

# Police Powers After Dicey

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*In recent years, the Supreme Court of Canada has expanded police powers and has upheld those powers against Charter challenges. This trend has been criticized, most notably by James Stribopoulos, who has argued that the expansion of police powers is at odds with AV Dicey's conception of the rule of law, particularly with the doctrine of strict construction. Stribopoulos claims that recognizing novel police powers, despite the absence of any express legislative grant, creates uncertainty for citizens, especially in the context of obstruction offences which carry serious penal consequences.*

*The author argues that Stribopoulos overstates the centrality of the "Diceyan model" to Canadian law. In several pre-Charter obstruction cases, the Court effectively adopted a thin ice principle—the idea that citizens skate on thin ice when they engage in conduct which has arguably been prohibited by the legislature, so they should not complain if they are ultimately prosecuted and convicted. The author agrees that the thin ice principle is in tension with the Diceyan model, so he proposes an alternative: an administrative model. This model is based on the premise that police officers ought to have discretion, similar to that of other administrative actors, to determine the extent to which Charter rights should yield to public interest considerations. Without claiming that this administrative model is categorically superior to the Diceyan model, the author notes it has distinct advantages.*

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## Introduction

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## Introduction

In a series of cases in the *Charter*<sup>1</sup> era, the Supreme Court of Canada has broadened police powers—sometimes through resort to the ancillary powers doctrine, sometimes through an expansive interpretation of legislative grants of authority, and sometimes by interpreting legislation that appears to authorize rights infringements in such a way that they survive *Charter* scrutiny. These lines of authority have been criticized, notably by James Stribopoulos, as incompatible with the rule of law.<sup>2</sup> His argument, which I believe reflects the views of other critics of the Court’s police powers jurisprudence,<sup>3</sup> rests on the premise that we should understand the rule of law in the terms set out by AV Dicey.

In this paper, I argue that Dicey provides an inappropriate lens through which to examine the Supreme Court’s approach to police powers. We gain a better understanding of that line of authority by abandoning Dicey and instead proceeding on the basis that police officers, as administrative actors, have discretion to determine the extent to which *Charter* rights should yield to public interest considerations. To a degree, I want to make that point simply by carrying forward the very analysis undertaken by Stribopoulos and others, for example, by showing that the Court’s approach to police powers cannot be reconciled with the Diceyan model.

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to *Canada Act 1982* (UK), 1982, c 11.

2. “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005) 31:1 *Queen’s LJ* 1 [Stribopoulos, “Dialogue”].

3. See e.g. Steve Coughlan, “Common Law Police Powers and the Rule of Law” (2007) 47 *CR* (6th) 266; Stephen Coughlan, “Criminal Justice in a Post-Rule of Law World” (Culliton Lecture in Criminal Law, delivered at the College of Law, University of Saskatchewan, 19 September 2011), online: YouTube <<http://www.youtube.com>>; Glen Luther, “Police Power and *The Charter of Rights and Freedoms*: Creation or Control?” (1987) 51:2 *Sask L Rev* 217; Steve Coughlan & Glen Luther, *Detention and Arrest* (Toronto: Irwin Law, 2010) at 5–24.

Rather than use that analysis to show that the jurisprudence is wrong, however, I use it to support the claim that the Diceyan conception of the rule of law is not as central to the Canadian legal order as the Court's critics suppose, and that we should scrutinize the cases through an altogether different lens.

As the above suggests, this paper has both descriptive and normative dimensions. It is descriptive in the sense that my aim is only to show that a particular kind of reasoning can explain the trajectory of police powers jurisprudence over the past 40 years. My purpose is not to show that we should prefer that sort of reasoning over others, such as the Diceyan approach that has dominated the academic analysis. In that sense, I do not attempt to advance a strong justification for what I call the administrative rationale. I do, however, want to make the case that alternatives to the Diceyan approach have plausibility—that it is not the only game in town—and that it is a mistake for lawyers and academics to ignore the administrative understanding as they try to explain Supreme Court case law. To that extent, one might say I have advanced a weak justification for it.

This paper proceeds in four parts. In Part I, I quickly review the Supreme Court's post-*Charter* police powers decisions, and present the criticisms made by Stribopoulos, who I will take to be my principal interlocutor. We will see that one of his concerns with the Court's approach is that it creates uncertainty for citizens, who may be unsure whether they are entitled to resist claims of police authority. In Part II, I suggest that, well before we had the *Charter*, the Court was alert to this risk. In three cases in the 1970s, the Supreme Court had the opportunity to interpret the offence of obstruction of police officers narrowly, such that citizens would not be deterred from resisting novel police powers not explicitly authorized by the legislature. Instead, it effectively suggested that, when in doubt, citizens should proceed on the widest reasonable interpretation of police powers. In Part III, I claim that this approach finds support in cases and thinkers articulating the "thin ice principle"—the idea that where a member of the public engages in conduct that has *arguably* been prohibited by the legislature, she cannot complain if she is ultimately prosecuted and convicted for doing so. The thin ice principle, I note, is in tension with the Diceyan model of the rule of law. Finally, in Part IV, I argue that the Diceyan model not only fails to explain the police powers

cases discussed by Stribopoulos, but also the obstruction cases mentioned in Part III. It fails as well to accommodate the Supreme Court's approach to the defence of lawful authority, the Court's deferential posture in administrative law, and our own intuitions about what police officers are doing when they assert novel police powers.

## I. Police Powers and the Principle of Legality

Over the past 30 years, the Supreme Court has expanded police powers in three different ways. First, it has increasingly made use of the ancillary powers doctrine. In *R v Dedman*, a majority of the Court held that the common law gives police the power to conduct random stops at sobriety checkpoints.<sup>4</sup> Later, in *R v Godoy*, the Court held that the police have the common law power to enter private premises in order to investigate disconnected emergency phone calls.<sup>5</sup> In *R v Mann*, the Court recognized a police power, again at common law, to conduct investigative detentions.<sup>6</sup> And in *R v Kang-Brown*, a majority of the Court found that the police have a common law power to use sniffer dogs to conduct searches for drugs on less than reasonable and probable grounds.<sup>7</sup> In each case, the police power was recognized despite the absence of an explicit legislative grant of authority.

Second, the Court has read legislative grants of police authority in an expansive rather than a narrow fashion. Thus, in *R v M(MR)*, the Court interpreted Nova Scotia's *Education Act* in such a way that it authorized teachers and principals to conduct searches and seizures of students, in spite of the absence of any explicit provision to that effect.<sup>8</sup> Likewise, in *R v Monney*, the Court interpreted the *Customs Act* as authorizing customs officials to hold travellers for a period of time in order to determine whether they have ingested narcotics.<sup>9</sup> In doing so, it engaged in a strained reading of the legislation.<sup>10</sup>

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4. [1985] 2 SCR 2, 20 DLR (4th) 324.

5. [1999] 1 SCR 311, 168 DLR (4th) 427.

6. 2004 SCC 52, [2004] 3 SCR 59.

7. 2008 SCC 18, [2008] 1 SCR 456.

8. [1998] 3 SCR 393, 166 DLR (4th) 456.

9. [1999] 1 SCR 652, 171 DLR (4th) 1.

10. See Stribopoulos, "Dialogue", *supra* note 2 at 39–40.

Finally, the Court has tended to interpret legislative grants of police powers, which on their face seem to run afoul of *Charter* guarantees, in such a way that they survive constitutional challenge. In *R v Hufsky*,<sup>11</sup> for example, the Court confronted a statutory provision which used language suggesting that police have “unfettered authority in deciding whom to stop”.<sup>12</sup> The Court held that the legislation implicitly authorized arbitrary detentions and therefore infringed section 9 of the *Charter*.<sup>13</sup> The Court went on to declare that the legislation was saved by section 1.<sup>14</sup> By holding that the legislature had implicitly authorized random stops—that such authorization did not need to be given explicitly—the Court made it possible to find the limitation on section 9 rights had been “prescribed by law” within the meaning of section 1. That, in turn, effectively led to an expansion of the police power to conduct random stops. Similar reasoning was later used by a majority of the Court in *R v Ladouceur*,<sup>15</sup> and more recently by the majority in *R v Orbanski*.<sup>16</sup>

Stribopoulos, analyzing these three lines of case law, concludes that they are inconsistent with the rule of law and produce an unacceptable degree of ambiguity concerning the scope of police powers. His argument is grounded in the Diceyan proposition that, as Parliament alone is sovereign, executive actors have no authority to restrain private citizens in the absence of an express legislative grant.<sup>17</sup> Where it is uncertain that Parliament intended to confer a given power of restraint upon an executive actor, the courts should presume that the actor is “subject to the ordinary law of the realm” and that the power in question is *ultra vires*.<sup>18</sup> As Stribopoulos observes, the principle of legality has been given clearest

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11. [1988] 1 SCR 621, 40 CCC (3d) 129.

12. Stribopoulos, “Dialogue”, *supra* note 2 at 43.

13. *Supra* note 1 (“[e]veryone has the right not to be arbitrarily detained or imprisoned”, s 9).

14. *Ibid* (“[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, s 1).

15. [1990] 1 SCR 1257, 77 CR (3d) 110.

16. Heard concurrently with *R v Elias*, 2005 SCC 37, [2005] 2 SCR 3. See also LeBel J, dissenting (*ibid*).

17. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London Ont: Macmillan & Co, 1959) at 193–94.

18. PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990) at 21.

expression in the interpretive canon of strict construction<sup>19</sup>—that “where the statute is ambiguous, the meaning favourable to the defendant must be preferred”.<sup>20</sup> On this view, the Supreme Court erred when, in the absence of plain legislative signals, it recognized that police had the discretion to conduct investigative detentions and random stops, and when it held that principals were entitled to search the lockers of students.

Stribopoulos claims, moreover, that this failure of legality has real consequences for both citizens and state actors.<sup>21</sup> The fact that the legislature need not expressly confer a power upon the police for it to exist means that law enforcement agents must look to the common law to define the limits of their authority. But it is in the nature of the common law to develop incrementally. The courts do not have the institutional competence to make sweeping statements about the sorts of powers that given state actors need, and about which powers would be especially problematic from a civil liberties (or, indeed, a crime control) perspective. Thus, in holding that police officers have the power to conduct investigative detentions, the Supreme Court in *Mann* did not say how long detainees may be held or how much force may be used.<sup>22</sup> In holding that school principals may search students, the Court in *M(MR)* did not say whether the age of the student matters, whether any and all kinds of searches are permissible, and whether force may be used.<sup>23</sup> In

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19. “Dialogue”, *supra* note 2 at 9–10.

20. Glanville Williams, “Statute Interpretation, Prostitution and the Rule of Law” in CFH Tapper, ed, *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (London Ont: Butterworths, 1981) 71 at 71–72.

21. This may be a mildly contentious way of putting Stribopoulos’ argument. I have suggested that his paper is grounded in the proposition that the courts lack the institutional legitimacy to articulate new police powers, and that claims about the relative institutional competence of courts and legislatures to do so merely provide additional heft to that argument from principle. We might turn the matter around, and say that what really bothers Stribopoulos is the relative lack of competence on the part of courts, and that the rule of law concerns are ancillary. But I am not sure this would be the strongest account of his paper. To say that the legislature is simply better at crafting rules capable of guiding police and citizens is to make, at bottom, an empirical claim which neither Stribopoulos nor other critics of the Court support with substantial evidence. To argue that it is institutionally illegitimate for the courts to craft those rules, on the other hand, is to make an argument that requires no evidence of (in)efficacy.

22. Stribopoulos, “Dialogue”, *supra* note 2 at 28–30.

23. *Ibid* at 37.

upholding legislation ostensibly authorizing random stops, the Court in *Ladouceur* did not set out procedures for ensuring that officers would not engage in racial profiling.<sup>24</sup> By leaving the scope of the police powers it recognized/created largely unsettled, Stribopoulos argues, the Court made it all but impossible for citizens involved in encounters with the police to know whether they are required to submit.<sup>25</sup> This uncertainty is deeply problematic, he claims, given that it will sometimes be a criminal offence to fail to acquiesce to police authority.<sup>26</sup> Police officers who exceed their authority will likewise commit a criminal offence.

Stribopoulos argues that the courts' failure to respect the principle of legality is problematic in a further sense. Insofar as legal officials are less likely to be informed of the content of court judgments as opposed to legislation, he suggests that the Supreme Court's approach to police powers is more likely to lead to state actors to act beyond the scope of their authority. For example, after the Court's ruling in *M(MR)*, school officials were inclined to read too much into the decision.<sup>27</sup> As additional support for this point, Stribopoulos cites scholarship suggesting that at least some law enforcement officials are inclined to treat the ambiguity of legal "constraints" on their powers as reasons for testing or violating them.<sup>28</sup> Furthermore, he is sceptical of the deterrent effect of the exclusionary rule.<sup>29</sup> Finally, and relatedly, police-citizen encounters tend to have "low visibility", making it unlikely that the courts can effectively ensure that law enforcement agents act within the scope of their authority.<sup>30</sup>

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24. *Ibid* at 47–48.

25. *Ibid* at 54–55. But see *Dedman*, *supra* note 4 at 36 (where the court contemplates that the well publicized nature of the Reduce Impaired Driving Everywhere (RIDE) program would ensure that citizens would be aware of the legality of these stops).

26. Stribopoulos, "Dialogue", *supra* note 2 at 54–55 citing *Criminal Code*, RSC 1985, c C-46, ss 129(a), 270(1).

27. Stribopoulos, "Dialogue", *supra* note 2 at 37–38.

28. *Ibid* at 50, citing Jerome H Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: Wiley, 1994) at 12.

29. "Dialogue", *supra* note 2 at 51–53.

30. *Ibid* at 61. See also James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process and Crime Control" in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 193.

Framed in these terms, Stribopoulos' argument boils down to two concerns about the vagueness of the substantive criminal law. First, if we are to hold people criminally accountable for overstepping their lawful authority, or for obstructing exercises of others' lawful authority, he claims, then we must give them fair notice as to just how far they or others can go in restraining bodies and property. Second, a failure to adequately define police powers encourages officials to exercise their powers in an arbitrary and *ultra vires* fashion. The concerns Stribopoulos raises, then, are similar if not identical to those expressed by the Supreme Court in *R v Nova Scotia Pharmaceutical* with respect to vague legislation.<sup>31</sup>

If the Diceyan principle of legality is as central to our constitutional order as Stribopoulos supposes, then he is right that the police powers case law is troubling. But its centrality should not be taken as a foregone conclusion. If we are to come to grips with the police powers case law, we should at least take into account a competing narrative in the substantive criminal law—one in which it is not the principle of legality that holds sway, but the thin ice principle. According to this other narrative, it is open to the state to craft somewhat open-ended offence provisions, and chill exercises of liberty which, though wrongful, are not in fact sanctionable. It is also open to the state to send different normative signals to different groups in the community concerning what is sanctionable and what is not, thereby encouraging some people to game the law while discouraging others from doing so. We may find this reading troubling or distressing, but it may ultimately reveal more about the reality of criminal law and criminal justice than Stribopoulos' appeal to Dicey.

## II. Obstruction of Police Officers

As we have seen, Stribopoulos' concern for the principle of legality is partly driven by the worry that citizens might resist exercises of claimed authority in the mistaken belief that they are entitled to do so. It is, he points out, a criminal offence to “resist or wilfully obstruct a public

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31. [1992] 2 SCR 606 at 633–36, 93 DLR (4th) 36. See also Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004) (arguing that the concern with arbitrary enforcement expressed by L'Heureux-Dubé J in *Nova Scotia Pharmaceutical* was primarily with the prospect of “standardless sweeps”, and not with arbitrariness as such at 96–98).



officer or peace officer in the execution of his duty”.<sup>32</sup> When the public is uncertain about just what duties police officers have—particularly when they think that their duties are narrower than they are—there is a risk that citizens will “accidentally” obstruct justice. Mistakes about the scope of a police officer’s lawful authority are errors of law that cannot exculpate, and so citizens cannot cite their confusion as a defence.<sup>33</sup>

Oddly, though, Stribopoulos does not say much about the substantive criminal law in his analysis. His focus is not on the courts’ approach to police powers in cases determining whether an obstruction of police duties has taken place, but on cases determining whether state actors have violated provisions of the *Charter*. That is peculiar—and problematic—because in *Charter* cases there will often (indeed, usually) be no reason for the courts to ask whether the person who was searched or arrested, or interfered with in some other fashion, would have been criminally liable for resisting that exercise of putative authority. It will be in the obstruction cases that the consequences of a broad or ambiguous reading of police powers will be most apparent. If the principle of legality has the centrality and gravitational pull that Stribopoulos claims, we would be most likely to see it asserted in this class of cases—not in the criminal procedure jurisprudence. It is also curious because the most significant Supreme Court decisions pertaining to obstruction occur in the decade before the *Charter* came into force. The cases of *R v Knowlton*,<sup>34</sup> *R v Biron*<sup>35</sup> and *R v Moore*<sup>36</sup> tend to complicate the narrative presented by Stribopoulos—the story of a post-*Charter* Supreme Court departing from a well-established tradition of respect for Diceyan ideals.

The most intriguing discussion in the three cases occurs in *Biron*. The police raided a restaurant where the accused had been drinking. He was verbally abusive and refused to provide his name. He was arrested without a warrant for causing a disturbance, and then placed in the custody of a second police officer, Dorion. The accused struggled with Dorion, and was later charged with resisting a peace officer in the execution of his duty. Ultimately, the accused was acquitted of the disturbance charge.

32. *Criminal Code*, *supra* note 26, s 129(a).

33. On mistake of law, see Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3d ed (Toronto: Carswell, 2007) at 387–89.

34. (1973), [1974] SCR 433, 33 DLR (3d) 755.

35. (1975), [1976] 2 SCR 56 (available on WL Can).

36. (1978), [1979] 1 SCR 195, 90 DLR (3d) 112.

The Crown nonetheless argued that he had committed a criminal offence by resisting the efforts of police to take him into custody. The Crown pointed to section 450(1)(b) (now section 495(1)(b)) of the *Criminal Code*, which permits a peace officer to arrest without warrant “a person whom he finds committing a criminal offence”.<sup>37</sup> Claiming that the provision authorized a warrantless arrest so long as the police officer believed that a criminal offence was taking place, the Crown argued that the conditions under section 450(1)(b) were satisfied.

