlawful transaction in public stores, under s. 417(2). It creates the conclusive presumption that a person “in the service or employment of Her Majesty or [who] was a dealer in marine stores or in old metals” knew that “public stores” bore a “distinguishing mark.”

4. For the distinction between the strong and weak versions of the orthodox position, see 4-5, below.

which purport to create conclusive presumptions should be replaced with substantive provisions.

This commentary has six parts. Part I briefly explains the strong orthodox position. We will see that it has important and counterintuitive implications for the presumption of innocence, and also that some of its main proponents have manifested discomfort with its implications. To this extent, it is worth assessing the merits of the strong orthodox view. In doing so, we will need to consider the respective functions of offence definitions and legal presumptions. This, in turn, will require us to consider the distinction (first drawn by Meir Dan-Cohen) between “decision rules” and “conduct rules.”⁵ Parts II and III explain that distinction. We will see that, although the criminal law purports to authoritatively express the wrongfulness of certain courses of action, only some rules (“conduct rules”) are directed at members of the public. Other rules (“decision rules”) are addressed exclusively to legal decision makers and are designed to guide them in the exercise of their discretion. Parts IV and V set out to show that, whereas offence definitions are both conduct rules *and* decision rules, conclusive presumptions are only decision rules. It is, therefore, inaccurate to suggest that they are functionally equivalent. Part VI uses the conclusive presumption contained in section 198(2) to illustrate this point.

I. THE ORTHODOX VIEW OF CONCLUSIVE PRESUMPTIONS

According to the orthodox view, conclusive presumptions do not exist. We can concisely explain why. Suppose that a criminal offence requires the Crown to prove A. Also suppose that a legal presumption directs the trier of fact to infer A upon proof of B. If the presumption is rebuttable, it remains open to the accused to show that the trier of fact should not, in the particular circumstances of the case at bar, infer A from B. The important question, in other words, is not whether B is true, but whether A is true. Where the presumption is conclusive, by contrast, it does not matter that the trier of fact should not infer A from B—the inference *must* be made no matter what further evidence (if any) the accused adduces. Upon proof of B, the factual issue is settled. But in that case, B is effectively nothing less than an alternative element of the offence: the Crown can either prove A *or* B. The conclusive presumption is not just a means

5. See Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law” (1984) 97 Harv. L. Rev. 625.

of facilitating proof: it sets out an alternative definition of the offence. It is not a rule of evidence, but a substantive offence definition.

Section 198(2) is typically used to illustrate this reasoning. Ostensibly, the Crown must prove that the accused kept a common gaming house. In reality, though, the Crown needs only to prove that the accused kept a place found to be equipped with a slot machine. Once the Crown proves that fact, it does not matter if the accused can show that, under the particular circumstances of the case, the trier of fact should not infer that the place was a common gaming house. So long as the Crown proves one fact or the other, she will discharge her burden of proof with respect to the *actus reus* of section 201(1). Thus, on the reasoning traditionally employed, section 198(2) does not merely facilitate proof: it creates an alternative offence element, and so amounts to a rule of substantive law rather than a rule of evidence. The orthodox view that conclusive presumptions in general, and section 198(2) in particular, are nothing more than offence definitions has been adopted by Delisle,⁶ Sopinka, Lederman, and Bryant;⁷ and Paciocco and Stuesser⁸ and finds support in the work of Thayer,⁹ Wigmore,¹⁰ Morgan,¹¹ and McCormick.¹²

There are two ways in which to understand the orthodox position. In its weaker version, the orthodox position amounts only to the claim that conclusive presumptions have the same evidentiary significance as offence definitions; that both tell the Crown what it must prove in order to discharge its legal burden in

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6. Ronald Joseph Delisle, Don Stuart & David M. Tanovich, *Evidence: Principles and Problems*, 8th ed. (Scarborough: Thomson Carswell, 2007).
 7. John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 3d ed. by Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst (Markham: LexisNexis, 2009).
 8. See David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 3d ed. (Toronto: Irwin Law, 2002) at 437.
 9. See James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898) c. VIII at 313ff.
 10. See John Henry Wigmore, *Evidence in Trials at Common Law*, rev. ed. by James Harmon Chadbourn (Boston: Little, Brown, 1981) vol. 9, s. 2492.
 11. See Edmund M. Morgan, "Presumptions" (1937) 12 Wash. L. Rev. & St. Bar J. 255 at 255.
 12. See Edward W. Cleary, ed., *McCormick on Evidence*, 3d ed. (St. Paul: West, 1984) s. 342 at 965. See also I. H. Dennis, *The Law of Evidence*, 2d ed. (London: Sweet & Maxwell, 2002) at 421.

criminal cases. This is a perfectly sensible and correct claim. It is also exactly the sort of claim one would expect to see in evidence textbooks and treatises. But Delisle, Stuart, and Tanovich; Sopinka, Lederman, and Bryant; and Paciocco and Stuesser do not simply argue that conclusive presumptions have a similar evidentiary function as offence definitions. They claim that conclusive presumptions just *are*, for practical purposes, offence definitions. We might think of this as the strong version of the orthodox position.

To some extent, the mere fact that so many evidence scholars have taken the strong orthodox view makes it an interesting object of critique. But, as it turns out, the strong orthodox position has important implications for the constitutionality of conclusive presumptions—particularly those used to facilitate proof of the *actus reus*. There is nothing unusual in the suggestion that a rebuttable legal presumption, by reversing the onus of proof on an essential element of an offence, can infringe the presumption of innocence (even if it is ultimately saved under section 1).¹³ It would, on the other hand, be quite unusual to claim that the act requirement contained in an offence definition could itself infringe the presumption of innocence. Though the Supreme Court of Canada has struck down criminal offences on the basis that they lack appropriate fault requirements,¹⁴ it has been conspicuously reluctant to strike down offences on the basis that the acts they proscribe are not wrongful¹⁵ or do not in fact target the wrong which Parliament intended to address.¹⁶ The courts have generally taken the view that Parliament has the last word in authoritatively defining what is and is not “guilty” behaviour, and that the offence definition provides us with the

13. *Canadian Charter of Rights and Freedoms*, ss. 1, 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See *R. v. Oakes*, [1986] 1 S.C.R. 103.

14. See *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. See Alan N. Young, “Done Nothing Wrong: Fundamental Justice and the Minimum Content of the Criminal Law” (2008) 40 Sup. Ct. L. Rev. (2d) 441 at 481-86.

15. See Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Portland: Hart Publishing, 2007) c. 9 at 195ff [Duff, *Answering for Crime*]. See also Eric Colvin & Tim Quigley, “Developments in Criminal Law and Procedure: The 1987-88 Term” (1989) 11 Sup. Ct. L. Rev. 165 at 183 (observing that the presumption of innocence can do little to protect citizens if Parliament can define the elements of offences however it wants).

16. See Victor Tadros & Stephen Tierney, “The Presumption of Innocence and the Human Rights Act” (2004) 67 Mod. L. Rev. 402.

clearest measure of what behaviour Parliament intended to target.¹⁷ Because Parliament is thought to have virtually unreviewable discretion to define wrongful conduct, it is difficult (if not impossible) to successfully argue that an offence definition infringes the presumption of innocence by purporting to criminalize conduct that is actually innocent.

