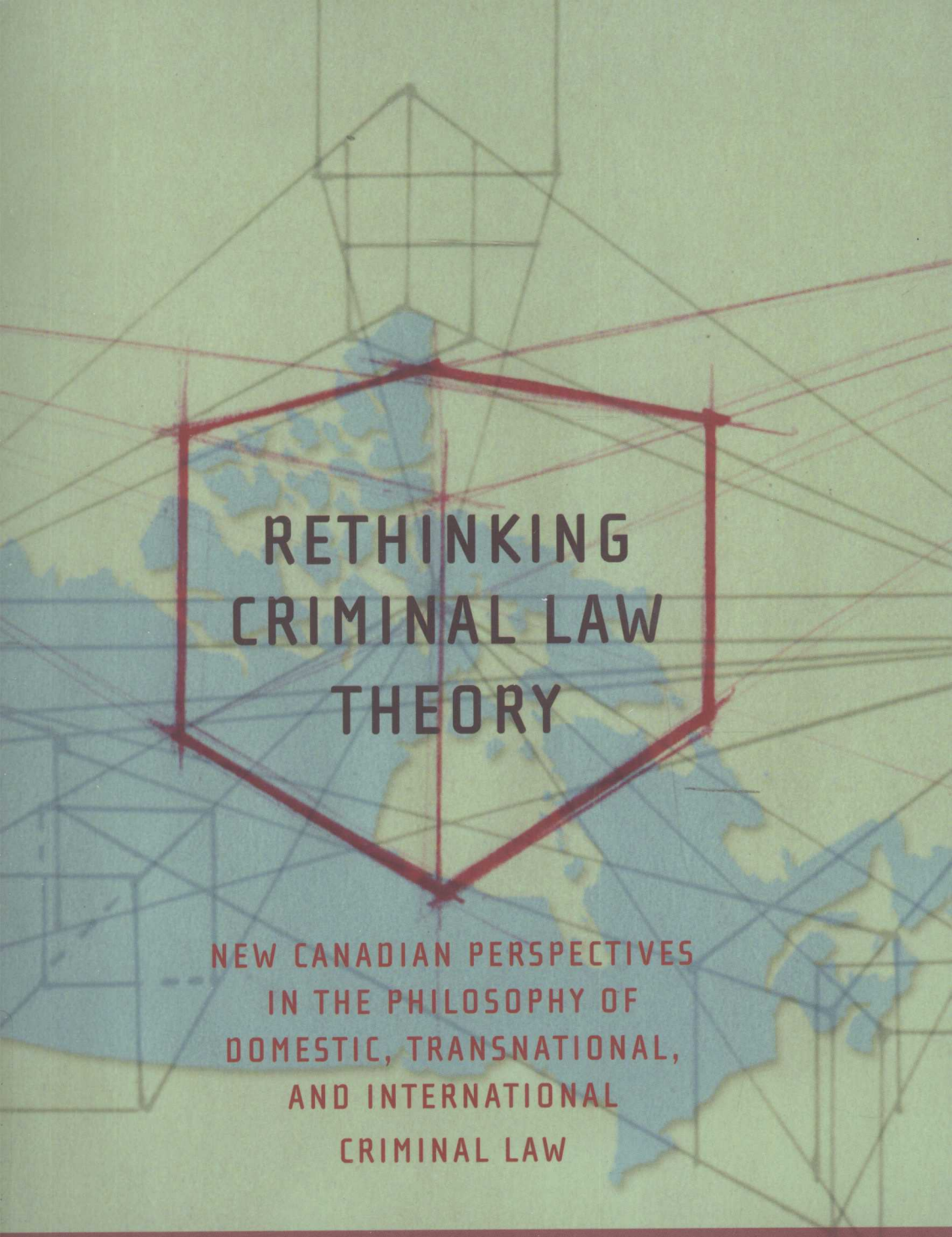

RETHINKING CRIMINAL LAW THEORY

NEW CANADIAN PERSPECTIVES IN THE PHILOSOPHY OF DOMESTIC, TRANSNATIONAL, AND INTERNATIONAL CRIMINAL LAW

EDITED BY
FRANÇOIS TANGUAY-RENAUD
AND JAMES STRIBOPOULOS

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PREFACE

The philosophy of criminal law is at a turning point in Canada. The adoption of the Charter of Rights and Freedoms in 1982 has given the Supreme Court of Canada unprecedented latitude to engage with principles of moral, political, and legal philosophy when elaborating its criminal law jurisprudence. Be it in the context of discussions about the constitutionalization of various aspects of moral innocence, the proper contours of criminal law defences, the legitimate scope of criminalization, the rule of law, the availability of legal rights to corporate entities, the justification of state punishment, or the nature of crimes with international dimensions, the works of philosophers like John Stuart Mill, Immanuel Kant, Jeremy Bentham, Hans Kelsen, HLA Hart, Joel Feinberg, Joseph Raz, and George P Fletcher are already given significant judicial attention. Given all of this, an appraisal of such works and the puzzles they address in light of Canada's distinctive problems and opportunities is overdue.