Justice Martland, writing for a majority of the Supreme Court, agreed with the Crown’s interpretation.<sup>38</sup> Finding it “apparent” that the accused had caused a disturbance—if not, as the Crown suggested in the indictment, “by shouting”—the majority found that the arrest was lawful.<sup>39</sup> More importantly, Martland J immediately concluded on that basis that the accused committed an offence by resisting arrest.<sup>40</sup> The fact that the ordinary citizen could not have been expected to know that “committing a criminal offence” would be interpreted to mean “apparently committing a criminal offence” was not regarded as problematic, or even addressed. Instead, Martland J buttressed his conclusion with the observation that, even if the initial *arrest* was unlawful, Dorion was entitled to take the accused into *custody*.<sup>41</sup> To have that authority, all Dorion needed (under section 31(2) of the *Code*) were reasonable and probable grounds for believing that the accused had been properly arrested in the first place. That being the case, the majority held, the accused must still be guilty of resisting a peace officer in the execution of his duty—we are only talking about a different peace officer and a different duty. Again, the majority mentioned nowhere that the accused, at the time he was transferred into the custody of the second officer, would not have been told that the period during which he could lawfully resist arrest had effectively expired; that is, that the arrest had, as a matter of law, already concluded.<sup>42</sup> The fact that an ordinary citizen would not have appreciated that the second officer was relying on an altogether different basis for detaining him was treated as neither here nor there.

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37. *Supra* note 26, s 495(1)(b).

38. *Biron*, *supra* note 35 at 75.

39. *Ibid.*

40. *Ibid.*

41. *Ibid* at 76.

42. *Ibid.* See also at 77 de Grandpré J, concurring (*ibid*).

Chief Justice Laskin, writing in dissent for three judges (including Dickson J), took issue with several of the premises on which Martland J based his decision. For the purposes of the offence of obstruction, Laskin CJC claimed, it was necessary for the Crown to show not only that the arrest was *apparently* lawful, but *actually* lawful. It is, he argued, necessary to distinguish between the use of section 450(1)(b) insofar as it informs the defence of lawful authority articulated in section 25(1) of the *Code*, from its use insofar as it informs the offence of obstruction. This is because the defence of lawful authority and the offence of obstruction are directed at two quite distinct ends. The former provides police officers with a defence in civil and criminal proceedings. The latter, by contrast, makes it a criminal offence for citizens to refuse to submit to police officers who are interfering with liberty or property. The mere fact that police officers do not act wrongfully or culpably when, in discharging their professional duties, they mistakenly interfere with the liberty of others, does not mean that those with whom they are interfering have a positive obligation to submit.<sup>43</sup> Chief Justice Laskin emphasized that in the absence of express legislative signals to the contrary, the courts should not interpret the offence of obstruction to mean that one commits an offence by resisting an apparently lawful arrest, rather than an actually lawful one.<sup>44</sup> They should, in other words, apply the doctrine of strict construction to the terms of the offence. To do otherwise would effectively strip citizens of their freedom to resist unlawful arrest.<sup>45</sup>

The dissenting judges, then, took issue with the majority's suggestion that "apparently" should be read into section 450(1)(b) *to the extent that subsection informed the substantive offence of obstruction*. If the boundaries of the offence were to be broadened, Laskin CJC argued, it must be done explicitly by the legislature. Furthermore, he rejected (as "bootstrapping") the majority's claim that because the second officer had merely taken the accused into custody, the accused could not have been resisting arrest.<sup>46</sup> Just as section 450(1)(b) (via section 25(1)) provides a defence to criminal and civil claims against arresting officers, not *ex ante* authorization, so the

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43. *Ibid* at 60. See also 61–62, 65 (*ibid*).

44. *Ibid* at 64–65.

45. *Ibid* at 65.

46. *Ibid* at 67.

same can be said of section 31(2).<sup>47</sup> Moreover, that latter section permitted Dorion to take the accused into custody only if the arresting officer had reasonable and probable grounds to believe that he had committed a breach of the peace. Chief Justice Laskin, purporting to follow *Frey v Fedoruk*,<sup>48</sup> argued that “breach of the peace”, however widely it might be interpreted when defining the defence available to Dorion under section 31(2), should be defined narrowly when construing the accused’s right to resist.<sup>49</sup>

What is striking is that Laskin CJC conducted the sort of analysis which, had it won the day, would have removed one of the critical problems Stribopoulos sees flowing from the Supreme Court’s post-*Charter* departures from the principle of legality. Chief Justice Laskin argued that an expansive definition of police defences need not trigger an equally expansive scope of civilian liability. That understanding of the relationship between defences and offences makes a difference because it allows us to recognize new police powers—to say that officers do not act wrongfully or culpably when they engage in a certain practice—without affecting the circumstances under which a citizen might be criminally sanctioned for resisting. It might be open to the courts to provide expansive interpretations of defence provisions, Laskin CJC suggested, but only the legislature could create what would amount to a new criminal offence. Following this line of reasoning, there is nothing inherently problematic about the police powers Stribopolous discussed, insofar as our real concern is with the uncertainty surrounding citizens’ liability for resisting. It becomes problematic only if and when the courts insist on ignoring the principle of legality when determining the scope of obstruction offences.

What is equally striking is that, faced with the opportunity to follow Laskin CJC’s reasoning in *Biron*, the majority declined to do so. Instead, as we have seen, Martland J implicitly took the view that the liabilities of citizens should be understood as symmetrical to the immunities enjoyed by police officers, even though nothing in the obstruction provision requires such a result. Faced with ambiguity, the majority read that provision expansively.

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47. *Ibid* at 65.

48. [1950] SCR 517, 3 DLR 513.

49. *Biron*, *supra* note 35 at 65–66.

A similar debate played out in *Moore*. The accused rode through an intersection on his bicycle. A peace officer stopped him and asked for identification, so that he could be given a ticket for proceeding against a red light. The accused refused and he was charged with obstruction. The majority opinion, written by Spence J, held that the police officer had a duty to establish the accused's identity.<sup>50</sup> On that basis, the majority found that the accused had committed obstruction by refusing to comply.<sup>51</sup>

Justice Dickson (as he was then), writing in dissent for himself and Estey J, agreed with the majority that the police officer had the duty and authority to take steps to identify the accused.<sup>52</sup> He further agreed that, when the accused refused to provide identification, the officer had the authority to arrest him.<sup>53</sup> The arrest, however, would have been for the much less serious charge of proceeding against the red light, and only for the purpose of establishing the accused's identity.<sup>54</sup> The accused's arrest, Dickson J implicitly claimed, would have been justified on purely administrative grounds—on the need to know the identity of the person to whom the traffic citation would be addressed. It could not, however, be defended on the basis that the accused was engaging in criminal wrongdoing of a kind and gravity that warranted arrest for obstruction. Though the police officer had the duty to determine the accused's identity, Dickson J argued, there was no corresponding legal duty on the accused to acquiesce.<sup>55</sup> The refusal, therefore, could not amount to obstruction.<sup>56</sup>

The Crown argued, in *Moore*, that the very fact that the police have the authority to investigate identity entails a reciprocal duty on the part of citizens to comply.<sup>57</sup> Justice Dickson rejected that suggestion:

The fact that a police officer has a duty to identify a person suspected of, or seen committing, an offence says nothing about whether the person has the duty to identify himself on being asked. Each duty is entirely independent. Only if the police have a lawful claim to demand that a person identify himself, does the person have a corresponding duty to do so. . . . [T]he duty of a peace officer to make inquiries must not be confused with the right of a

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50. *Moore*, *supra* note 36 at 203.

51. *Ibid* at 203–04.

52. *Ibid* at 208.

53. *Ibid*.

54. *Ibid*.

55. *Ibid* at 208–09.

56. *Ibid* at 208.

57. *Ibid* at 210–11.

person to refuse to answer questions in circumstances where the law does not require him to answer.<sup>58</sup>

In the absence of express legislative language, Dickson J held, no legal duty to identify oneself to the police could be found to exist.<sup>59</sup> “The criminal law”, he remarked, “is no place within which to introduce implied duties, unknown to statute and common law, breach of which subjects a person to arrest and imprisonment”.<sup>60</sup>

Like Laskin CJC’s opinion in *Biron*, Dickson J’s dissent in *Moore* emphasizes two points. First, the mere fact that police officers have a duty or power should not necessarily affect our analysis of the obligations imposed upon citizens by the offence of obstruction. We can say, without inconsistency, both that the police have a duty to act in a certain way and that citizens do not act criminally by refusing to acquiesce. Second, it falls to Parliament to explicitly define the circumstances under which citizens may be subjected to criminal sanctions. Justice Dickson invoked strict construction. But again, as we have seen, these arguments failed to attract a majority on the Court. Seized of the opportunity to give effect to the principle of legality, by requiring express legislative language expanding the meaning of “obstruction” even in the face of judicial opinions creating or recognizing new police powers, the majority flatly refused to do so. Instead, they simply acknowledged the liberty interests at stake, before dismissing them as trivial in comparison with the “major inconvenience” that the police would suffer if citizens could refuse to identify themselves.<sup>61</sup>

This hesitation to read the obstruction provision narrowly can also be seen in the Court’s brief decision in *Knowlton*, reached several years before *Biron*. In *Knowlton*, the police cordoned off an area outside the hotel where a foreign dignitary was staying. The accused wanted to take photographs and, despite the warnings of police officers, pushed his way into the area.<sup>62</sup> He was charged with obstruction, but acquitted by the trial judge, who held that the officers were not executing any police duties at the time.<sup>63</sup> The Alberta Court of Appeal substituted the acquittal with

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58. *Ibid* at 212.