If we suppose that offence definitions cannot infringe the presumption of innocence (at least insofar as they pertain to the *actus reus* rather than *mens rea* requirement), then the strong orthodox position has constitutional implications. It would, after all, be strange to think that conclusive presumptions *are* offence definitions, but that the former can infringe section 11(d) whereas the latter cannot. Given the deference courts show to parliamentary judgments of “criminal conduct,” the strong orthodox position implies that conclusive presumptions pertaining to the act requirement cannot infringe the presumption of innocence.¹⁸ That is a jarring suggestion: if Parliament can offend section 11(d) by creating a *rebuttable* presumption, one would expect it can do so with a *conclusive* presumption. (Indeed, one would intuit that conclusive presumptions are more flagrant infringements of section 11(d), not less.)¹⁹

It is, then, worth thinking about the strong orthodox position, for it has constitutional implications that are not only troubling, but counterintuitive. We will see that the strong orthodox position is in fact wrong. To see why it is wrong, we must look more carefully not just at the role played by legal presumptions, but at the function of offence definitions—particularly those aspects of offence definitions dealing with the *actus reus*.²⁰

Before getting started, however, we should also take a moment to consider a basic tension that lies at the heart of two influential Canadian discussions—those led by Delisle and by Sopinka, Lederman, and Bryant—of conclusive presumptions. These discussions are interesting because, though both explicitly and emphatically state that conclusive presumptions are nothing more than rules of substantive criminal law, they also propose reformulations of

17. See Young, *supra* note 14 at 499.

18. This was the position taken (unsuccessfully) by the Crown in *R. v. Shisler* (1990), 53 C.C.C. (3d) 531 at 538-9 (Ont. C.A.) [*Shisler*].

19. Thus, the Court of Appeal in *Shisler, ibid.*, ultimately found that the conclusive presumption contained in s. 198(2) was not justified under s. 1.

20. See *infra* note 53.

section 198(2) that show a reluctance to equate it to an offence definition. Consider, first, Delisle's analysis:

Professor Thayer notes that the term "presumption" is legitimately used only when the matter presumed is left open to further inquiry. It is sometimes said that given certain facts other facts shall be "conclusively presumed." ... The Criminal Code provides that "a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house." In truth these are not presumptions apportioning burdens of proof, but rather rules of substantive law; a "conclusive presumption" is a contradiction in terms. On proof of the basic fact the so-called "presumed fact" in such a case is actually immaterial; if the prosecution proves that the place was equipped with a slot machine the substantive law provides for conviction and whether the place is a common gaming house or not is immaterial. It would be best then, in our quest to minimize confusion, to discard the use of the term "conclusive presumption." The above section could simply be reworded to provide that "a place that is found to be equipped with a slot machine is a common gaming house."²¹

There is, in this passage, an interesting sleight of hand. Delisle argues that conclusive presumptions are not, properly speaking, presumptions at all, because on proof of the primary fact the presumed fact becomes irrelevant: having shown that the accused kept premises equipped with a slot machine, it no longer matters whether those premises amount to a common gaming house. Parliament would do better, he claims, to devise a section of the *Criminal Code* defining places equipped with slot machines as common gaming houses. In a way, the suggestion is perfectly sensible: if our problem with conclusive presumptions is that they make the presumed fact functionally irrelevant to criminal proceedings, then we resolve the problem by restoring the presumed fact to its central place in the proceedings. Delisle's proposed rewording accomplishes that—it indicates that the fact that a place is equipped with a slot machine has significance only insofar as it makes that place a common gaming house.

We can see why Delisle's solution involves sleight of hand if we observe that, given the nature of his critique of conclusive presumptions, his proposed reformulation is actually no reformulation at all. Delisle's complaint with section 198(2) is that the conclusive presumption it contains effectively makes it an offence to keep a place equipped with a slot machine—that the presumption is, like other so-called conclusive presumptions, a "rule of substantive law"

21. *Supra* note 6 at 116. I have omitted the reference to *doli incapax*, which raises distinct issues: see *infra* note 53.

rather than an evidentiary or adjectival rule. His proposed “rewording,” by contrast, does not make it an offence to keep a place equipped with a slot machine; it merely indicates the evidentiary significance of the fact that one has been found to keep such a place. If we accept Delisle’s understanding of conclusive presumptions—that they are substantive offences in disguise—then a true rewording of section 198(2) would simply state: “It is an offence to keep a place equipped with a slot machine.” He (rightly) does not propose such a reformulation, but his analysis does not give him the resources to explain why.

The tension in Delisle’s account can be stated succinctly: Delisle claims that conclusive presumptions are substantive rather than evidentiary provisions, while also claiming that conclusive presumptions can be reformulated as evidentiary provisions without changing their essential meaning. His proposed rewording of section 198(2) is intuitively attractive because we are used to thinking about conclusive presumptions as somehow different from substantive provisions. Delisle therefore trades on the very intuition he wants to challenge.

This confusion in Delisle’s analysis has significance for at least two reasons. First, it suggests a basic reluctance to treat conclusive presumptions as clear signals of a parliamentary intention to create new criminal offences. We will see that his reluctance is entirely appropriate, but only because Delisle was wrong to suggest conclusive presumptions like section 198(2) are substantive provisions in disguise. Second, and relatedly, Delisle’s proposed reformulation suggests that conclusive presumptions have more in common with provisions purporting to gloss the meaning of particular terms than with provisions purporting to define wrongful conduct. In assessing the merits of conclusive presumptions, we would do better to ask whether they are as effective as those glossing provisions, than to ask whether they are effective substitutes for substantive offence provisions. To ask the latter question is to rig the argument against conclusive presumptions at the outset.

The treatment of conclusive presumptions by Sopinka, Lederman, and Bryant (SLB) is also telling. They note that “[a] conclusive presumption is a rule of substantive law clothed in the language of presumptions.”²² This plainly echoes Delisle’s critique of conclusive presumptions. Their proposed reformulation of section 198(2), though, is quite different from that of Delisle. Referring to that section, they remark that “Parliament could have achieved the same result

22. *Supra* note 7 at 142.

by defining a common betting house as a place equipped with a slot machine.”²³ This is a jarring proposal. It seems to do just as effectively what Delisle criticizes section 198(2) for doing: it strips the concept of “common gaming house” of any practical significance in criminal proceedings brought under section 198(1). Since, on the SLB formulation, a common gaming house just *is* a place equipped with a slot machine, a trier of fact only needs to ask itself whether the place kept by the accused was equipped with a slot machine—it does not need to ask whether that place was also a common gaming house.²⁴ If section 198(2) changes the substantive law by creating a new criminal offence, in short, then so does the SLB rewording.²⁵ To a degree, that just shows that the reformulation does what SLB say it will do: namely, change the substantive law in the manner of a conclusive presumption without using the (in their view, misleading) language of presumptions. But SLB do not remark on the peculiarity of the suggestion that Parliament should change the substantive criminal law, not by expressly creating a new criminal offence or re-drafting the relevant offence provision itself, but by radically redefining a term in that provision (possibly, though not necessarily, in an altogether different section of the *Criminal Code*). If Parliament wants to criminalize the keeping of places equipped with slot machines, why not just say so, and avoid any reference to common gaming houses in the first place?

