

John Gardner's Transatlantic Shadow

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In Rethinking Criminal Law Theory, François Tanguay-Renaud and James Stribopoulos present a collection of papers by Canadian thinkers on a number of issues pertaining to criminal law. In this review essay, the author examines three contributions to the collection—by Malcolm Thorburn, François Tanguay-Renaud and Annalise Acorn—all of which engage with the work of John Gardner. Thorburn's paper continues his debate with Gardner over the nature of police powers, self-defence and justificatory defences in general. Tanguay-Renaud addresses the use of defences in "private emergencies". Though Tanguay-Renaud accepts much of Gardner's approach to criminal defences, the former's treatment of "epistemic justifications" breaks down the latter's division between justification and excuse—a distinction Gardner thought was important in his debate with Thorburn. Finally, Acorn weighs in on a debate between Gardner and Ronnie Mackay on whether stigma should be attached to claims of diminished responsibility and mental disorder. Throughout this review, the author's primary aim is to expose some of the fault lines in the debates, rather than to take sides.

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Introduction

I. Gardner and Thorburn on Police Powers

A. Justificatory Defences and Public Law

B. The Diceyan and Kantian Models of Equality

II. Thorburn on Self-Defence

A. Individuals as State Actors

B. Individuals and Their Role as Decision-Makers

III. A Guidance Function for Justificatory Defences?

IV. Justifications, Excuses and Warrants

V. Gardner and Acorn on Mental Disorder and Stigma

Conclusion

Introduction

Rethinking Criminal Law Theory,¹ a collection of papers dealing with various theoretical issues in the substantive and procedural criminal law, is an important addition to the recently-expanding body of literature on this topic in Canada. Edited by François Tanguay-Renaud and James Stribopoulos, the volume includes a number of essays concerning (among other things) the proper scope of the criminal law, the nature of justifications and excuses, responsibility, evidence, policing and special issues arising in the context of international criminal law. The volume makes interesting and valuable contributions to several debates going on throughout the common law world.

A quick sampling of just a few of the papers shows how diverse they are. Leslie Green considers the relationship between “community standards” and criminal prohibitions on pornography in the internet age. James Stribopoulos examines the significance of unreviewable police discretion on Herbert Packer’s distinction between “crime control” and “due process” models of criminal justice. Kimberley Brownlee asks whether human beings have a right to social inclusion, and what it would mean to our ideas of criminal justice if we did. And a number of papers consider whether and how criminal law concepts could apply in the international and transnational criminal law context.

Given that the book contains more than a dozen articles on a diffuse range of topics, it would be silly even to attempt to discuss all of

1. François Tanguay-Renaud & James Stribopolous, eds, *Rethinking Criminal Law: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012).

them here. Instead, I am going to focus on three articles, all situated in Part I of the volume, and all of which directly engage the work of one of the world's leading criminal law theorists, John Gardner. This is a risky approach. It sometimes makes the debates occurring within the volume (or indeed in criminal law theory generally) appear insular or esoteric. Furthermore, Gardner himself has stated that his scholarship, at least in the immediate future, will no longer focus on the criminal law.² But given all he has had to say about a wide range of issues in the criminal law, the fact that he has “retired” as a criminal law theorist makes it all the more interesting and important to think through some of his earlier remarks. In any case, though the papers I discuss are loosely bound together by their shared preoccupation with Gardner's views, my intention is not simply to use them as a springboard for a discussion of his work, but to engage with them on their own terms.

The bulk of this review essay focuses on the debate between Malcolm Thorburn and John Gardner and the interjection of Tanguay-Renaud, who in many (but not all) respects echoes Gardner's position. The three thinkers tell very different stories about criminal defences, stories that reflect differing views about the relationship between law and practical reason, the guidance function of the substantive criminal law, and the extent to which we should try to draw neat lines between justifications and excuses. In the final part, I examine Annalise Acorn's intervention in Gardner and Timothy Macklem's debate with Ronnie Mackay on the relationship between self-respect, mental disorders and criminal defences. Throughout, my aim is to neither defend nor attack any particular theory, but simply to track some of the fault lines.