59. *Ibid* at 212–13.

60. *Ibid* at 213.

61. *Ibid* at 205–06.

62. *Knowlton*, *supra* note 34 at 445.

63. *Ibid*.

a conviction, which the Supreme Court unanimously upheld.<sup>64</sup> Chief Justice Fauteux, writing for the Court, applied the *Waterfield* test.<sup>65</sup> He found that provincial legislation imposed a statutory duty to preserve the peace and that, in light of an earlier attack upon the dignitary, it was incumbent on the police to take steps to protect him.<sup>66</sup>

In holding that the police had the statutory authority to cordon off the area, the Supreme Court observed that “[w]e are not concerned here with a case of false arrest, but with a case of wilful obstruction of a police officer in the execution of his duty”.<sup>67</sup> Had this been a case in which false arrest was alleged, the Court suggested, it might be significant that the police had failed to provide the accused with “the legal justification for their interference with his right of free access to public streets”.<sup>68</sup> But the accused admitted to having seen the earlier attack on television and, even if he had not, the Court would have been prepared to “assume” he had, given that the attack had been widely publicized.<sup>69</sup> Moreover, Fauteux J intriguingly remarked: “In law, the appellant cannot, any more than in fact, plead ignorance of the legal duty then performed by the police”.<sup>70</sup> This appears to suggest that, just as the accused could not argue that he did not know the factual circumstances necessitating a cordoned-off zone, so it was not open to him to argue that he was unaware of the police’s legal duty and authority to take steps needed to preserve the public peace. The mere fact that the statute did not explicitly authorize the police to take these particular steps did not affect the accused’s legal obligation to

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64. *Ibid* at 448.

65. *R v Waterfield* (1963), [1964] 48 Cr App R 42 CA (Eng) at 47–48:

In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person’s liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

66. *Knowlton*, *supra* note 34 at 446–47.

67. *Ibid* at 448.

68. *Ibid*.

69. *Ibid* at 447–48.

70. *Ibid* at 448.

comply, and did not make his conduct any less an obstruction within the meaning of the *Criminal Code*.

Since *Moore*, few appellate decisions have addressed the relationship between police powers and obstruction in cases where the existence of a particular power was uncertain before the police-citizen encounter in question but was later confirmed by the courts. One rare example is the Ontario Court of Appeal's decision in *R v Waugh*.<sup>71</sup> There, the Court applied the *Waterfield* test and held that the police have the common law power to impound a vehicle reasonably believed to be uninsured.<sup>72</sup> Without remarking on the point that the accused would not necessarily have known that such a power existed, the Court held that the only question left to be decided was whether the accused had frustrated its exercise.<sup>73</sup> No mention was made of the idea that a police power might be recognized without automatically expanding the meaning of "obstruction". Nor was it thought problematic for the Court to read new obligations into the offence of obstruction.

None of this, of course, challenges Stribopoulos' core claim that the post-*Charter* police powers jurisprudence is in grave tension with the principle of legality, or that it has the effect of expanding the circumstances under which citizens may be punished for obstruction. But it does underscore the fact that the departure from the principle of legality began well before the advent of the *Charter*. Cases like *Dedman* and *Lyons* did not represent a radical break from the past.<sup>74</sup> It also suggests that the broadening effect of the police powers case law on citizens' liability is not a matter of mere forgetfulness. The Supreme Court had the opportunity in *Knowlton*, *Biron* and *Moore* to say that its interpretation of police powers would not (or would not always) affect liability in obstruction cases. That it did not take that path suggests that the problem of liability expansion, to which Stribopoulos points, was not seen as a problem. Why not?

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71. 2010 ONCA 100, 251 CCC (3d) 139.

72. *Ibid* at para 34.

73. *Ibid* at para 36.

74. But see *R v Colet*, [1981] 1 SCR 2, 119 DLR (3d) 521. The decision admittedly complicates this analysis somewhat, however, as I suggest towards the end of Part III, echoing Coughlan and Luther, the core holding of *Colet* has been narrowed and marginalized to the point where it cannot sustain any significant objection to my analysis.



### III. The Thin Ice Principle

The thin ice principle, put simply, is the proposition that in the face of ambiguity in the content of a criminal offence, members of the public ought to interpret it broadly rather than restrictively. The thin ice principle was articulated by Lord Morris in *Kneller v Director of Public Prosecutions*.<sup>75</sup> The defendants in that case were the directors of a company that regularly published a magazine. One issue featured an advertisement in which men were invited to meet for homosexual sex. The defendants were charged with conspiracy to corrupt public morals under the *Sexual Offences Act 1967*.<sup>76</sup> They argued, among other things, that the offence was insufficiently precise—that one could not know in advance whether, by publishing something, they were running afoul of the law. Lord Morris disagreed. He observed that legal language is often imprecise, and that it will often fall to a jury or trial judge to decide whether, as a matter of fact, a given publication is defamatory or likely to corrupt public morals.<sup>77</sup> He remarked:

Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in. So when Parliament has made it an offence to publish an article which may tend to deprave and corrupt and has left it to a jury to decide whether an article may so tend it is no criticism of the law to say that a man will not be sure in advance whether he will be acquitted or convicted.<sup>78</sup>

Justice Holmes made a similar claim in *United States v Wurzbach*:

Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no-one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.<sup>79</sup>

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75. (1972), [1973] AC 435 HL (Eng).

76. (UK), c 60.

77. *Kneller*, *supra* note 75 at 463.

78. *Ibid* at 463–64. See also Douglas Husak, *Overcriminalization* (Oxford: Oxford University Press, 2008) at 75–76; Andrew Ashworth, “Interpreting Criminal Statutes: A Crisis of Legality?” (1991) 107:3 Law Q Rev 419 at 428–29 (suggesting that the thin ice principle explains the result in *Attorney General’s Reference (No 1 of 1988)* (1989), 89 Cr App R 60 HL (Eng)).

79. 280 US 396 at 399 (WD Tex 1930).

Where citizens opt to engage in behaviour that, on the widest reasonable interpretation of the offence provision in question, amounts to criminal conduct, they have taken their chances. At the very least, they received fair warning that their proposed course of action may have been deemed criminal by the legislature—and that they should, therefore, skate with care.

Jeremy Waldron has pursued this line of reasoning in a number of works. Responding to the hard positivist's claim that, if an offence provision is to count as a *legal* rule properly speaking, members of the public must be able to be guided by it without having to engage in moral deliberation,<sup>80</sup> Waldron argues that a legal rule can discharge that guidance function so long as it alerts people to the need to engage in moral deliberation under certain circumstances.<sup>81</sup> Thus, there is nothing wrong in principle with a provision prohibiting members of the public from driving motor vehicles at a speed that is more than "reasonable and proper".<sup>82</sup> Such an offence does not tell the private citizen precisely when her driving falls outside that standard. It essentially does nothing more than repeat the moral injunction against acting in a way that would put others at unreasonable risk, leaving it to the individual motorist to weigh the competing reasons for and against driving more or less quickly along different roadways and through different neighbourhoods. It does, however, serve to remind the citizen that the moral injunction exists. When, in the face of that reminder, she decides not to err on the side of caution, she has, as it were, stepped onto thin ice and cannot complain if her driving is subsequently deemed criminal. In an important sense, Waldron's version of the thin ice principle is narrower than that of Lord Morris. Lord Morris does not suggest that the offence of conspiring to corrupt public morals is *mala in se*—that, in the absence of legislation, morality would require a member of the public to consider whether the publication of a given article would tend to corrupt or deprave others. He proceeds simply on the basis that, inasmuch as Parliament has declared that the corruption of public morals is a criminal act, it falls to citizens to exercise caution.<sup>83</sup> Waldron's thin

80. See Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) at 217.

81. "Vagueness and the Guidance of Action" in Andre Marmor and Scott Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford: Oxford University Press, 2011) 58.

82. *Ibid* at 59, discussing *State v Schaeffer*, 117 NE 220 (1917).

83. See *Waldron*, *supra* note 81.

ice principle, by contrast, appears to apply only where the prohibited conduct is *mala in se*—where the offence serves as a reminder that moral deliberation is required. His approach has an advantage over that of Lord Morris, of course, in that there is far less reason to doubt that members of the public have had notice of an offence—that they are aware that they are stepping onto morally uncertain territory—where the prohibited conduct is wrongful in itself rather than wrongful only by virtue of an Act of Parliament.

But in another sense, Waldron wants to push Lord Morris’ reasoning further. Lord Morris premised the thin ice principle on the sheer fact (so far as he knew) that a person in the defendants’ position could not receive guidance as to the circumstances under which the trier of fact might convict her for conspiracy to corrupt public morals.<sup>84</sup> Waldron wants to say that even if it were possible to find out in advance whether a given course of conduct would be treated as criminal as a matter of law, it would be illegitimate to seek out or provide that sort of guidance. It is, to borrow Lord Morris’ analogy, not only wrong to complain when one finds no sign telling them just where the ice is thinnest; it is, according to Waldron, wrong to ask for the erection of a sign before setting foot on the ice, and still worse for the state to provide one.