In a sense, SLB’s reformulation better reflects the ostensibly substantive nature of conclusive presumptions than Delisle’s attempted rewording. Delisle, of course, never said Parliament ought to define common gaming houses as places equipped with slot machines; rather, he proposed that places equipped with slot machines should be defined as common gaming houses. The difference is not trivial. Delisle’s reformulation allows a trier of fact to conclude that a place is a common gaming house even if it is not equipped with a slot machine—it glosses the meaning of “common gaming house,” foreclosing the possibility of a trier of fact finding both that a place was equipped with a slot machine and that

23. *Ibid.* at 143.

24. It is, of course, possible that SLB intended to say that a common gaming house is a place equipped with a slot machine, as well as other places. In that case, their proposal would more closely resemble Delisle’s rewording, and the same criticisms of Delisle would apply to SLB.

25. In fact, it arguably goes further than s. 198(2): it not only creates the new offence of keeping a place equipped with a slot machine, but also removes the offence of keeping a common gaming house. For our purposes, we can set that point aside.

it is nonetheless *not* a common gaming house, without saying anything about other circumstances under which the trier of fact could find that a place *is* a common gaming house. His reformulation is designed to guide triers of fact as they try to determine whether a place is a common gaming house; it does not change the substantive law (as he claims that section 198(2) does) by making the issue whether a place is equipped with a slot machine.

The proposed reformulation of SLB, by contrast, would appear to require the trier of fact to find that a place was equipped with a slot machine as a necessary and sufficient precondition to finding that place a common gaming house. It does not simply guide triers of fact as they attempt to determine whether a place is a common gaming house; it effectively makes that question irrelevant as a matter of law. But, as we have seen, SLB also seem reluctant to fully embrace the idea that conclusive presumptions change the substantive law rather than the adjectival law. Though, on their reasoning, one could reformulate section 198(2) simply by proposing a new criminal offence of keeping a place equipped with a slot machine, they instead suggest a provision that redefines a term in section 198(1). This approach appears just as elliptical a means of altering the substantive law as the conclusive presumption it is supposed to replace. Like Delisle, SLB seem to think that it would be wrong (or, at any rate, not ideal) to translate conclusive presumptions directly into offence definitions, even though they regard conclusive presumptions as substantive provisions.

II. CRIMINAL OFFENCES AS AUTHORITATIVE EXPRESSIONS OF WRONGFULNESS

The law tells us many circumstances under which a person may be subjected to a deprivation. Income tax legislation tells us when a person may be moved into a higher tax bracket. Civil forfeiture legislation tells us some conditions under which a person may be deprived of property.²⁶ Section 35 of the *Health Protection and Promotion Act* tells us when a person with a “virulent disease” may be forcibly detained in Ontario.²⁷ *Criminal Code* provisions likewise set out conditions under which individuals may be deprived of property or liberty. The deprivation attending a criminal conviction, however, is different from deprivations

26. See e.g. *Remedies for Organized Crime and Other Unlawful Activities Act, 2001*, S.O. 2001, c. 28.

27. *Health Protection and Promotion Act*, R.S.O. 1990, c. H-7 [HPPA].

attending civil commitment, income tax assessments, or civil forfeiture. Income taxes are designed to generate public revenue, not discourage people from earning more money. When we detain individuals with virulent diseases under the *HPPA*, we do so as a means of managing threats to public health, not to discourage people from acting as they did. When we seize property through civil forfeiture proceedings, it is ostensibly to secure some public good, not to discourage people from acting as the (former) owners did. To be sure, these legal mechanisms can be used to discourage misconduct—civil forfeiture targeting proceeds of crime is used to “deter crime and compensate victims”²⁸ and “sin taxes” may be levied to discourage smoking, drinking, or other vices. There is, however, nothing essentially punitive about such deprivations. Property may be seized as proceeds of crime whether or not it is possessed by someone who acted wrongfully in obtaining it.²⁹ We require a smoker to pay sin taxes on her cigarettes even if we believe that she cannot control her addiction. A person detained as a threat to public health may be unable to do anything to make her condition less virulent and may have been unable to do anything to avoid contracting her illness in the first place.³⁰

When we fine or imprison an offender as part of a criminal sentence, the deprivation has quite different significance. It necessarily purports to communicate the judgment that the offender has acted wrongly.³¹ We can see this connection between wrongdoing and sentencing in several places in the criminal law. The Supreme Court has often observed that criminal sentences must reflect the moral blameworthiness of the offender.³² The *Criminal Code* requires judges to issue sentences that are “proportionate to the gravity of the offence and the degree of responsibility of the offender.”³³ Such remarks presuppose the

28. See *Chatterjee v. Ontario (A.G.)*, [2009] 1 S.C.R. 624 at para. 3.

29. *Ibid.* at para. 46.

30. This may be an issue in the context of patients with drug-resistant tuberculosis. See e.g. *Toronto (City) Medical Officer of Health v. McKay* (2007), 286 D.L.R. (4th) 178 (Ont. Ct. J.).

31. See H.L.A. Hart, *The Concept of Law*, 2d ed. (New York: Oxford University Press, 1994) at 39 [Hart, *The Concept of Law*]; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008) at 78-79; and Andrew Ashworth, “Is the Criminal Law a Lost Cause?” (2000) 116 *Law Q. Rev.* 225 at 232.

32. See *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at paras. 36, 40.

33. *Supra* note 1, s. 718.1. See also *R. v. Proulx*, [2000] 1 S.C.R. 61; *R. v. Wust*, [2000] 1 S.C.R. 455.

offending conduct was wrong in the first place and that the sentence should track the degree of wrongfulness.³⁴ Furthermore, the Supreme Court has held that a person can be convicted of a criminal offence punishable with a term of imprisonment only if she has a degree of fault that is appropriate given the amount of stigma and punishment involved.³⁵ This surely presumes that the offender's acts were wrongful. After all, the intention to engage in a particular course of conduct, or to produce a particular result, surely signals a "blameworthy" state of mind only if the intended course of conduct is wrongful.³⁶

We may, of course, disagree about what it is that makes conduct wrongful and what makes some kinds of conduct more wrongful than others.³⁷ We can set those questions aside. For the purposes of this commentary, it is enough that we agree that criminal punishment is distinct from civil sanctions insofar as the deprivation attending the former signifies that the offender acted wrongly, whereas deprivations attending the latter do not. This point is closely tied to another (I hope uncontroversial) observation: the purpose of the criminal law is not to distribute deprivations among members of the public—to tell police officers when they can arrest citizens, prosecutors when (and what) they can charge, triers of fact when they can convict, and judges what kinds of sentences they can deliver—but to guide citizens *away* from conduct proof of which triggers criminal deprivations. To say that an offender was wrong to act as she did is to say that the conditions for punishing her should never have been satisfied. This in itself suggests that criminal offences (unlike tax laws) do not purport

34. See *R. v. Marmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571 at paras. 233-35, Arbour J., dissenting in *Caine* [*Marmo-Levine*]. For a discussion of the communicative function of sentencing, see Antony Duff, *Trials and Punishments* (New York: Cambridge University Press, 1986); *Punishment, Communication, and Community* (New York: Oxford University Press, 2001).

35. See *Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] 2 S.C.R. 486 at para. 1; *R. v. Creighton*, [1993] 3 S.C.R. 3 at para. 15.