Canadian law schools and philosophy departments have sought to keep up with this development by hiring, in recent years, a number of criminal law theorists able to participate in philosophical debate and contribute to its healthy development. The number of Canadian legal and moral theorists interested in criminal law who have been hired by foreign institutions has also witnessed a marked increase. The result has been a significant deepening of Canadian scholarship in the philosophy of criminal law, both in relation to Charter-related questions and broader *problématiques*, since the time that the now defunct Law Reform Commission of Canada (1971–1993) and Law Commission of Canada (1997–2006) last looked at these fundamental issues. Criminal law theory is now alive and well in Canada and, thus, no longer to be associated exclusively with the older British, German, and American traditions.

This Canadian momentum is not only being felt in respect of the study of domestic criminal law. Because of Canada's leadership in international criminal law, both at the level of the International Criminal Court and of specific war crimes tribunals, Canadian legal theorists have also begun to turn their attention to international criminal law per se, building on their domestic expertise.

The present collection seeks to capitalize on this rapidly developing expertise and bring together for the first time the work of leading Canadian theorists of domestic and international criminal law – both newer voices as well as older voices addressing new questions or old questions from new perspectives. The topics covered are wide-ranging and ambitious. They address questions of philosophical methodology, the legitimate scope of domestic and international criminalization, the nature of criminal responsibility and blame, as well as various

rationales for justificatory and excusatory defences. Theoretical questions related to the criminal process, evidence, and the form of punishment are also given focal importance. To be sure, authors and topics were selected to reflect the broad diversity of philosophical work currently being done by Canadians on all aspects of domestic and international criminal law, in a way that balances consideration of more local issues with the general and timeless puzzles that they engage. Thus, it is our hope that this collection will become an enduring contribution to theorizing about criminal law, not only in Canada, but also internationally.

The essays compiled in this book were first presented at a conference sharing its title, held at Osgoode Hall Law School, York University, in Toronto on 10–12 September, 2010. Financial support for the conference was primarily provided by Osgoode Hall's Jack and Mae Nathanson Centre on Transnational Human Rights, Crime and Security. We owe sincere thanks to the Centre's Director, Professor Craig Scott, for showing so much enthusiasm for this project from the very start and for his willingness to integrate criminal law theory into the Centre's mandate. We also wish to thank Osgoode Hall Law School and its Dean, Professor Lorne Sossin, as well as the following law firms, for their generous support: Cooper & Sandler LLP, Di Luca Copeland Davies LLP Barristers, Fenton Smith Barristers, Henein and Associates, Kapoor Barristers, and Lacy Wilkinson LLP. The conference also benefited from the tireless administrative support of Ms Lielle Gonsalves, Administrative Assistant of the Nathanson Centre, as well as that of Mohamad Al-Hakim (PhD candidate in philosophy, York University) and Joshua Tong (JD student, Osgoode Hall Law School). Joshua Tong is also to be thanked for his invaluable editorial assistance in preparing the manuscript for publication.

A special expression of gratitude is also owed to our British colleagues Antony Duff (Stirling/Minnesota), Sandra Marshall (Stirling), and Victor Tadros (Warwick) who so generously offered to use some of the funding tied to their multi-year Criminalization research project (funded by the Arts and Humanities Research Council of the United Kingdom) to attend the conference and offer thoughtful commentaries on some of the chapters. Their advice in the organization of the conference and their input during the event were invaluable, as well as a fine illustration of what the future of a more transnationalized pooling of resources for the study of criminal law theory holds in store. Significant thanks are also owed to our American colleagues Stuart P Green (Rutgers-Newark) and Ekow Yankah (Cardozo), to our Indian colleague Neha Jain (Georgetown), as well as to our very own Susan Dimock (York) for their helpful and challenging responses to some of the chapters. Finally, we want to express our appreciation to Osgoode, York, and McMaster University colleagues who kindly agreed to act as panel chairs – namely, Louis-Philippe Hodgson, Dan Priel, Craig Scott, Wil Waluchow, and Alan Young. The future of Canadian criminal law theory is all the brighter for their contributions.