I. Gardner and Thorburn on Police Powers

A. Justificatory Defences and Public Law

In *The Concept of Law*, H.L.A. Hart famously drew a distinction between conduct-guiding rules and power-conferring rules.³ There can be no doubt that criminal offences purport to guide conduct. On at least one

2. John Gardner, “In Defence of *Offences and Defences*” (2012) 4:1 *Jerusalem Review of Legal Studies* 110 at 110–11.

3. HLA Hart, *The Concept of Law*, 3d ed (Oxford: Oxford University Press, 2012).

influential view, they create “protected reasons”, directing us to ignore the countervailing reasons we have for or against engaging in a certain course of action.⁴ Criminal offences transform the normative terrain on which decisions about how to act must be made.

It is less obvious that justificatory defences guide conduct. John Gardner, in “Justifications and Reasons”, argued that they do not.⁵ A justificatory defence, he claimed, merely strips away the special protection that criminal prohibitions confer upon the reasons for or against acting in a certain way. The defence leaves us free to engage in the sort of weighing of reasons that, but for the criminal offence, we would have done anyway. To use Gardner’s language, the defence “cancels” the second-order reasons the offence gives us to ignore some of the first-order reasons for action.⁶ This is not to say, however, that the defence encourages or discourages private actors from relying on the first-order reasons which may now inform their decision-making.⁷ To take one example, the criminal law does not care whether an attacked person uses force against another in self-defence. The attacked party *may* use force, but if she does not—for example, because she is a committed pacifist—the criminal law has nothing to say about it. Indeed, we may regard her forbearance as praiseworthy.

On Gardner’s analysis then, justificatory defences cannot be conduct-guiding rules because they do not push the actor in one direction or another. Does that mean all justificatory defences are power-conferring rules? Malcolm Thorburn has suggested they are.⁸ A person who claims to have been justified in acting as she did essentially argues that she was acting as something akin to an agent of the state—someone with discretion (in the administrative law sense) to decide how best to address the special circumstances before her. According to Thorburn, the person who applies lethal force in self-defence stands in much the same position as

4. See Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed (Oxford: Oxford University Press, 2009) at 18; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, revised ed (Oxford: Clarendon Press, 1995) at ch 12.

5. John Gardner, “Justifications and Reasons” in John Gardner, ed, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 91 [Gardner, “Justifications and Reasons”].

6. *Ibid* at 106–08, 115–16.

7. See *ibid* at 115.

8. Malcom Thorburn, “Justifications, Powers, and Authority” (2008) 117:6 Yale LJ 1070 [Thorburn, “Justification, Powers, and Authority”].

the police officer who exercises her lawful authority to conduct an arrest or search (and who is subsequently prosecuted for assault or theft).⁹ In both cases, Thorburn observes, the courts tend to assess the defendant's conduct on a reasonableness standard.¹⁰ They do not go so far as to ask whether the accused's conduct was correct—i.e., whether the defendant was right to conclude that there was a compelling reason to, for example, inflict lethal force in self-defence.¹¹ By using a reasonableness standard, the courts arguably send the signal that they are prepared to defer to the defendant's judgment in much the same way as they might defer to that of a public actor whose conduct is now subject to judicial review. On this view, justificatory defences should be treated as a branch of public law.

Gardner has vigorously rejected this argument.¹² Neither the individual who claims to have acted in self-defence nor the police officer claiming lawful authority should be accorded deference by the court—their claims should succeed only if their behaviour was *actually* appropriate and not merely if it was, we might say, “reasonably perceived as reasonable” at first instance.¹³ To interpret the reasonableness requirement as Thorburn has, Gardner would say, is to dissolve the boundary between justification and excuse—since an excuse, for the latter, is just the claim that one's actions, though unreasonable, were based on a mistake that it was reasonable for someone in her position to make.¹⁴ Tellingly, Gardner criticized Thorburn's yoking of the law of defences to public law in part on the basis that public law is under-theorized, and has so far failed to draw important conceptual distinctions between justifications and excuses.¹⁵ For his part, Thorburn has effectively criticized Gardner for giving short shrift to the role of authority in criminal law—for proceeding

9. *Ibid.*

10. *Ibid* at 1081–82, 1091–92.