36. See *Marmo-Levine*, *supra* note 34 at para. 230, Arbour J., dissenting in *Caine*.

37. There is, of course, a vast literature on this subject, largely centring on whether conduct must reach a certain threshold of harmfulness before it is sufficiently wrongful to be criminalized. See H.L.A. Hart, *Law, Liberty, and Morality* (London: Oxford University Press, 1963); Husak, *supra* note 31; and Joel Feinberg, *The Moral Limits of the Criminal Law*, vols. 1-4 (Oxford: Oxford University Press, 1984-1990).

merely to distribute deprivations, since the implication is that there should be no occasion for depriving anyone at all.³⁸

Criminal offences purport to do more than express one of many equally valid conceptions of wrongdoing. The expression of wrongfulness encapsulated in (and by) a criminal offence is in itself taken seriously by at least some members of the public, even if the punishment for non-compliance is trivial and even if the risk of getting caught or (if caught) punished is trivial or non-existent. In weighing the reasons for and against regarding a course of action as wrongful, many members of the public³⁹ treat the fact that Parliament has said it is wrongful as dispositive (or, anyway, highly influential).⁴⁰ In this sense, the criminal law is not simply a system of “orders backed by threats.”⁴¹ For many citizens, compliance with the criminal law has little or nothing to do with the threat of punishment (or the likelihood of it being carried out), and much to do with the judgment that they *ought* to comply because a criminal prohibition represents an authoritative expression of wrongfulness.⁴² (We will set aside the question of whether, and under what circumstances, it is right for citizens to think of the criminal law as authoritative in this sense.)

III. CONDUCT RULES AND DECISION RULES

Criminal offences, in summary, purport to authoritatively convey the wrongfulness of certain courses of action to citizens. That in itself does not make offence definitions distinct from conclusive presumptions—we might just as easily say that the criminal law generally serves this guidance function. But not every aspect of the criminal law does serve that function. We can distinguish between “conduct rules” and “decision rules.”⁴³ Conduct rules are directed at

38. See John Kleinig, “Criminally Harming Others” (1986) 5 *Crim. Just. Ethics* 3; Hart, *The Concept of Law*, *supra* note 31 at 38.

39. Even Hart conceded that many members of the public will treat the criminal law as reasoning only insofar as it makes threats that are likely to be carried out. See Hart, *ibid.*

40. See Joseph Raz, “The Relevance of Coherence” in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (New York: Oxford University Press, 1994) c. 12 at 261ff.

41. Hart, *The Concept of Law*, *supra* note 31, c. 3 at 26ff.

42. See John Gardner, “Justifications and Reasons” in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Toronto: Oxford University Press, 2007) at 91.

43. See Dan-Cohen, *supra* note 5.

members of the public for the purpose of guiding their behaviour.⁴⁴ Decision rules direct legal officials as to the circumstances under which they should convict citizens for criminal offences and punish them in a particular way.⁴⁵ *Criminal Code* prohibitions of robbery or theft are examples of conduct rules. By contrast, provisions requiring an acquittal where an offence (like theft or robbery) was committed as a result of duress or necessity are decision rules.⁴⁶ Likewise, a statutory or common law rule directing judges to grant an absolute discharge to people convicted of theft of goods valued less than \$5.00 could be described as a decision rule.

Why believe certain rules of criminal law are not directed at citizens? First and foremost, we often want members of the public to weigh their reasons for action in light of some legal rules, but not in light of others. Consider the defence of necessity.⁴⁷ We recognize that defence ostensibly because actors cannot always realistically choose to obey the law—sometimes, it is said, the violation is the result of “moral involuntariness.”⁴⁸ This reflects the intuition that some perils are so imminent, dire, and unavoidable through lawful means that we refuse to condemn a person for breaking the law to avoid them. At the same time, we ordinarily expect members of the public to comply with the law even if doing so is against their interests (hence the old saw that motive is irrelevant to liability).⁴⁹ We expect them to regard the expression of wrongfulness encapsulated in the criminal offence as authoritative even in the face of what they subjectively perceive as “peril,” so long as moral involuntariness is (objectively speaking) not an issue.⁵⁰

The trouble is that a member of the public, if and when she becomes aware of the defence of necessity, may be too quick to conclude that a threat to her

44. *Ibid.* at 626-34.

45. *Ibid.* We might speak just as well of “guidance rules” and “enforcement rules.” See Dale E. Nance, “Guidance Rules and Enforcement Rules: A Better View of the Cathedral” (1997) 83 Va. L. Rev. 837.

46. Dan-Cohen, *ibid.* at 637-48.

47. *Ibid.* at 637-39. The account that follows departs from Dan-Cohen’s explanation to the extent that the Canadian approach to necessity is not the same as the American approach.

48. See *R. v. Perka*, [1984] 2 S.C.R. 232 at 249; *R. v. Ruzic*, [2001] 1 S.C.R. 687.

49. See *R. v. Lewis*, [1979] 2 S.C.R. 821; Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3d ed. (Toronto: Thomson Carswell, 2007) at 192-93.

50. See *R. v. Latimer*, [2001] 1 S.C.R. 3 at para. 27.

interests is especially dire, or that its crystallization is imminent, or that her response is “proportionate” and “unavoidable.”⁵¹ She may be too quick, in other words, to decide her actions are morally involuntary and commit a criminal offence without a valid excuse. The person who treats criminal offences as authoritative expressions of wrongfulness, and has no idea that the defence of necessity exists, will be far less likely to commit a criminal offence unless compliance is all but impossible. She will comply unless and until she truly has no realistic choice—precisely the circumstances in which the defence is supposed to apply. The defence of necessity should be used by legal officials when they decide whether to charge and convict some offenders, but it should not guide the conduct of citizens. Likewise, rules suggesting that some offences should receive only an absolute or conditional discharge should not influence citizens when deciding whether to comply with a criminal offence.

Consider also the doctrine of *doli incapax*. Section 13 of the *Criminal Code* states: “No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.”⁵² Though the section requires the acquittal of persons who engage in criminal acts before the age of twelve, it could not mean that children under twelve cannot commit wrongful acts or that the criminal offences contained in the *Criminal Code* purport to define wrongful behaviour for everyone *except* people under the age of twelve. If a five-year-old picks up a carelessly stored handgun and shoots her brother, she has surely engaged in wrongful behaviour. She is acquitted, not because her conduct is not wrongful, but because she is conclusively presumed⁵³

51. Members of the public may not appreciate the normative difference between excuses and justifications. See Dan-Cohen, *supra* note 5 at 639-40; Simon Gardner, “Necessity’s Newest Inventions” (1991) 11 *Oxford J. Legal Stud.* 125 at 127; and “Instrumentalism and Necessity” (1986) 6 *Oxford J. Legal Stud.* 431 at 432.

52. *Supra* note 1, s. 13.

53. Because this is a conclusive presumption going to the accused’s lack of *mens rea*, rather than one going to the presence of an element of the *actus reus*, I am reluctant to lump the doctrine of *doli incapax* together with s. 198(2) in discussions of conclusive presumptions. To be sure, both conclusive presumptions are decision rules (for reasons which will become clearer). It is, however, less obvious that *mens rea* requirements in offence definitions ever perform a conduct-guiding function in the manner of *actus reus* requirements. I am, for that reason, less confident that conclusive presumptions going to the (non-)existence of *mens rea* are conceptually different from substantive *mens rea* requirements contained in offence definitions.

to lack culpability and so is exempt from having to answer for her wrongful acts in a criminal court.⁵⁴ Importantly, we probably do not want children under twelve to know they enjoy an exemption. We want them to regard criminal offences as authoritative determinations of wrongfulness without being tempted to “game” the system, and the surest way to tempt emotionally immature people into doing so is to inform them they can break the law with impunity.⁵⁵ Again, the distinction between decision rules and conduct rules allows us to say that the doctrine of *doli incapax* should guide exercises of discretion by decision makers but should not affect the way in which children regard the norms created by criminal offences.