François Tanguay-Renaud
James Stribopoulos
Osgoode Hall Law School
Toronto, 4 March 2011

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Two Conceptions of Equality before the (Criminal) Law

MALCOLM THORBURN*

I INTRODUCTION

Equality before the law is one of the central ideals in modern legal thinking, but its precise meaning is the object of considerable dispute. It is important for criminal law theorists to get a clear sense of the meaning of this ideal, however, for it plays an important part in our understanding of the law of justification defences. This is because criminal law justification defences seem to undermine our equality before the law by permitting some people to do the very things that others are criminally prohibited from doing. For example, the prison official who punishes a duly convicted offender is entitled to a justification for his conduct, but a private citizen who takes it upon himself to punish a wrongdoer in the same way is treated as a criminal vigilante. Any attempt to explain the legitimacy of justification defences will have to find some way to square the ideal of equality before the law with the way in which justifications privilege some to act in ways that are foreclosed to others.

In this chapter, I contrast two different conceptions of the ideal of equality before the law and their implications for criminal law justifications doctrine. In section II, I set out the two ideals, which, for the sake of simplicity, I call 'Diceyan' and 'Kantian' and I articulate some of their implications for criminal law justifications doctrine. In section III, I show how contemporary criminal law doctrine – as well as doctrines in Canadian and American constitutional law and elsewhere in our legal systems – seems to fit more neatly with the Kantian account of equality before the law. That said, I point out that the fit is far from perfect – there are still a number of older doctrines that seem to fit better with the Diceyan picture. In this section, I argue that the root of my disagreement with John Gardner (and

* Thanks to Larissa Katz, Dennis Klimchuk, Sandra Marshall, Hamish Stewart, François Tanguay-Renaud, Mark Walters and to all the participants in the conference that led to this volume for valuable comments and discussion. Thanks also to the Social Sciences and Humanities Research Council of Canada for its financial support.

others)[1] on the structure and rationale of justification defences in contemporary criminal law is at least in part the result of a deeper disagreement on the nature of the ideal of equality before the law. In section IV, I conclude by pointing out that there is much more at work in justification defences than the issues that dominate contemporary criminal law theory debates in this area. Rather than arguing about whose intuitions about justification are best, we should look to the prior question of what role justifications are supposed to play within a legitimate legal order. It is this issue, which animates the dispute over the ideal of equality before the law that should be at the heart of the criminal law theory debate.

II THE TWO CONCEPTIONS CONTRASTED

A The Diceyan Ideal

The first account of equality before the law is what I shall (somewhat loosely) call 'the Diceyan ideal'.[2] Although this ideal of equality before the law is almost never made explicit in criminal law theory debates – probably because it is thought to be too obvious to be worthy of mention – it is the one that has dominated Anglo-American criminal law theory for at least a generation. According to this way of thinking, the key to equality before the law is the absence of any special legal status for the conduct of state officials – or anyone else, for that matter. One of the deep problems with late nineteenth-century French *droit administratif*, in Dicey's opinion, was the fact that 'affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies (*tribunaux administratifs*)'.[3] That is, it had one set of rules designed only for private citizens (administered by the ordinary courts) and another set of rules designed only for public officials (administered by a parallel set of courts that concerned themselves only with public law matters). By contrast, the great virtue of the common law, in Dicey's opinion, was

[1] My disagreement with John Gardner is on a point where he is in agreement with most of the current orthodoxy in Anglo-American criminal law theory. So, although I focus my comments on his position, I believe that most of my comments also apply, mutatis mutandis, to most other English-speaking criminal law theorists, as well.

[2] I use this expression as a sort of shorthand. I do not pretend to be faithful to the writings of AV Dicey in every aspect of this ideal. I should also add that I am using Dicey to stand in for a stronger set of claims than the ones I made in his name in an earlier article: M Thorburn, 'Justifications, Powers, and Authority' (2008) 117 *Yale Law Journal* 1070. In that article, I invoked Dicey in support of the ideal that everyone may be held criminally liable unless he can provide an adequate justification defence for his prima facie wrongful conduct. But I did not invoke the stronger claim, which is part of the larger Diceyan ideal that justification defences apply to us in virtue of our factual position rather than in virtue of our legal standing. There as here, I rejected that stronger Diceyan claim.

[3] This, at least, is Dicey's characterization of the situation in the early editions of his great book, *An Introduction to the Study of the Law of the Constitution* (eg, at 215–16 of the 1885 edition). There is reason to believe that this was not, strictly speaking, the case even at the time when Dicey was writing. But the accuracy of Dicey's description of the French legal system is not relevant for present purposes.

the fact that it subjected everyone – public officials and private citizens alike – to the same set of rules administered by the same court system. As Dicey puts it:

> Every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.[4]

But, of course, in the common law world, public officials are often able to claim justifications that are not open to the rest of us. Police officers, to take only one example, are entitled to make arrests on the basis of reasonable suspicion of the commission of an indictable offence but private citizens are not.[5] So what is the real substance of the Diceyan ideal of equality before the law? In order for it to escape the charge of empty formalism – merely demanding that public officials be tried in the same courts but allowing them to be tried according to an altogether different set of rules – something more must be added. That 'something more' is the claim that any differences between the justification defences available to public officials and those open to private citizens is merely a reflection of their different factual circumstances.