11. *Ibid.*

12. John Gardner “Justification under Authority” (2010) 23:1 Can JL & Jur 71 [Gardner, “Justification under Authority”].

13. See *ibid* at 90–91. Gardner appears prepared to accept that the defence of consent does operate in the manner suggested by Thorburn. *Ibid* at 83.

14. “Justifications and Reasons”, *supra* note 5 at 110.

15. “Justification under Authority”, *supra* note 12 at 94–97.

as if the state had nothing to say about whether criminal suspects should be arrested, or whether people should defend themselves from assailants.¹⁶

B. The Diceyan and Kantian Models of Equality

In his contribution to *Rethinking Criminal Law Theory*, Thorburn claims that his disagreement with Gardner boils down to a dispute about what it means for individuals to be equal before the law.¹⁷ The Diceyan model of equality supposes that no one has a greater entitlement than anyone else to engage in conduct that prima facie amounts to a criminal offence.¹⁸ All other things being equal, the police officer is in the same position as an ordinary citizen. She may, like any defendant, claim that she was justified in acting as she did, but her status as a police officer is, in itself, “neither here nor there”.¹⁹ Gardner, in his reply to Thorburn, seemed to strongly endorse the Diceyan model.²⁰ Thorburn, by contrast, adopts what he describes as “the Kantian model of equality”. On this view, people are equal insofar as each has a “sphere of personal sovereignty” that will be “vindicated” when it comes under threat.²¹ This kind of equality presupposes not just a legislative body, but the existence of people who can authoritatively intercede on behalf of members of the public who have been or will be wronged.²² In the absence of that kind of authoritative presence “on the ground”, threats against personal sovereignty could be addressed, not by appealing to right, but only to raw force.²³ A commitment to Kantian equality, then, entails a commitment

16. “Justification, Powers, and Authority”, *supra* note 8 at 1084–85 (observing that Gardner’s approach fails to distinguish between vigilantism and lawful police activity).

17. Malcolm Thorburn, “Two Conceptions of Equality before the (Criminal) Law” in Tanguay-Renaud & Stribopoulos, *supra* note 1, 3 [Thorburn, “Two Conceptions of Equality”].

18. *Ibid* at 4–7.

19. Gardner, “Justification under Authority”, *supra* note 12 at 97.

20. *Ibid* at 95–97.

21. Thorburn, “Two Conceptions of Equality”, *supra* note 17 at 8. See also Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009).

22. See Thorburn, “Two Conceptions of Equality”, *supra* note 17 at 10–11.

23. See *ibid* at 10.

to the idea that certain individuals are entitled to greater deference than others when determining whether they were justified in using force.

As Thorburn freely concedes, the Diceyan model of equality has a stronger hold on the Anglo-American legal imagination than the Kantian conception.²⁴ Many critics of Canadian police powers jurisprudence, for example, have criticized it implicitly or explicitly on the basis that it conflicts with the Diceyan understanding of the rule of law.²⁵ Far from treating police officers as ordinary citizens with only narrow additional powers that must be strictly construed, the courts have tended to be generous in their interpretation of police powers.²⁶ Elsewhere, I have argued that these criticisms may well miss their mark precisely because it is unclear that the courts share this understanding. The police powers case law arguably presupposes something like the Kantian model of equality that Thorburn has advanced.²⁷ He is right, moreover, that the courts do not seem terribly “embarrassed” by the fact that Parliament has expressly conferred extensive powers upon law enforcement officials that have not been conferred upon the public at large.²⁸ With respect to police powers, it is simply not clear that Gardner’s account fits with common practice.

II. Thorburn on Self-Defence

A. Individuals as State Actors

The matter becomes decidedly more vexed when we turn away from police powers and toward self-defence. Here, Thorburn’s suggestion that

24. *Ibid* at 4.

25. See e.g. James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005) 31:1 Queen’s LJ 1 [Stribopoulos, “In Search of Dialogue”]; Steve Coughlan, “Common Law Police Powers and the Rule of Law” (2007) 47 CR (6th) 266; Steve 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), [unpublished]; 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.