One could argue that the distinction between conduct/guidance rules and decision rules is false; that a person who knows that the defence of necessity exists, or knows that absolute discharges are issued when one steals less than \$5.00 worth of goods, may use that information to decide whether, when, and how to commit theft or robbery. She may respond to this information by performing a robbery while pretending that she is under duress or by stealing only small bags of candy. And, indeed, the law in this situation has served a guidance function of sorts. It is, however, guidance of the incorrect sort. The person who games the offence of robbery or theft, by feigning duress or stealing less than \$5.00 worth of goods, has used the criminal law as a basis for predicting the circumstances under which she will suffer a deprivation.⁵⁶ She has not used it, though, as a means of determining whether robbery and theft are wrongful acts. If she had used it in that way, it would not matter that she could avoid sanctions through deception or calculation—she would nonetheless reject robbery and theft as acceptable courses of action. The point is not that only Holmesian “bad men” commit criminal offences. The point is just that people who, like Hart’s “puzzled man,” regard the expressions of wrongfulness embodied in criminal offences as authoritative (*i.e.*, obligation-generating) will not take the

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54. Consider the discussion in Norvin Richards, “Criminal Children” (1997) 16 Law & Phil. 63. For a discussion of exemptions see Duff, *Answering for Crime*, *supra* note 15 at 284-91; Victor Tadros, *Criminal Responsibility* (New York: Oxford University Press, 2005) at 124-29.
55. Indeed, members of the public frequently complain that young offenders reason in exactly this way; *i.e.*, that, because they do not face similar sanctions as adult offenders, they have less reason to comply with the criminal law.
56. In this sense, she is like Holmes’ “bad man.” See Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harv. L. Rev. 457.

low risk of punishment as a reason to ignore (or game) those offences. Since the criminal law aims at that kind of authoritativeness,⁵⁷ it follows that certain rules are not supposed to be considered by members of the public when deciding how to act. We do not need to make the (silly) claim that no citizen in a legal order such as ours games the criminal law. Many probably do.⁵⁸ We cannot, however, make sense of what distinguishes the criminal law from orders backed by threats, or what distinguishes it from quite different fields of law, if we focus our attention on people who do not treat the expressions of wrongfulness contained in the criminal law as authoritative.

IV. THE DUAL CHARACTER OF OFFENCE DEFINITIONS

So far, we have assumed that rules of criminal law must be either conduct rules or decision rules. Some rules have a dual function: they communicate to both citizens and legal officials. Offence definitions are rules of this type. They tell citizens what they should not do, and they tell legal officials what the Crown must prove before they can convict a citizen of a criminal offence. Importantly, they do not necessarily convey the same message to both recipients. Offence definitions make use of ordinary terms that have technical legal meanings.⁵⁹ Consider just a few examples. A “public place” does not include a person’s living room, even when the curtains are wide open, the lights are on, and all the world can see what is going on inside.⁶⁰ A person can “use a firearm” simply by verbally revealing that it is present, even if it is never brandished.⁶¹ A “weapon”

57. Hart himself did not argue that we should privilege the perspective of the “puzzled man” over that of the bad man—only that a theory of law should be able to accommodate the view of the puzzled man. See Stephen R. Perry, “Holmes versus Hart: The Bad Man in Legal Theory” in Steven J. Burton, ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University Press, 2000) 158; Scott Shapiro, “The Bad Man and the Internal Point of View” in Burton, 197. Other theorists have argued more pointedly that citizens ought to adopt the viewpoint of the puzzled man. See W. Bradley Wendel, “Lawyers, Citizens, and the Internal Point of View” (2006) 75 *Fordham L. Rev.* 1473.

58. Hart would not have necessarily disagreed with this claim. See Hart, *The Concept of Law*, *supra* note 31 at 38-39.

59. See Andrew Halpin, *Definition in the Criminal Law* (Oxford: Hart Publishing, 2004).

60. See *R. v. Clark*, [2005] 1 S.C.R. 6.

61. See *R. v. Steele*, [2007] 3 S.C.R. 3.

can be any object used to cause injury, whether or not it was designed for that purpose.⁶² A firearm “is capable” of firing bullets in rapid succession with a single pull of the trigger so long as it is capable *if adapted*.⁶³ A person “consents” to sexual contact if she “want[s]” that contact.⁶⁴ None of those understandings of the terms involved are self-evident or necessarily correspond to everyday usage. Standing naked in front of one’s lit living room window would intuitively strike many people as a public act. “Using a firearm” will strike many people as very different from “describing or referring to a firearm.” We often think that a person can want to engage in an act without consenting to it, and can consent to an act without wanting to engage in it.

Because criminal offences are defined with reference to ordinary terms that have technical meanings, members of the public may understand an offence to condemn a relatively broad range of conduct, whereas legal officials understand it to authorize them to convict on proof of a relatively narrow range of conduct. This “acoustic separation” may be desirable, inasmuch as we want to accomplish different things depending on the group to whom the law addresses itself.⁶⁵ It is worth taking a moment to examine that claim.

Offence definitions are, insofar as they are directed at citizens, supposed to authoritatively express the wrongfulness of courses of action.⁶⁶ The language we use to convey the wrongfulness of a particular course of action is often “fuzzy” (particularly since it is morally laden) and open to a range of interpretations.⁶⁷ To draw on earlier examples, reasonable people may disagree about what it means to engage in sexual contact “without consent,” or what it means to “use a firearm.” We may be prepared to accept a (large) degree of ambiguity to the

62. See *R. v. Lamy*, [2002] 1 S.C.R. 860 at para. 16.

63. See *R. v. Hasselwander*, [1993] 2 S.C.R. 398.

64. See *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 61.

65. Dan-Cohen, *supra* note 5 at 649-50.

66. It has been suggested that because terms may need to be read in or out of offence definitions to make them constitutionally compatible, they may not function as conduct rules in all instances. Presumably, the suggestion is that, unless or until constitutionally problematic terms have been read out of offence definitions (or other terms read in), the offence definition is unconstitutional, and so citizens should not or do not treat it as authoritative (or, therefore, conduct-guiding). But this seems to call into question the unaltered offence definition’s status as an offence definition in the first place, given that Parliament lacked the authority to create it.