In support of this claim, one may look to HLA Hart’s influential discussion of the internal point of view in *The Concept of Law*.<sup>85</sup> Hart observed that a member of the public might look to the criminal law for guidance in one of two senses. She might, like Holmes’ bad man, look to the criminal law for no other reason than to find clues as to the circumstances under which she will be made to undergo sanctions.<sup>86</sup> The person who adopts this attitude towards the criminal law does not believe she does anything morally wrong merely because she violates one of its provisions. She may believe that doing so is imprudent, but even that attitude will depend on the perceived likelihood that disobedience will meet with prosecution and punishment. Alternatively, she might adopt the attitude of Hart’s puzzled man, who has internalized the prohibitions set out in the criminal law and looks to the law to determine which

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84. *Ibid* at 463.

85. *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1994).

86. See OW Holmes, “The Path of the Law” (1897) 10:8 Harv L Rev 457.

courses of action are wrongful.<sup>87</sup> From that perspective, the criminal law imposes obligations, and neglecting them deserves opprobrium whether or not there is any genuine risk of prosecution or deprivation. Hart did not claim that any actual society is populated by “puzzled men”,<sup>88</sup> but he did suggest that insofar as legal systems claim that citizens have a duty to obey the law, they will invariably presuppose that the only appropriate attitude to their pronouncements is that of the puzzled man.<sup>89</sup> Moreover, it is certainly the case that, all other things being equal, a society populated by puzzled men will have a healthier legal order than one populated by Holmesian bad men.<sup>90</sup>

With Hart’s observations about the internal point of view in mind, Meir Dan-Cohen argued that the criminal law may feature two sets of norms—one directed at members of the public, the other directed at legal officials.<sup>91</sup> The public will be exposed to “conduct rules” purporting to guide their behaviour. They may not, however, be exposed to “decision rules” guiding the behaviour of legal officials as they decide whether they are entitled to arrest, prosecute, and convict members of the public for breaches of conduct rules. That information, of course, is valuable to members of the public only to the extent that they want to know if and when a given breach of conduct rules will be met with sanctions. Insofar as “citizens”<sup>92</sup> are expected to be guided by conduct rules whether or not breaches are sanctionable, information about decision rules may be thought, at best, irrelevant—and, at worst, corrupting, distracting, or confusing. For that reason, decision rules may be communicated to legal

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87. *Supra* note 85 at 40.

88. See Scott J Shapiro, “The Bad Man and the Internal Point of View” in Steven J Burton, ed, *The Path of the Law and its Influence* (Cambridge: Cambridge University Press, 2000) 197.

89. See Frederick Schauer, “Was Austin Right After All? On the Role of Sanctions in a Theory of Law” (2010) 23:1 *Ratio Juris* 1.

90. See W Bradley Wendel, “Lawyers, Citizens, and the Internal Point of View” (2006) 75:3 *Fordham L. Rev* 1473.

91. “Decision Rules and Conduct Rules: Acoustic Separation in the Criminal Law” (1984) 97:3 *Harv L Rev* 625.

92. I use the scare quotes to indicate that conduct rules are expected to guide everyone in the community—not only “citizens” in the strict sense. For the remainder of the paper, I will use “citizens” to refer to members of the public generally.

officials in such a way that they are not “heard” by the public at large. There is, to use Dan-Cohen’s language, “acoustic separation”.<sup>93</sup>

On Dan-Cohen’s analysis, conduct rules may prohibit conduct that is not subject to sanctions according to the applicable decision rules. An offence provision may prohibit conduct defined in terms that have an ordinary meaning (accessible to the general public); which is quite broad, but also a technical meaning (known only to legal officials), which is narrow. This means that some members of the public—those whose attitude towards the criminal law resembles that of the bad man—may be guided away from courses of action, in which they would otherwise engage, on the basis of a mistaken belief that all violations of conduct rules are punishable. Furthermore, Dan-Cohen observed that American courts, when deciding whether to articulate a exculpatory decision rule, would consider whether the circumstances were such that acoustic separation could be maintained. If it could not, he noted, the courts tended not to apply the decision rule at all.<sup>94</sup> Thus, a person charged with prison escape could not successfully use the defence of necessity, in spite of the fact that he had been threatened with assault or rape.<sup>95</sup> The availability of such a defence could not, practically speaking, be kept from the prison population at large. Rather than tempt inmates to disingenuously use the defence of necessity to avoid liability—to game the offence provisions prohibiting escape attempts—the United States Supreme Court chose instead to deny that the defence is available on a mere showing that the accused had been threatened.<sup>96</sup> To ensure that citizens do not respond to offence provisions in the manner of the Holmesian bad man, Dan-Cohen claimed, the courts control the flow of information regarding the precise circumstances under which criminal sanctions will be imposed.

Dan-Cohen acknowledged that this use of vague language to discourage non-sanctionable conduct is a kind of manipulation—indeed, he described it as “brutality”—but he hesitantly concluded that it does not represent a serious rule of law problem.<sup>97</sup> His argument has an obvious affinity with that of Waldron and Lord Morris. Since citizens are expected to look to

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93. *Supra* note 91 at 630.

94. *Ibid* at 641–43.

95. See *People v Lovercamp*, 43 Cal App (3d) 823 (1974).

96. *Ibid*.

97. *Supra* note 91 at 673–77.

the criminal law to guide them away from wrongful courses of action, and not simply to enable them to predict when they will be subjected to deprivations, they ought to interpret conduct rules in the widest sense possible. To adopt any other interpretive approach is to willingly engage in behaviour that one knows may be wrongful under the law. It is, as it were, to step onto thin ice.

In the context of the offence of obstruction, the thin ice principle would require citizens to adopt the broadest reasonable understanding of the powers possessed by police officers. In police-citizen encounters involving the assertion of a seemingly novel police power—for example, the power to barge into one’s home to investigate a disconnected 9-1-1 call, or the power to cordon off a public space to protect a visiting dignitary—it would effectively require the citizen to proceed on the basis that the officer’s assessment of the limits of her powers is correct, and that resistance amounts to a criminal wrong. This suggestion could generate some push-back on two fronts. First, it might seem to ignore the duty on police officers to respect *Charter* rights. As I will explain in the next section, this is not the case: police officers, like other administrative actors, are under an obligation to take seriously the *Charter* rights of those affected by their decisions. The point is not that police officers make these decisions in a “*Charter*-free zone”, as it were, but that their decisions are subject to review by the courts rather than by individual citizens. When a citizen resists an asserted police power on the basis that it has been unlawfully claimed, she steps onto thin ice.

The second objection is that the thin ice principle, in all the forms in which it is presented, is incompatible with the interpretive canon of strict construction—that “where the statute is ambiguous, the meaning favourable to the defendant must be preferred”.<sup>98</sup> But we should not be too quick to reach that conclusion. First, the rule itself is not as wide as some seem to suppose. It does not require the court to interpret the terms of a statute in a manner that is flatly at odds with its legislative purpose.<sup>99</sup> Strict construction comes into play only where a purposive reading of the provision in question does not tell us whether it should apply to the

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98. Williams, *supra* note 20 at 71–72.

99. See Pierre-André Coté, *The Interpretation of Legislation in Canada*, 2d ed, translated by Katherine Lippel et al (Montreal: Yvon Blais, 1991) at 398–401, discussing *R v Robinson*, [1951] SCR 522, 12 CR 101.

circumstances of the instant case.<sup>100</sup> In many cases, the legislative purpose will be best reflected in a “fair, large and liberal” reading of statutory language,<sup>101</sup> rather than a restrictive one. For this reason, Pierre-André Côté has suggested that the rule of strict construction had by the mid-1950s “acquired an increasingly subsidiary role”.<sup>102</sup> Justice LeBel, writing in *obiter dicta* for a majority of the Supreme Court in *R v Jaw*, remarked: “I have reservations about the proposition that any uncertainty in a charge *must*, as a matter of course, be resolved in favour of the accused. This proposition seems to be based on the strict constructionist approach to interpreting penal legislation that developed in the eighteenth century, when criminal law sanctions were especially severe. By the mid-1980s, however, the presumption of a restrictive interpretation of penal statutes had started to wear thin. . . . A restrictive interpretation *may* be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation”.<sup>103</sup>

To be sure, Fish J offered an alternative view, describing the rule of strict construction as “long-established”, and suggesting that the Supreme Court had endorsed it in *R v CD*.<sup>104</sup> In *CD*, the Court was called upon to define the term “violent offence” in section 39(1)(a) of the *Youth Criminal Justice Act*.<sup>105</sup> Ultimately, it adopted a narrow, harm-based interpretation of that term. And, as Fish J notes, the Court did suggest that this narrow interpretation would be consistent with the rule of strict construction of penal statutes.<sup>106</sup> But it made these remarks only after it had explained that a narrow interpretation was also more consistent with the purposes of the statute—the remarks about strict construction were entirely superfluous. The better view is that strict construction has been largely supplanted by the purposive approach.

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100. See *Director of Public Prosecutions v Ottewill* (1968), [1970] AC 642 at 649 HL (Eng). See also Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 207–08.

101. *Interpretation Act*, RSC 1985, c-I-21, s 12.

102. *Supra* note 99 at 398.