26. For a discussion of post-*Charter* case law, see Stribopoulos, “In Search of Dialogue”, *supra* note 25.

27. See Michael Plaxton, “Police Powers After Dicey” (2012) 38:1 Queen’s LJ 99.

28. Thorburn, “Two Conceptions of Equality”, *supra* note 17 at 16.

individuals are justified insofar as they have been authorized to administer force as public officials resonates far less. He concedes as much.²⁹ We are, he notes, resistant to the idea that the state could refuse to confer the power on individuals to defend themselves against attacks.³⁰ He claims, though, that his account would not entail that the state could do such a thing. He remarks:

Although I argue that the criminal law justification of self-defence has its normative ground in the delegation of a state power, it would be wrong for the state to foreclose the use of force in self-defence to private citizens. The *reason* why it would be wrong on my account, however, is crucial. Prohibiting the use of force by private citizens in self-defence is tantamount to condemning certain innocent individuals to death at the hands of their attackers. And this is an exercise of public power that, like the decision to execute innocent persons, could not possibly be legitimate.³¹

In essence, the individual administering force in self-defence is like the police officer inasmuch as she purports to protect an individual's sphere of personal sovereignty—the difference is only that the sovereignty she protects is her own. It is presumably necessary for the state to confer this authority upon citizens because it could not otherwise guarantee that a public authority would be available and on hand to intercede on victims' behalf. We cannot have a society in which right prevails over force unless the state authorizes private actors to use force in self-defence.

To a point, this answer is serviceable enough. But, as Thorburn says in the above quotation, his reasons are crucial—and it is his reasoning that readers will find unsettling. We do not tend to think of attacks upon ourselves as matters in which we disinterestedly “intercede” in the fashion of a professional law enforcement agent, and only because a more legitimate (i.e., state) actor is not immediately available. Rather, we think of these attacks as conflicts which in a sense “belong” to us, and which the state cannot take away—that is, by casting us as supporting players in a drama that is really our own—without doing a kind of symbolic violence to us.³² Indeed, whereas a police officer, though equipped with discretion, has a professional duty to enforce the law, it would be more

29. *Ibid* at 19.

30. *Ibid*.

31. *Ibid* [emphasis in original].

32. Nils Christie, “Conflicts as Property” (1977) 17:1 *Brit J Crim* 1 (I borrow this language, but do not necessarily endorse his argument in its entirety).

unusual to suggest that a person who faced a threat to her own life had a *duty* to repel that threat with lethal force. Yet that seems to be the thrust of Thorburn's account, which treats attacks on a person as fundamentally public emergencies in which the person attacked represents the first law enforcement official on the scene.

Should that understanding be as jarring as it is? After all, we commonly speak of the state as having a monopoly on the legitimate use of force.³³ Thorburn simply takes that proposition and reasons that if private citizens are sometimes permitted to use non-consensual force, it must be because they are acting as something other than private citizens. The law, he suggests, cannot be indifferent to its use. Tanguay-Renaud, in his contribution to the volume, seems to disagree with that conclusion.³⁴ He asks:

[D]oes the law really claim to monopolise the authoritative determination of the permissibility of *all* uses of force? In legal systems with which I am familiar, it certainly does not explicitly make this claim across the board. For example, it does not regulate the permissibility of my decision to cut myself with a knife or to lift a heavy box. It sometimes even explicitly denies having interest in some uses of force against others, such as trifling ones, as exemplified by the oft-cited legal maxim *de minimis non curat lex*. Instead, the legal regulation of force seems to be focused on *certain* uses—namely, those that may hinder social life, such as violent retaliation, coercion and killings or serious inflictions of harm to others.³⁵

But Tanguay-Renaud's own answer is not altogether satisfying for a number of reasons. First, Canadian appellate courts have been reluctant to recognize the *de minimis* doctrine as a valid defence in the assault context.³⁶ It has not been decisively rejected either—now and then, one member or another of the Supreme Court of Canada will toy with the idea

33. See Malcolm Thorburn, "Criminal Law as Public Law" in RA Duff & Stuart Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) 21 at 36, n 51.