67. Dan-Cohen, *supra* note 5 at 655-56. See also Halpin, *supra* note 59.

extent that offence definitions are directed at citizens: supposing that citizens regard the *Criminal Code's* expressions of wrongfulness as authoritative, we can also suppose that they will interpret ambiguous language in the broadest reasonable way possible to avoid straying into wrongful conduct.⁶⁸ (Those who try to game ambiguous terms—for example, “torture”—may be said to wander, as it were, onto thin ice.)⁶⁹

When addressed to legal officials, offence definitions are supposed to constrain exercises of discretion. This requires greater technical precision: fuzzy moral language, because it lends itself to an array of interpretations, would (if left vacuous) allow legal decision makers more discretion (in the “hard” sense)⁷⁰ than the rule of law could stomach. It will ordinarily fall to the courts to give precise legal content to ambiguous terms—*e.g.*, “public place,” “weapon,” or “consent”—and tell us the circumstances (whether wide or narrow) under which legal decision makers are entitled to find that a given element of an offence has been satisfied. By “filling” ambiguous terms with precise legal content, we constrain the discretion to charge and convict.⁷¹ Importantly, though, the public at large would rarely be notified of the judicial glosses put on the offence definitions contained in the *Criminal Code* in the way that it would be notified of the creation of the offence itself. The practical upshot is that, while citizens are expected to act on a broad understanding of the offence definition, decision makers may be directed to act on a (relatively) narrow understanding.⁷²

We should not assume that, because decision makers work with a narrower understanding of offence definitions, their understanding is “correct” whereas

68. Dan-Cohen, *ibid.* at 650.

69. For a discussion of the thin ice principle, see Andrew Ashworth, *Principles of Criminal Law*, 5th ed. (New York: Oxford University Press, 2006) at 73-74. See Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House” (2005) 105 *Colum. L. Rev.* 1681 (criticizing, by implicitly drawing upon the thin ice principle, attorneys seeking to define “torture” in a narrow way).

70. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) c. 2 at 14ff.

71. This is not to say that the “official understanding” of offence terms is necessarily narrower than the “public understanding.”

72. Dan-Cohen, *supra* note 5 at 651. See also Dale E. Nance, “Rules, Standards, and the Internal Point of View” (2006) 75 *Fordham L. Rev.* 1287 at 1300-04 (discussing some implications of this mismatch between citizen and official understandings of legal rules for the authority of law).

the public's broader understanding is "incorrect." The meaning of terms for decision-making purposes, as we have seen, may be narrowed for no other reason than to limit discretion. Discretion may be constrained not only in the sense that decision makers can convict only those people who have committed the wrong that Parliament actually intended to target when it devised the offence in question; the constraint may go further and entail the acquittal of individuals who *do* engage in a targeted wrong. This would, of course, open up the possibility that a citizen could engage in prohibited conduct without facing any risk of sanction. But this is, in itself, unproblematic. Citizens are expected to regard parliamentary expressions of wrongfulness as authoritative even without the threat of punishment. To the extent we think it important to convey the seriousness of the wrong by sanctioning and stigmatizing offenders, we may nonetheless think the presence of gaps in enforcement/punishment less worrisome than the discretion that decision makers would have if we aimed at "perfect" enforcement.

The disjunction between public and official understandings of a criminal offence becomes problematic when the official understanding of the conditions for conviction is manifestly wider than the public understanding of the wrong targeted by the offence in question (even among those who would be inclined to interpret the wrong widely out of deference to Parliament's wrong-defining authority). In that case, we are more inclined to say that members of the public have not been given a fair opportunity to respond appropriately to the expression of wrongfulness embodied in the offence. This raises clear rule of law concerns.⁷³

There are two reasons for reflecting, however briefly, on the different messages that offence definitions send to members of the public and to legal decision makers. First, it establishes that the distinction between conduct rules and decision rules does conceptual work even when we have, on the surface, a single set of rules. This is especially important for the purposes of this commentary, as we consider the distinction between offence definitions and conclusive presumptions. We will see in Parts V and VI that presumptions (including conclusive presumptions) are exclusively directed at legal decision makers, and do not purport to guide citizens.

Second, we have a better sense of the reasons for having conclusive presumptions when we reflect upon the legitimate interests the state has in sending

73. See Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

divergent messages to citizens and to decision makers. We have seen that offence definitions may send divergent messages in an attempt to condemn an expansive class of conduct while constraining official discretion as far as practicable. This may be especially effective where Parliament creates the offence definition and the courts gloss the terms contained in it; as noted above, citizens are not notified of judicial interpretations as they are notified when new offences are created. But what if Parliament decides to issue its own glosses on the language contained in its offence definitions, or decides to provide some other kind of guidance to triers of fact as they decide whether the elements of an offence have been satisfied? One may not be able to incorporate a direction designed to constrain discretion into the offence definition itself without narrowing or obscuring the expression of wrongfulness directed at citizens. Suppose, for example, that Parliament drafted section 173(1) so that it prohibited indecent acts in “public places other than one’s own living room.” In that event, members of the public would be entitled to think that it is not only not sanctionable to engage in indecent acts in their own living rooms, but that it is not wrongful to do so whether or not others can see them. The direction to officials would obscure the direction to citizens.

This point is significant when we consider that, as we will see shortly, presumptions are designed to help triers of fact draw appropriate inferences from proof that some state of affairs existed. Parliament, though it wants to guide decision makers in the use they will make of proof of that state of affairs,⁷⁴ may not wish to give members of the public the impression that there is something uniquely or especially wrongful about that state of affairs in particular. Its interest in maintaining “acoustic separation” may, therefore, give it a good reason to issue a direction to decision makers from outside the four walls of the offence definition.

In observing that conclusive presumptions can function as a means of achieving greater acoustic separation, my intention is not to urge their use—only to suggest, by way of explaining their existence, that they can serve a purpose (whether or not some other kind of provision could serve that purpose just as well). Parliament has other means at its disposal for guiding triers of fact in their understanding of legal terms of art deployed in offence definitions. Indeed,

74. Laurence H. Tribe, “Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles” (1975) 39 *Law & Contemp. Probs.* 8 at 10-11 (noting that conclusive presumptions constrain arbitrary exercises of discretion by decision makers).

the *Criminal Code* is rife with provisions purporting to guide exercises of official discretion, but which are not framed as conclusive presumptions. Section 150, for example, states that a “public place’ includes any place to which the public have access as of right or by invitation, express or implied.”⁷⁵ This section puts triers of fact on notice: once one finds that members of the public were invited to a place, one must regard that place as having been “public” (at least for so long as the invitation lasted) for the purposes of section 173(1). Consider, too, Delisle’s proposed replacement for section 198(2). This would, remember, state that a place equipped with a slot machine is a common gaming house (or, to rephrase, that a “common gaming house” includes any place equipped with a slot machine). As we noted in Part I, such a provision would guide triers of fact as they determined what inferences they could choose not to draw, having found that a place was equipped with a slot machine.

There are many other term-clarifying provisions in the *Criminal Code*, some of which do much more to define the terms they purport to clarify than section 150 and Delisle’s hypothetical provision. It is unnecessary, for our purposes, to discuss them in any depth—*i.e.*, to determine whether some or all of these provisions are more successful than conclusive presumptions at generating acoustic separation, or whether (if they are less successful) there are other reasons to prefer them over conclusive presumptions. So long as we accept that conclusive presumptions *are* decision rules, and that this distinguishes them from offence definitions, this commentary’s primary conceptual argument will be made out. Let us turn, then, to presumptions.

V. PRESUMPTIONS: DECISION RULES, NOT CONDUCT RULES

Offence definitions express the wrongfulness of certain courses of conduct to members of the public. They also set out what the Crown must prove to obtain a conviction. In proving the elements of a given criminal offence, the Crown will adduce evidence. If that evidence is admissible and accepted by the trier of fact, it will logically support the inference that those elements exist. Logic and experience may tell us that a particular element of an offence can usually be inferred from proof that some other “basic” (or “primary”) fact exists. If the

75. *Supra* note 1, s. 150.

inferential connection between the basic fact and the element is sufficiently reliable, Parliament may decide that it is needlessly inefficient to require triers of fact to decide on a case-by-case basis whether the element can be inferred from that fact. It may, instead, direct triers of fact to presume the element in question from the basic fact.