103. 2009 SCC 42 at para 38, [2009] 3 SCR 26 [emphasis in original].

104. *Ibid* at para 90, citing *R v CD*, 2005 SCC 78 at para 50, [2005] 3 SCR 668.

105. SC 2002, c 1, s 39(1)(a).

106. *CD*, *supra* note 104.

The most compelling support for strict construction in the interpretation of legislation creating police powers is found in the Supreme Court's 1981 decision in *R v Colet*.<sup>107</sup> The police had obtained a warrant to seize firearms from the accused. Ostensibly in execution of the warrant, the police attempted to search the accused's property for the firearms. The accused forcibly resisted, and was charged with a number of violent offences. Justice Ritchie, writing for the Court, held that the authority to search could not be inferred from the power to seize—that the former must be expressly granted by Parliament.<sup>108</sup> *Colet* is frequently cited in support of strict construction, often by way of criticizing post-*Charter* police powers jurisprudence.<sup>109</sup> As Coughlan and Luther observe, though, the *ratio decidendi* of the case has itself been read narrowly and, in their words, "it may now not be correct to describe the case as involving any general statutory interpretation advice involving police powers".<sup>110</sup>

Perhaps as importantly, it is possible—even desirable—to understand strict construction, not as a device by which we determine the content of conduct rules, but as a means by which we determine appropriate decision rules. The canon of strict construction emerged as a response to the large number of capital offences that once existed in English law—it was a means of ensuring that members of the public were not subjected to unduly harsh sanctions.<sup>111</sup> As we have seen, one can have a broad understanding of offence terms when determining the conduct rule that the legislature intended to create, and simultaneously have a narrow understanding of the circumstances in which breaches of conduct rules will be punished. Thus, we may interpret penal statutes in a "strict" fashion when deciding whether individuals should be punished, yet discourage citizens from reading those same statutes "strictly" when they consider whether a course of action is wrongful. If citizens adopt that interpretive strategy, they necessarily take the chance that judges who interpret the decision rules in play will either conclude that it is unnecessary to resort to strict construction, or that even a strict reading is wider than members of the public would suppose.

107. *Colet*, *supra* note 74.

108. *Ibid* at 10.

109. See Stribopoulos, "Dialogue", *supra* note 2 at 10–11; Luther, *supra* note 3 at 218–19; Coughlan & Luther, *supra* note 3 at 12–13.

110. *Ibid* at 13.

111. Coté, *supra* note 99 at 397–98; Ashworth, *supra* note 78 at 432.



There is, then, no reason to suppose that the Supreme Court’s police powers jurisprudence is inconsistent with the rule of strict construction, at least when it is properly construed. The case law may indeed require citizens to read the offence of obstruction in a broad rather than narrow fashion—that is, to accept an officer’s expansive interpretation of her powers instead of their own (possibly much narrower) understanding. In itself, though, that does not make it incompatible with the rule of strict construction. Moreover, the expectation that citizens will interpret the offence of obstruction broadly sits happily alongside the thin ice principle. The only question that remains is this: are there good reasons of principle or policy for expecting citizens to interpret the offence of obstruction in a “large and liberal” fashion? In the next section, I argue that it is possible to think so, but only if we abandon the Diceyan mindset.

#### IV. Two Views on the Wrongness of Obstruction

Dicey’s principle of legality emerged out of a concern for parliamentary supremacy. If Parliament is to be truly supreme, Dicey argued, the courts must ensure that administrative actors do not overstep their statutory grants of authority. To that end, the courts should interpret grants of authority narrowly, presuming that the ordinary law of the land applies to executive actors in the absence of express legislative language to the contrary. Stribopoulos appeals to this notion in his work.

The idea that the ordinary law should be presumed to apply to police officers has some intuitive attractiveness. Police practice frequently strays perilously close to criminal behaviour. When a police officer arrests a suspect and holds her against her will, she engages in what would normally be described as a “kidnapping”.<sup>112</sup> When a police officer frisks a person she intends to question, she engages in what would normally be described as an “assault”—perhaps, if it is a strip search or body cavity search, a “sexual assault”.<sup>113</sup> When she barges into a person’s home or car to conduct a search, she engages in what we would usually call, albeit colloquially, a “home invasion” or “carjacking”.<sup>114</sup> If, at the end of the search, she seizes goods or papers, she may have committed what we ordinarily would regard as

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112. *Criminal Code*, *supra* note 26, s 279.

113. *Ibid*, ss 265, 271.

114. *Ibid*, s 348(1).

a “theft”, “robbery” or even “armed robbery”.<sup>115</sup> A police officer’s day-to-day duties require her regularly to commit an array of what would, if undertaken by others, ordinarily be considered criminal offences.<sup>116</sup> She is immunized from liability by provisions like section 25(1) of the *Criminal Code*, which creates a positive defence she can invoke as an answer to criminal charges.<sup>117</sup> But the point, surely, is that the invocation of section 25(1) is an *answer* to criminal charges—that police officers *can* be called to account for their day-to-day actions, and made to explain themselves in a criminal trial. And, where police officers misuse the powers given to them by Parliament, or exercise authority they do not have, they can no longer rely upon the defence of lawful authority, and they are in precisely the same position as any Canadian citizen who commits an assault, a kidnapping, or a theft. Dicey articulated that very point in his analysis of the rule of law.<sup>118</sup> He stated: “In England, the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us 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

115. *Ibid*, ss 322(1), 343–44.

116. See John Gardner, “Justification under Authority” (2010) 23:1 Can JL & Jur 71 (“[i]n the common law tradition, it is a fine and perilous line between arresting someone and assaulting her, between granting an export licence for military aircraft and abetting murder, between discontinuing a prosecution and conspiring to pervert the course of justice, between seizing evidence and stealing, and so on” at 96).

117. *Criminal Code*, *supra* note 26, s 25(1):

Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

118. *Supra* note 17 (“when we speak of the ‘rule of law’ as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals” at 193).

character but in excess of their lawful authority. . . . [T]hough a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen”.<sup>119</sup>

If police officers are, at least in principle, as accountable as the rest of us for violations of the criminal law—if we are equal before the law in that sense—then it does not seem far-fetched to suppose that citizens are entitled to resist police officers when they reasonably believe they have overstepped their authority. When, walking along the sidewalk, I am confronted by an ordinary citizen who blocks my path, or aggressively asks me to identify myself, I am under no obligation to stop or answer her questions. I am entitled to assume that she has no authority over me. The peace officer will have a badge and a uniform, but she too has no authority over me except insofar as she is executing a duty given to her by Parliament. That point is critical: on the Diceyan model, the officer’s special authority is the *exception*, not the rule. In the absence of a clear legislative statement that I must yield to the officer under the particular circumstances before me, I am entitled to assume that I can ignore or sidestep her attempts to impose her will, just as surely as I can ignore or sidestep a fellow citizen who attempts to stop me in the absence of some clear duty to act. It is the officer who must justify the imposition,<sup>120</sup> not I who must justify my resistance to it.

On the above analysis, it is problematic for the courts to say after the fact that a police officer had the duty and authority to impose her will upon me in a certain way. Since I will have no way of knowing, until the courts have ruled, whether she had the duty and power in question, prudence dictates that I presume her authority over me—that I treat her as occupying a special position relative to my other fellow citizens. We are equal in the sense that we are both accountable to the law: she is criminally liable if she oversteps her grant of authority, and I am criminally liable if I wrongfully resist her claim of authority. Practically speaking, however, the police officer can arrest me for obstruction if I do not comply. Given the low visibility of citizen-police encounters, and the vulnerability of

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119. *Ibid* at 193–94.

120. The relationship between justification and administrative powers can be seen to some extent in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

many citizens in those encounters, it is far less likely that the officer faces a similar threat of prosecution for crossing the line. As a matter of fact, then, the use of the common law to create new police powers results in a *de facto* inequality that runs counter to (in Fuller's words) law's aspirations.<sup>121</sup> This, I take it, is the crux of Stribopoulos' critique.<sup>122</sup>

The Diceyan model is problematic both as an account of the law and as a matter of principle. We have already seen that the Supreme Court rejected the proposition that police duties may be construed broadly when interpreting defence provisions but narrowly when interpreting the offence of obstruction. That sort of approach would have permitted the articulation of new police powers by the courts without chilling the resistance of citizens to police conduct that has not been expressly authorized by the legislature. It would, in other words, re-affirm that police officers and citizens are on a level playing field. Both could push the envelope to some extent—officers interpreting their powers generously; citizens interpreting them narrowly—without courting prosecution. That road was not taken.

The difficulty is not just that the Supreme Court has refused to close the distance between the *de facto* freedom of the police officer and that of the citizen. The Court has also effectively expanded the defence of lawful authority in spite of hints in *R v Perka* that this would be a matter best left for Parliament. In *Perka*, Dickson J drew a distinction between justifications and excuses.<sup>123</sup> When a defendant argues that she was justified in acting as she did, she essentially claims that someone else in her position, faced with the circumstances she faced, would act rightly in following her example or in assisting her.<sup>124</sup> She claims that there is or ought to be a rule of conduct requiring or allowing people to act as she did when they act under comparable conditions. When a court accepts a justification-based defense, it purports to create such a norm or asserts that

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121. Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969).