34. François Tanguay-Renaud, "Individual Emergencies and the Rule of Criminal Law" in Tanguay-Renaud & Stribopoulos, *supra* note 1, 21.

35. *Ibid* at 42 [emphasis in original].

36. See e.g. *R v Kubassek* (2004), 189 OAC 339, 188 CCC (3d) 307; *R v Ewanchuk*, [1999] 1 SCR 330 at para 28, 169 DLR (4th) 193. For further discussion of the doctrine, see Hamish Stewart, "Parents, Children, and the Law of Assault" (2009) 32:1 Dal LJ 1 at 19.

of using it to cure what might be perceived as an overbreadth problem.³⁷ That, however, seems a tenuous basis for claiming that the state has no interest in certain uses of force, even if other jurisdictions have been more enthusiastic in endorsing the principle.

Tanguay-Renaud's second observation is, if anything, more problematic. He observes that the law "does not regulate the permissibility of my decision to cut myself with a knife or to lift a heavy box". But the obvious reply is that these are consensual applications of force. Gardner took the view that consent is the one justificatory defence that conceivably fits Thorburn's model, suggesting that the law at least sometimes treats the consenting party as someone with the power to authorize wrongful applications of force.³⁸ (For his part, Thorburn explicitly argued that consensual applications of force do not need to be justified insofar as they "[carry] out the wishes of the person who is sovereign over his own body.")³⁹ Whichever view one takes, though, Tanguay-Renaud's example cannot support the proposition that the law is *uninterested* in non-consensual applications of force.

Thus, even if the law does not claim a monopoly on the use of non-consensual force in the sense that only "full-time" public officials can wield it, Thorburn may have a point that the law is never silent on whether it should be used.

B. Individuals and Their Role as Decision-Makers

We might take issue with Thorburn's analysis from another direction. He wants to say that it would be illegitimate not to permit citizens to apply force in self-defence. That is intuitively right, but he has trouble explaining why. After all, he does not want to say just that citizens can use self-defence, but that they are entitled to a degree of deference in deciding whether it was appropriate to do so. Now, in other public law contexts, deference is ostensibly grounded in the expertise of the public authority

37. See e.g. *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 132, [2004] 1 SCR 76, Arbour J; *R v Cuerrier*, [1998] 2 SCR 371 at para 21, 162 DLR (4th) 513.

38. "Justification under Authority", *supra* note 12 at 75-83. Tanguay-Renaud acknowledges this, *supra* note 34 at 42, n 52.

39. "Two Conceptions of Equality", *supra* note 17 at 18.

making the decision.⁴⁰ But ordinary citizens have no such expertise when it comes to deciding whether and when force is appropriate.⁴¹ Thorburn avoids this problem by grounding administrative deference less in expertise than in the idea that public officials function as fiduciaries, implicitly comparing the decision-making authority of someone acting in self-defence to that of a parent exercising authority over her children.⁴² (Parents, too, typically lack any special expertise in the field of parenting, yet we defer to their judgments every day.) In taking that approach, though, Thorburn adopts an esoteric model of public law. That the model is unusual is not a knockdown argument in itself. It underscores Gardner's objection, however, that it may be unwise to yoke a theory of criminal defences to a field as under-theorized as public law.⁴³

If we ignore Gardner's warning for now and take Thorburn's attempt seriously, it may be worth considering whether a person acting in self-defence could assert some sort of claim of limited expertise. Interestingly, Tanguay-Renaud's paper is instructive here. He argues that there are such things as "individual" (as opposed to "public") emergencies, in which the law essentially withdraws, leaving the individual to fall back upon her own practical reason. It does so, he argues, because the law is in no position in crisis situations to provide effective guidance on how one should act.⁴⁴ Tanguay-Renaud adopts Gardner's understanding of justifications as "cancelling permissions", claiming that the person who uses force in self-defence is neither guided by the law nor acting as a quasi-public official.⁴⁵ The individual merely has "practical latitude".⁴⁶

There is a perilously thin line between saying that the law permits people to act in self-defence because the legislature *lacks* the expertise to guide them in crisis situations (Tanguay-Renaud's view), and saying

40. See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012).

41. There is an interesting question as to whether even professional police officers genuinely have the sort of training and sensitivity to be described as "experts" to whom deference is owed, but let us set that point aside for the sake of argument.