Presumptions are decision rules. They “speak” to triers of fact, instructing them to infer Y upon proof of X; that is, they direct decision makers to discharge their functions in a certain way upon a finding that X is the case.⁷⁶ For example, section 212(1)(j) of the *Criminal Code* makes it an offence to live off the avails of prostitution.⁷⁷ Section 212(3) directs the trier of fact to presume, in the absence of evidence to the contrary, that the accused lived off the avails of prostitution upon proof that she lived with (or was habitually in the company of) a prostitute.⁷⁸ The section tells the trier of fact that, in the absence of evidence to the contrary, a finding that the accused lived with a prostitute requires it also to find that the Crown has proven the accused lived off the avails of prostitution.

Presumptions are not conduct rules. They do not authoritatively express the wrongfulness of courses of action. Consider the above example. A person who lives with a prostitute does nothing wrong by virtue of that fact alone. The presumption contained in section 212(3) directs the trier of fact to infer that the defendant committed the wrong upon proof that she lived with a prostitute. If she is convicted as a result of the presumption, though, she is condemned not for living with a prostitute, but for living off the avails of prostitution. This is a pivotal distinction. Section 212(1)(j) is directed at a particular kind of wrong: the wrong of pimping or “living parasitically off a prostitute’s earnings.”⁷⁹ It expresses the wrong of a particular kind of exploitation and violence (both sexual and otherwise). It does not suggest that there is anything wrongful about being the friend or spouse of a prostitute; that there is anything wrongful about caring (or being seen to care) about sex workers. To say that a person convicted through the operation of section 212(3) has been convicted because she lived with a prostitute, though, is to interpret the wrong in the latter sense. This is not only

76. See Sopinka, Lederman & Bryant, *supra* note 7 at 144-45.

77. *Supra* note 1, s. 212(1)(j).

78. *Ibid.*, s. 212(3).

79. See *R. v. Downey*, [1992] 2 S.C.R. 10.

unfair in the sense that it misrepresents Parliament's expression of wrongfulness. It is unfair to the victim,⁸⁰ whose exploitation has not been recognized and whose company has been treated as a reason to stigmatize others.⁸¹

Consider a further example. Under section 322 it is a criminal offence to sell stolen goods, including precious metals. The trier of fact is directed to presume, upon proof that the accused sold precious metals, that these were stolen unless the accused adduces evidence to the contrary.⁸² Let us suppose that the Crown proves that a defendant sold precious metals and, through the operation of the presumption, this defendant is convicted. It would, again, badly mischaracterize the wrong to suggest that the accused was convicted because he sold precious metals, without describing the goods as "stolen." Section 322 expresses the wrongfulness of the sale or trade of stolen precious metals. It does not reflect the view that the sale of precious metals generally is wrongful.

In some sense, presumptions could be construed as conduct rules: a person who wanted to avoid the sanctions attached to an offence would be well-advised to avoid engaging in conduct proof of which would trigger a presumption. But the object of the presumption is not to discourage people from engaging in the behaviour it describes any more than the object of tax laws is to discourage people from earning (more) income. The presumption in section 212(3) is not supposed to discourage people from living with prostitutes. The presumption in section 656 is not supposed to discourage people from selling precious metals. A person who acted in those ways would do nothing wrong, even if we thought it imprudent to do so (at least under circumstances where it would be difficult to rebut the presumption later). To treat these presumptions as conduct rules would misconstrue them as surely as we would misconstrue the defence of duress if we treated *it* as a conduct rule. In either case, we would

80. For a discussion of fair labelling, see James Chalmers & Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71 Mod. L. Rev. 217; Andrew Ashworth, "Taking the Consequences" in Stephen Shute, John Gardner & Jeremy Horder, eds., *Action and Value in Criminal Law* (New York: Oxford University Press, 1993) 107 at 114.

81. It has been suggested that the purpose of s. 212(1)(j) may be to isolate prostitutes and thereby discourage prostitution without criminalizing it. On that understanding, though, the section is not criminal but civil—it aims to redistribute the benefits of companionship and the burdens of prostitution without declaring prostitution wrongful. One could conceivably argue that s. 212(1)(j) targets the wrong of encouraging people to live as prostitutes, but the section is too narrowly tailored to sustain such an interpretation.

82. *Criminal Code*, *supra* note 1, s. 656. See *R. v. Laba*, [1994] 3 S.C.R. 965.

have confused a rule designed to direct decision makers with a rule designed to authoritatively express a wrong.⁸³

The same point can be made by considering whether it would be appropriate to explain a person's criminal conviction simply by referring to the basic fact triggering a rebuttable-but-unrebutted presumption. In a superficial sense it would: but for that conduct, the trier of fact would not have rendered a guilty verdict. But we could just as easily say the trier of fact would not have rendered a guilty verdict but for the poor quality of the accused's legal representation, or the colour of his tie, or the trier of fact's heartburn. Such accounts give us some insight into the decision-making process, but they do not explain why we are punishing the offender rather than merely sanctioning her. That kind of explanation must refer (either implicitly or explicitly) to the fact that the offender deserves her sanction—*i.e.*, to the fact that she has engaged in a wrongful act and that she was convicted because she engaged in it. To explain a conviction with reference to the basic fact alone is to obscure or badly distort the wrong that justifies punishment in the first place.⁸⁴ We do not punish a person merely because she lives with a prostitute. We do not punish a person merely because she sells precious metals. If we punish such people at all, we do so because they committed particular wrongful acts, wrongs inferred from the fact that they lived with prostitutes or sold precious metals. In short, our explanation of a conviction cannot focus on the basic fact, disregarding the inference of wrongdoing it triggers, without stripping the normative significance that makes the offence criminal.

One might argue that we have missed the mark by dwelling on rebuttable presumptions. These are, after all, supposed to be wildly different from conclusive presumptions: whereas conclusive presumptions are regarded as functionally the same as offence definitions, rebuttable presumptions are not. Consider, though, *why* they are ostensibly different. Evidence scholars claiming conclusive

83. One might object that the defence of duress, if treated as a conduct rule, encourages people not to abide by criminal offences; whereas presumptions, if treated as conduct rules, arguably encourage at least a form of compliance. Even if true, it makes no difference to the argument made here. A rule does not become a conduct rule by virtue of its salutary effect on obedience, but by virtue of its normative significance.

84. To this extent, we should be somewhat wary of the suggestion that presumptions, when cited as reasons for reaching decisions, actually legitimate them. See Karen Petroski, "The Public Face of Presumptions" (2008) *Episteme* 388 at 395-97.

presumptions are equivalent to offence definitions do so primarily on the basis that an inference conclusively triggered by proof of a basic fact becomes irrelevant; that the basic fact becomes a *de facto* offence element.⁸⁵ In the context of rebuttable presumptions, the inference to be drawn from the basic fact ostensibly remains relevant in deciding whether the presumption has been rebutted; that is, whether the inference to be drawn from the basic fact remains valid in light of other evidence. Since there is no possibility of rebuttal in the case of conclusive presumptions, as the argument goes, the usefulness of the inference is exhausted.