122. "Dialogue", *supra* note 2. See also David M Tanovich, "Ignoring the *Golden Principle* of Charter Interpretation?" (2008) 42 Sup Ct L Rev (2d) 441 ("[d]iscretion is the breeding ground of racial profiling" at 454).

123. [1984] 2 SCR 232 at 248, 13 DLR (4th) 1.

124. See George P Fletcher, *Rethinking Criminal Law*, (Boston: Little, Brown and Company, 1978) at 762.

it already existed when the defendant acted.<sup>125</sup> This is why, as Dickson J noted, it is problematic for the judiciary to recognize justification-based defenses not created by Parliament—it eats into the democratically elected legislature’s legitimate monopoly over social policy.

The language of section 25(1) makes it clear that Parliament envisions the defence of lawful authority as a justification.<sup>126</sup> But even accepting that the courts have a responsibility to interpret that provision, there is a clear element of social policy-making when the courts read new powers of entry, detention, or search into its open-ended terms. There is, we might say, a vagueness problem, albeit an unusual one. Ordinarily, we are concerned about vagueness in offence provisions—like obstruction—because it puts citizens at risk of punishment for conduct they could not have known was criminal.<sup>127</sup> Here, the concern is that vague terms will be used to carve out an ever-widening field in which particular individuals can restrain others with virtual impunity. However we conceive of the problem, though, it is striking that the Supreme Court has broadened the justificatory defence of lawful authority, seemingly in spite of its own admonition that this should be done with caution. This is especially interesting in light of the Court’s willingness to expand the offence of obstruction.

The explanatory power of the Diceyan model, then, is limited. But we may also find the kind of explanation it provides problematic. It precludes one group of people in the community from exercising arbitrary power over everyone else—in the absence of explicit legislative authorization, a police officer is not entitled to restrain me or my property for any reason, and I am entitled to resist.<sup>128</sup> This indeed enhances equality of a sort. But it also treats every assertion of power by police officers, not explicitly authorized by the legislature, as an *arbitrary* assertion of one

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125. See Peter Alldrige, “Rules for Courts and Rules for Citizens” (1990) 10:4 Oxford J Legal Stud 487 at 499; James Chalmers & Fiona Leverick, “Fair Labelling in Criminal Law” (2008) 71:2 Mod L Rev 217 at 245–46.

126. *Criminal Code*, *supra* note 26, s 25(1).

127. See *Nova Scotia Pharmaceutical*, *supra* note 31 at 633–36.

128. See Malcolm Thorburn, “Justifications, Powers, and Authority” (2008) 117:6 Yale LJ 1070; Malcolm Thorburn, “Two Conceptions of Equality before the (Criminal) Law” in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 3 [Thorburn, “Two Conceptions”].

private will over another. It supposes that, when the officers in *Godoy* pushed into the accused's home to investigate the disconnected 9-1-1 call, or when the officers in *Knowlton* cordoned off the area outside a previously attacked dignitary's hotel, they could not be said to have acted in the public interest, but only in their private interests—that they were no more entitled to speak on behalf of the public good than any private citizen. A police officer has the authority to decide whether and when to exercise the powers that have been explicitly recognized by statute, the Diceyan seems committed to saying, but does not have the authority to decide what powers she needs to cope with problems unforeseen by the legislature.

The Diceyan understanding of administrative powers has been rejected in most other contexts. The Supreme Court has held that administrative tribunals may infer that a legislative grant of authority permits them to infringe *Charter* rights, in spite of the absence of express language to that effect, so long as they impair them to a minimal extent, and in a fashion that is proportionate given the reasons for the infringement. Recently, the Supreme Court has gone further and held that administrative tribunals are entitled to deference on judicial review, even where they have engaged in this kind of *Charter* analysis.<sup>129</sup>

The basis for this deference is straightforward enough. Administrative tribunals have been entrusted to make decisions concerning matters in which they have an expertise that courts lack.<sup>130</sup> In *Doré v Barreau du Québec*, the Supreme Court unanimously accepted that this expertise makes them particularly well-suited to weigh *Charter* values and determine whether and how *Charter* rights should be restricted in the administrative context in question.<sup>131</sup> If we accept that police officers have a similar kind of expertise, it is not obvious why we would not conclude that they are likewise owed deference when, faced with a novel situation that calls for new or expanded police powers, they proceed on the basis that they must have them. Indeed, discussing *Godoy*, Stribopoulos observes that it would be absurd if police officers did not have the power to forcibly enter a home to investigate a disconnected 9-1-1 call.<sup>132</sup> He concludes that

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129. See *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

130. See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 49, [2008] 1 SCR 190.

131. *Supra* note 129 at paras 46–54.

132. “Dialogue”, *supra* note 2 at 24–25.

it nonetheless falls to the legislature, and not the courts, to confer that power upon officers. Surely, though, it is also reasonable to suppose that the legislature did not intend an absurd result, and that it was therefore open to police officers to interpret their grant of authority in such a way that it could be avoided.

To some extent, the assumption that police powers must be expressly conferred by Parliament, and not given *ex post facto* benediction by the courts, raises the same objections that have been levelled against Dicey throughout the last hundred years. In 1928, William A Robson rejected the suggestion that “every tribunal which does not at the moment form part of the recognized system of judicature must necessarily and inevitably be arbitrary, incompetent, unsatisfactory, injurious to the freedom of the citizen and to the welfare of society”.<sup>133</sup> The modern administrative state is shot through with exercises of discretion which impact upon individual rights, and would be all but impossible if express legislative permission was needed for any and every incursion.<sup>134</sup> Carr, Jennings, and Laski launched broadly similar criticisms at the Diceyan suspicion of administrative decision-making.<sup>135</sup>

We might ask whether police officers belong in a category that is different from many or most other administrative actors. In *Doré*, the Supreme Court observed that an administrative decision-maker must balance *Charter* values with the objectives of her empowering statute.<sup>136</sup> It is surely fair to wonder whether police culture is such that officers will frequently fail to give *Charter* rights and liberties appropriate weight when determining what their duties entail, or even whether they are effectively trained to undertake this kind of normative analysis.<sup>137</sup> Furthermore, administrative tribunals arguably deserve deference not only because of their special expertise, but because of the process by which their decisions

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133. *Justice and Administrative Law: A Study of the British Constitution* (London: MacMillan & Co, 1928) at xv.

134. *Ibid* at 261–83.

135. Sir Cecil Thomas Carr, *Concerning English Administrative Law* (New York: Columbia University Press, 1941) at 124–26; Sir W Ivor Jennings, *The Law and the Constitution* 5th ed (London, UK: University of London Press, 1959) at 306–08; Harold J Laski, *A Grammar of Politics*, 4th ed (London, UK: George Allen & Unwin, 1938). For a comparison of the critiques, see Craig, *supra* note 18 at 49–51.

136. *Supra* note 129 at para 55.

137. See Stribopoulos, “Dialogue”, *supra* note 2 at 50–57.

are made. That process requires, among other things, an opportunity for affected parties to make submissions. Yet many police decisions are made, as it were, *ex parte*. It may be that the absence of public input affects the competence or legitimacy of *Charter* balancing by police officers. These are fair questions to ask, but we cannot assume that they should be decided one way rather than another.

Indeed, it appears that the Supreme Court has already answered them. In *R v Clayton*, a majority of the Court recognized a police power to conduct investigative roadblocks on the basis of a 9-1-1 tip.<sup>138</sup> Writing for the majority, Abella J observed:

The common law regarding police powers of detention . . . is consistent with Charter values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk.<sup>139</sup>

This is so in spite of the fact that it will be the police who, at first instance, must engage in a unilateral balancing of rights and interests. The implication of this reasoning, Binnie J later observed in *R v Sinclair*, is that police have the professional skill to determine what incursions on the *Charter* rights of citizens are “reasonable” on a case-by-case basis.<sup>140</sup> Though Binnie J did not explicitly tie his remarks to the Court’s administrative law jurisprudence, he did suggest that the police are entitled to weigh the scope of their powers at first instance, subject to something akin to judicial review for reasonableness later.<sup>141</sup>

Suppose, if only for the sake of argument, that police officers do have the expertise—through training<sup>142</sup> or experience<sup>143</sup>—to weigh *Charter* rights appropriately, and that they have the authority not only to decide when to exercise the powers conferred upon them, but also to decide

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138. 2007 SCC 32, [2007] 2 SCR 725.

139. *Ibid* at para 21.

140. 2010 SCC 35 at para 114, [2010] 2 SCR 310.

141. *Ibid* at paras 108–11.

142. By “training” I mean, among other things, the training to conduct *normative* assessments of the relative weight of *Charter* rights and law enforcement interests.

143. By “experience”, I have in mind experience of the impact that certain courses of police conduct can have upon *Charter*-protected interests, and of the real effect of *Charter* violations upon the well-being of citizens.



what powers they have. In that case, we could characterize the decisions made by the police in *Godoy* or *Knowlton* as decisions made in the public interest in their capacity as administrative actors. Their decisions would warrant the sort of respect and deference that courts routinely give other administrative bodies.

This non-Diceyan account would explain the Court's willingness to expand the defence of lawful authority. Justice Dickson's decision in *Perka* assumed that it fell to Parliament to make decisions about social policy—to decide when the bodily integrity or other rights of citizens may justifiably be invaded or infringed by others. But once we suppose that Parliament is capable of delegating that sort of balancing to administrative actors, we are drawn to the conclusion that they too can decide what sorts of infringements are justified as a matter of social policy. The ambit of the defence of lawful authority can, then, be expanded not only by the legislature, but by police officers themselves. The role of the courts is merely to check whether the balancing undertaken by law enforcement agents fails the test of reasonableness (as opposed to one of correctness).