42. "Two Conceptions of Equality", *supra* 17 at 19. See also Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31:1 *Queen's LJ* 259.

43. "Justification under Authority", *supra* note 12 at 94-97.

44. *Supra* note 34 at 22.

45. *Ibid* at 42-43.

46. *Ibid*.

that it recognizes the defence because the individuals entangled in those situations are in a special position to know whether and when force is appropriate—e.g., to assess the gravity and imminence of the peril. Even if ordinary members of the public do not have the sort of training and guidance that (we hope) professional police officers receive, they arguably stand in a privileged position relative to everyone else at the moment they are threatened (assuming there is no police officer on the scene). On that basis, it is plausible that the law would confer *public* powers upon individuals to apply force in self-defence.⁴⁷ I do not want to draw any firm conclusions on this point, but it is worth thinking about.

III. A Guidance Function for Justificatory Defences?

Let us set Thorburn’s interpretation aside for a moment and accept, for the sake of argument, that justificatory defences are not power-conferring rules. That still leaves the question of whether they are conduct-guiding norms. Gardner, we have seen, wants to say that they are not—that the criminal law has nothing to say, for example, about whether a person should use force to repel her attacker. Tanguay-Renaud echoes that view. But it rests on a contentious Razian premise about what it means to be “guided” by law.⁴⁸ In particular, it supposes that the criminal law only guides us when it pre-emptly our consideration of competing reasons for action. “Cancel” the pre-emption, Gardner and Tanguay-Renaud argue, and there is no longer any guidance—no service for the law to perform. We might take a different, broader view of what it means to be guided. Jeremy Waldron has argued that the law can assist us in our practical reasoning by alerting us to the need to weigh certain reasons for or against a course of action.⁴⁹ Thus, a road traffic provision prohibiting drivers from proceeding at a speed that is more than “reasonable and proper” can

47. See Scott J Shapiro, *Legality* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011); Daly, *supra* note 40 at 80.

48. Both Gardner and Tanguay-Renaud wear their Razian colours freely. See Gardner, “Justifications and Reasons”, *supra* note 5 at 105; Tanguay-Renaud, *supra* note 34 at 29.

49. Jeremy Waldron, “Vagueness and the Guidance of Action” in Andrei Marmor & Scott Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford: Oxford University Press, 2011) 58.

provide guidance even though it does not tell motorists precisely what speed that is.⁵⁰ Scott Shapiro, for his part, has likewise argued that the law can serve a guidance function so long as it “channels deliberation in a particular direction”.⁵¹

Do justificatory defences serve that limited sort of guidance function? Arguably, yes.⁵² Consider the old section 34 of the *Criminal Code*. It provided that one using force in self-defence must use “no more [force] than is necessary to enable him or her to defend himself”.⁵³ The provision did not tell us precisely how much force we could employ against attackers, or identify the precise point at which force became excessive. Still, it may have served as a useful reminder that though some force could be justified to fend off an attacker, all moral bets were not off. Indeed, the person who was under attack also received guidance from another source: the criminal prohibition, which enjoined her from intentionally applying force to others without their consent. Though, by virtue of the old section 34, it did not pre-empt the actor’s consideration of reasons to inflict force on others (assuming it ever did), it still served as a reminder that there are strong moral reasons not to injure people. One may wonder if most people really need such a reminder; criminal assault, after all, is surely a *malum in se* offence. But it is precisely during these “private emergencies”, which Tanguay-Renaud is keen to address, that we are most likely to over-react, misjudge the threats we face and respond in disproportionate ways.

That point lies at the bottom of Meir Dan-Cohen’s observation that the criminal law may have an interest in withholding information about defences from the public at large.⁵⁴ A person who knows that she is permitted to use force under certain conditions will be more likely to give the reasons *not* to use it insufficient weight—that is, she will be more likely to engage in flawed practical reasoning. By contrast, the person who is

50. *Ibid* at 59.

51. *Supra* note 47 at 276.