According to the old common law adage, a police officer is only 'a person paid to perform as a matter of duty acts which if he were so minded he might have done voluntarily'.[6] That is, the justifications available to police officers are for the most part the same as the ones open to the rest of us; and where they are different this is not in virtue of any difference in legal status for officials. Instead, it is merely because the law recognizes that police officers (and other public officials) find themselves in a different set of circumstances from the rest us. As Dicey puts it, 'officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law *the same position*' (emphasis added).[7] Those circumstances are different in such a way that, applying the *same* basic normative standards, we should permit public officials to do things that others are prohibited from doing. Gardner has recently endorsed this position in the following terms:

[4] AV Dicey, *An Introduction to the Study of the Law of the Constitution* 8th edn (Indianapolis, Liberty Fund, 1982) 124.

[5] In Canadian criminal law, the difference is set out in the Criminal Code RSC 1985 ch C-46, ss 494 (concerning ordinary citizens) and 495 (concerning police officers).

[6] The Royal Commission on the Police, cited in G Marshall, *Police and Government: The Status and Accountability of the English Constable* (London, Methuen, 1965) 17.

[7] Dicey, *An Introduction* (n 4) 185. Dicey elaborates on this point as follows:

> [T]hey are, each and all of them, bound to withstand and put down breaches of the peace, such as riots and other disturbances; they are, each and all of them, authorised to employ so much force, even to the taking of life, as may be necessary for that purpose, and they are none of them entitled to use more; they are, each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force; they are each, it must be added – for this is often forgotten – liable, in theory at least, to be called to account before the Courts for non-performance of their duty as citizens in putting down riots, though of course the degree and kind of energy which each is reasonably bound to exert in the maintenance of order may depend upon and differ with his position as officer, magistrate, soldier, or ordinary citizen.

> [T]he legal power of ordinary members of the public to effect an arrest is the basic power, and the extra arrest powers of police officers, including the power to arrest on reasonable suspicion of the commission of an offence, are special extensions of that. This reflects the general common law doctrine, of which Dicey made so much, that public officials are regulated first by the ordinary law of the land applicable to private persons, to which ordinary law of the land all specifically public powers, duties and permissions must be read as either extensions or exceptions.[8]

But if public officials are no different in their legal standing from ordinary citizens, why should the law ever grant them permission to do things that the rest of us are forbidden from doing? One reason concerns their expertise: for example, if they are trained in the use of firearms and other coercive tools in a way that the rest of us are not, then there might be good prudential reasons for the law to grant them the exclusive right to use coercive force. Another reason for doing so is the need to coordinate the activities of a plurality of actors: for example, it is best to give the right to use coercive force exclusively to *someone* in order to avoid violent chaos. But these reasons merely track factual circumstances that are not necessarily related the officer's status as a public official. In other cases, it might be some private citizen who has the relevant expertise (say, a doctor, who may perform surgeries that the rest of us may not) or who is the one we pick out of the crowd for reasons of social coordination (as we might privilege the person closest to the scene of an accident as the person to take charge of the situation). Gardner makes clear his commitment to this point in the following terms:

> [O]ccasionally people have additional legal powers by virtue of being public officials, such as police officers. But although these additional powers are the powers of public officials, nothing turns, for the criminal law, on the fact that they are the powers of public officials . . . In the criminal court . . . their public character is neither here nor there.[9]

According to the Diceyan ideal, then, understanding the structure of justification defences is a fairly straightforward affair. There is a single phenomenon of justification that is the same both inside and outside the criminal law. The justification defences made available in a legitimate criminal justice system should track as closely as possible the sorts of reasons that an individual might present to justify his conduct morally outside the legal system. So the criminal law theorist's main task when making sense of justification defences, it seems, is to read the current literature in moral philosophy and to take careful notes. If we believe that all individuals are morally justified in killing in self-defence, then we should advocate in favour of a justification defence of self-defence open to all. If we believe that police officers are morally justified (given the institutional arrangements in which they find themselves) in using force to apprehend criminal suspects in ways that the rest of us are not, then we should advocate in favour of a special justification defence of

[8] J Gardner, 'Justification under Authority' (2010) 23 *Canadian Journal of Law and Jurisprudence* 71, 95–96.

[9] ibid 97.