Taking seriously the status of police officers as administrative actors also helps to explain the Court's approach to obstruction. We have seen that the Court opted not to interpret police duties in a narrow fashion when defining the scope of the offence, though this would encourage citizens to resist unlawful assertions of power. Once we say that police officers have the authority to decide whether they have certain powers, it is no longer reasonable for citizens to presume that they are free to resist exercises of those powers. If, as Parliament has declared, it is wrongful to resist police officers in the execution of their duties, and if police officers have the authority (albeit within limits) to define those duties, then the case can be made that resistance to a police power, whether expressly conferred or not, presumptively amounts to a criminal wrong.

To see how this case of presumptive wrongfulness could be made, we need to jettison (for the sake of argument) the quite thin conception of equality advanced by the Diceyan model, and tentatively replace it—if only by way of a sketch—with something more robust. As we have seen, Dicey's principle of legality is intuitively attractive because it places the citizen and the official on common ground; it underscores that we are all equal before the law. But it also makes it impossible for any given person to claim that she has a stronger right to speak in the name of the

law than any other. A police officer, on the Diceyan model, may exercise the powers explicitly delegated to her, but cannot decide that my private interests should yield for the sake of some broader public good. Thus the Diceyan seems not to have the resources to explain why a police-initiated RIDE program,<sup>144</sup> or a search of student lockers,<sup>145</sup> is anything other than an arbitrary assertion of the police officer's (or school principal's) private will.

This is problematic because we also intuit that a commitment to equality requires more than just non-interference by the state in citizens' private affairs. It frequently demands that someone authoritatively intercede on behalf of those vulnerable members of the community who would otherwise be at the mercy of the more powerful.<sup>146</sup> Now, there is nothing in Dicey's principle of legality that precludes the legislature from expressly authorizing police officers to conduct RIDE programs, or enter homes to investigate disconnected 9-1-1 calls, or impound uninsured vehicles.<sup>147</sup> But the Diceyan model is committed to the view that, in the absence of express legislation, the police officer has no more right to use force than any other citizen—her forcible intercession, to the extent it goes beyond what the legislature has said citizens can do to protect each other, is no less a public wrong than the attack or endangerment she seeks to forestall. We might be able to characterize her conduct as excused, such that she is not criminally liable for her actions. In that case, though, we have still treated her course of action as a lesser evil rather than as being appropriate or warranted.<sup>148</sup> We may want to go further than that, and say that it is right and proper for police officers to speak and act on behalf of the public interest. If that is the case, however, then we seem committed to saying that citizens who resist such authoritative claims have engaged in a public wrong. In short, a more robust model of equality—one that emphasizes the role of the state in creating conditions under which

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144. See *Dedman*, *supra* note 4.

145. See *M(MR)*, *supra* note 8.

146. See Thorburn, "Two Conceptions", *supra* note 128.

147. See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 14 (observing that Packer's crime-control model is consistent with the Diceyan model of equality).

148. See *Perka*, *supra* note 123 at 252.

everyone can pursue their individual conceptions of the good life—will give us some reason to interpret obstruction in broad terms.<sup>149</sup>

Taking this approach does not mean abandoning the idea that courts are entitled to review police determinations. But, assuming that a decision by a police officer deserves deference, it will be reviewed like other administrative decisions, on a reasonableness standard. Even if the reviewing court disagrees with the decision, it will often be upheld as a valid exercise of administrative authority on the basis that the front-line decision-maker was in a better position to weigh all relevant factors than the Johnny-come-lately reviewing court. There is effectively a presumption that the first-instance decision was right. That being the case, citizens can rarely be justified in resisting that decision.

One might object to a step in the above argument. In principle, judicial deference to the decisions of administrative actors might be based less on their presumed rightness than on their excusability—that is, on the idea that, even when administrative actors make incorrect decisions, it is important to defer to them (at least sometimes) for the sake of finality or some other value. If that account is accurate, it is less clear that citizens who resist police interpretations of their duties presumptively act wrongly by doing so. Although the officer should be excused, and not sanctioned (either civilly or criminally) for her mistake, we might be inclined to say that the citizen also should not be punished for acting on the basis of an interpretation of police powers that was correct (or, anyway, more correct than that reached by the officer whose determination she resisted). Justice Laskin's reasoning in *Biron*, in other words, becomes more persuasive.

There are two responses to this objection. First, the idea that judicial deference to administrative decisions is sometimes grounded in excuse rather than justification—that is, in our interest in finality rather than in the expertise of the decision-maker—finds little support in the case law. John Gardner has recently made such an argument, but he made it by way of saying that the distinction between justification and excuse was unknown to public law, and that it was therefore at a stage of theoretical

149. See Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58:1 UTLJ 75 (arguing that Dicey's model of the rule of law was informed by a political philosophy that emphasized negative rights against the state and marginalized positive rights). For the classic distinction between positive and negative rights, see Isaiah Berlin, "Two Concepts of Liberty" in Isaiah Berlin, ed, *Four Essays on Liberty* (New York: Oxford University Press, 1969) 118.

infancy (relative to the substantive criminal law).<sup>150</sup> The mere fact that public law does not draw the distinction is, of course, no reason for it not to—many instances of deference in judicial review may be more adequately explained as cases of excuse rather than justification. Unless and until the distinction is drawn though, we seem committed to treating police determinations of their powers as presumptively justified. Second, even if deference is sometimes grounded in excuse rather than justification, we may still want citizens to treat police determinations as presumptively final.

As I noted at the outset of this paper, my aim is only to show that the administrative model of police powers plausibly explains the approach taken by the Supreme Court over the last 40 years, and that its explanatory power is arguably better than that provided by the Diceyan model. In making that case, I have tried to show that the administrative account has some intuitive appeal. I am less interested in “selling” the administrative model as categorically superior, however, than in showing that it should at least be taken seriously by criminal lawyers and academics, and that Dicey is not the only game in town. To that end, I am content to point out that the administrative model better explains the Supreme Court’s post-*Charter* approach to police powers, the Court’s approach to obstruction, its implicit willingness to expand the justificatory defence of lawful authority in spite of *Perka*, and its approach to the judicial review of other administrative decisions that interfere with *Charter* rights. It also reflects the difficulty one has in reconciling the modern, thriving welfare state with the alleged centrality of the principle of legality.

## Conclusion

Whatever the merits of the Diceyan position, it has nothing like the grip on the Canadian legal imagination that Stribopoulos and others suppose. On the contrary, our law of criminal procedure presupposes that some individuals are more entitled to speak and act on behalf of the public interest than others. To make that claim is neither to dismiss concerns about low-visibility police encounters with citizens, in which decisions ostensibly made in the public interest in fact reflect discriminatory

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150. *Supra* note 116 at 94–97.

attitudes or values hostile to *Charter* rights, nor to suggest that the courts are insensitive to them. It does, however, suggest that objections to broad (and broadening) police powers must be reframed. If the courts intend to defer to police interpretations of their powers on the understanding that the police have the expertise to balance *Charter* rights against the wider public interest, it falls to critics to insist on the sort of robust police education and training on institutional competence that will make judicial deference warranted. A mere insistence on the institutional *illegitimacy* of police officers interpreting their own legislative grants of authority will have no traction.

Without dwelling on this point, I would observe that the Supreme Court has already shifted its attention to questions of institutional competence in its recent case law on *Charter* remedies. In *R v Grant*, the majority revamped its approach to exclusion of evidence under section 24(2), placing a heavy emphasis on the good faith of police officers.<sup>151</sup> The majority made it clear that bad faith violations include not only deliberate violations by individual officers, but also violations resulting from *systemically* negligent police practices.<sup>152</sup> Similarly, in *Vancouver (City of) v Ward*, the Court underscored that *Charter* damages awarded under section 24(1) should be directed at institutions of government, rather than at individual agents.<sup>153</sup> Again, this suggests that the point of *Charter* damages is to address institutional policies that have failed to inculcate, among administrative actors, a proper respect for *Charter* values. One implication of both cases is that the institutional failure to train police officers in such a way that they can and will engage in a responsible balancing of *Charter* rights and law enforcement interests amounts to especially egregious state conduct. This makes particular sense if police officers have the responsibility, not just to respect *Charter* rights, but to determine their scope and limits in low-visibility encounters.

Whether these or other remedies for law enforcement misconduct will do enough to encourage better training and education for police officers is, as I observed earlier, an empirical question falling beyond the scope of this paper. My point, here, is more modest: that discussions of the rule of law will carry us only so far, certainly not as far as many critics

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151. 2009 SCC 32, [2009] 2 SCR 353.

152. *Ibid* at para 75.

153. 2010 SCC 27 at para 68, [2010] 2 SCR 28.

of the Supreme Court's police powers jurisprudence have supposed. To effectively argue that police discretion poses a problem to be solved, we must focus on how it is exercised, not how it is created. Critiques must not be supported by sweeping appeals to the rule of law, but by hard evidence about the limits of police expertise that goes beyond the merely anecdotal. If the debate is to move forward, that must be the roadmap.