The argument is telling. It presupposes the inference drawn from the basic fact is useful only insofar as it helps *decision makers*. The argument ignores the usefulness of the inference as a means of explaining the wrongfulness of the offender's conduct, *i.e.*, after the verdict has been rendered.⁸⁶ We have seen that it would be absurd to try to explain a conviction without referring to the fact inferred through the operation of a rebuttable-but-unrebutted presumption, since doing so would blunt or distort the normative significance of the offence. We must look to the inferred fact if we are to bring the wrong targeted by the offence more closely into view. But there is no reason to think the attempt any less absurd when the presumption is conclusive rather than rebuttable. To see why, let us return to the offence of keeping a common gaming house.

VI. KEEPING A COMMON GAMING HOUSE

The offence of keeping a common gaming house is one of several offences directed at the keeping of "disorderly houses." These provisions do not suggest that betting, gaming, or prostitution are wrongful in and of themselves. It would be strange for a provision targeting gaming, betting, or prostitution to criminalize the keeping of places where those activities occurred rather than the activities themselves. Rather, these provisions express the wrongfulness of keeping houses that ostensibly cause a certain kind of harm to the community. As a majority of the Supreme Court remarked in *R. v. Rockert*: "[T]he mischief to which [the disorderly house] offences were directed was not the betting, gaming and prostitution *per se*, but rather the harm to the interests of the community in

85. See 3-4, above.

86. For a discussion of the relationship between fair labelling and conclusive presumptions, see Tribe, *supra* note 74 at 17.

which such activities were carried on in a notorious and habitual manner.”⁸⁷ Thus, a majority of the Supreme Court in *R. v. Labaye* held that conduct is “indecent” for the purposes of section 210(1) only if it produces harm incompatible with proper societal functioning.⁸⁸

Likewise, there are strong suggestions in the definition of “common gaming house” that it is not directed at gaming (understood as “wagering on games of chance”)⁸⁹ *per se* but is, rather, directed at harm to the community. Section 197(1) defines a “common gaming house” as, among other things, a place “kept for gain to which persons *resort* for the purpose of playing games.”⁹⁰ In *Rockert*, the majority observed that “‘resorting’ connotes habitual or frequent” use of a place.⁹¹ Furthermore, section 201(1) states: “Every one who *keeps* a common gaming house ... is guilty of an indictable offence.”⁹² Again, the majority in *Rockert* noted that “keeps” “connotes frequent or habitual behaviour.”⁹³ If section 201(1) was supposed to express the wrongfulness of gaming, one would expect the provision to apply whether or not the wrongful activity was “frequent or habitual.” Moreover, section 197(2) states that a place will not be considered a “common gaming house” so long as it is “occupied and used by an incorporated genuine social club,” its keeper does not directly or indirectly receive the proceeds from games played therein, and only authorized fees are charged for participation in the games.⁹⁴ If section 201(1) is supposed to express the wrongfulness of gaming *per se*, this exception is unintelligible. Why would gaming be less wrong just because those participating in it were members of a social club? Why would the state license gaming in the first place if it is wrongful?

Read together, these sections strongly suggest that the common gaming house provisions are aimed at the wrong of causing a particular kind of harm to the community. The fact that the use must be habitual or frequent indicates that the targeted wrong does not emerge “instantly” but crystallizes over a period of

87. *R. v. Rockert*, [1978] 2 S.C.R. 704 at para. 21 [*Rockert*].

88. *R. v. Labaye*, [2005] 3 S.C.R. 728 at para. 30.

89. See *R. v. Di Pietro*, [1986] 1 S.C.R. 250.

90. *Criminal Code*, *supra* note 1, s. 197(1) [emphasis added].

91. *Rockert*, *supra* note 87 at para. 19, citing *R. v. Patterson*, [1968] S.C.R. 157 at para. 6.

92. *Criminal Code*, *supra* note 1, s. 201(1) [emphasis added].

93. *Rockert*, *supra* note 87 at para. 19.

94. *Criminal Code*, *supra* note 1, s. 197(2).

time. The concern is with the corrosive effect that a common gaming house will have upon the community if operated on more than a sporadic basis. At the same time, the provisions apply only where the gaming house is open to the community at large; *i.e.*, where the community is not insulated from its corrosive impact.⁹⁵

Section 198(2) states: “a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house.”⁹⁶ Section 198(3) defines “slot machine” for the purposes of section 198(2):

In subsection [198](2), “slot machine” means any automatic device or slot machine

(a) that is used or intended to be used for any purpose other than vending merchandise or services, or

(b) that is used or intended to be used for the purpose of vending merchandise or services if

(i) the result of one or any number of operations of the machine is a matter of chance or uncertainty to the operator,

(ii) as a result of a given number of successive operations by the operator the machine produces different results, or

(iii) on any operation of the machine it discharges a slug or token,

but does not include an automatic machine or slot machine that dispenses as prizes only one or more free games on that machine.⁹⁷

Suppose that, through the operation of section 198(2), a person were convicted under section 201(1). We could not explain the offender’s conviction merely by referring to the basic fact (that the offender kept a place equipped with a slot machine) without referring to the inference drawn (that the offender kept a common gaming house). We have seen that section 201(1) is directed at a particular kind of wrong—the wrong of causing or risking harm to the community by regularly providing a venue, open to the public, for wagering on games of chance. To say that a person was convicted because she kept a place equipped with a slot machine, though, does not capture the wrong addressed by the offence. A place equipped with a slot machine may not be used often, and it

95. See *R. v. MacDonald*, [1966] S.C.R. 3.

96. *Supra* note 1, s. 198(2).

97. *Ibid.*, s. 198(3).

may not be open to the public.⁹⁸ If we say that a person was convicted because she kept a place equipped with a slot machine, we imply that sporadic wagering or wagering among a few friends on games of chance is wrongful. Whether or not that is true, that is not the wrong that section 201(1) expresses. We distort the section by suggesting otherwise.

The conclusive presumption contained in section 198(2), then, fails to express the wrong of keeping a common gaming house just as surely as the rebuttable presumptions discussed in Part IV of this commentary fail to capture the wrongs addressed by their respective offences. This underscores the fact that conclusive presumptions, like rebuttable presumptions, function as decision rules and not as conduct rules. This, in turn, shows why and how conclusive presumptions are distinct from offence definitions.

VII. CONCLUSION

Evidence scholars have been persistent in their claim that conclusive presumptions are nothing more than offence definitions in fancy (shabby?) dress. That claim, if understood robustly, is straightforwardly false. Understanding why it is false, however, requires us to take a not-so-straightforward tour of the aims and assumptions underpinning the criminal law. It requires us to keep in mind that the criminal law does not merely aim at guiding legal officials as they decide whether there is evidence sufficient to convict criminal defendants. The substantive criminal law primarily aims at guiding members of the public as they attempt to live their lives free of wrongdoing. We are, furthermore, called upon to remember that the rules contained in the criminal law are not all addressed to both citizens and legal decision makers. Some are, but some are not. Recognizing these facets of the criminal law allows us to make better sense, not only of the relationship between offence definitions and legal presumptions, but between both of these and the presumption of innocence.

98. See *Shisler*, *supra* note 18 at 540.