52. It is worth emphasizing here that I am discussing only the conceptual claim that the criminal law serves a conduct-guiding function. I am not making the empirical claim that the criminal law in any particular system in fact succeeds in discharging that function.

53. *Criminal Code*, RSC 1985, c C-46, s 34, before re-enactment by *Citizen’s Arrest and Self-defence Act*, SC 2012, c 9, s 2.

54. Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law” (1984) 97:3 Harv L Rev 625.

unaware of the existence of a defence will be more likely to use force only when it is genuinely reasonable to do so. Indeed, she may refrain from using force in spite of the fact that it is reasonable and in spite of her desire to use it: making defences unknown to the public at large may distort actors' practical reasoning rather than assist it.⁵⁵ This is why we may find the idea of acoustic separation less troubling in the context of excuses (which exculpate an accused despite the wrongfulness of her conduct) than in the context of justifications.⁵⁶ This likewise explains Tanguay-Renaud's suggestion that it is appropriate to make certain justificatory defences (like self-defence) explicit. "In such cases," he observes, "legal silence is insufficient, but only because the permission is set against a backdrop of prohibitions, including the prohibitions on murder, wounding and assault".⁵⁷ If the offence provision is not to warp practical reason in emergency situations, the existence of a defence like self-defence must be made known to the public. One can accept that proposition, though, without inflating it to the proposition that the criminal law cannot and should not provide any guidance at all to those who confront crises. And we are still left with the naked fact that a provision like the old section 34 of the *Code*—the vehicle, presumably, by which the public is alerted to the defence—does more than restore the *ex ante* normative terrain; it also alerts citizens *in extremis* to some salient moral considerations.

Moreover, Tanguay-Renaud is not altogether clear on whether justification-based defences do need to be public. Following the English approach, he treats necessity as (at least sometimes) a justification.⁵⁸ But unlike self-defence, the defence of necessity is uncodified.⁵⁹ The legislature has not explicitly alerted citizens to the fact that under some circumstances they can appeal to a "lesser evils" argument when answering a criminal charge. Nor has it alerted them to what those circumstances might be. Tanguay-Renaud does not seem to regard this as a problem, remarking

55. See *ibid.*

56. See *ibid.* at 639–45 (Dan-Cohen emphasizes the defences of necessity and duress, more usually associated with excuses, in illustrating acoustic separation).

57. Tanguay-Renaud, *supra* note 34 at 42.

58. *Ibid.* at 52. Under Canadian law, it is clear that the defence of necessity is to be treated exclusively as an excuse. See *R v Perka*, [1984] 2 SCR 232, 13 DLR (4th) 1. See also *R v Ryan*, 2013 SCC 3, 353 DLR (4th) 387.

59. Section 8 of the *Criminal Code* preserves common law defences, but it does not set out what defences are so preserved. RSC 1985, c C-46, s 8.

that it would only be a problem if the defence of necessity was supposed to provide guidance to citizens.⁶⁰ Yet the very reasons which earlier made it important to codify self-defence are no less present in the context of necessity—i.e., the fact that the “permission is set against a backdrop of prohibitions”.⁶¹ Tanguay-Renaud, then, seems caught between two unhappy positions. Either he must deny the common sense intuition that offences can continue to guide us even when a justificatory defence is available to an actor, or he must scale back his central claim that justification-based defences do not serve a guidance function.

IV. Justifications, Excuses and Warrants

Tanguay-Renaud, like Gardner, claims that justificatory defences simply restore the actor to a normative zone in which the law is silent on how to behave. But he acknowledges the point raised a moment ago that people facing emergency situations are likely to engage in flawed practical reasoning. When they do this—by, for example, misjudging the imminence of a threat or the extent to which force is required to meet it—he takes the view that the criminal law should and does excuse their behaviour. It does so, Tanguay-Renaud suggests, by applying the very reasonableness standard that Thorburn takes as a standard of (justification-based) deference.⁶² Tanguay-Renaud rejects that interpretation,⁶³ but he is plainly uncomfortable with the suggestion that a person *in extremis* can only be justified in acting as she did if she engaged in the sort of weighing of competing reasons that one would expect of a cool-headed deliberator. In particular, he worries about situations in which an actor rightly proceeds on the basis of incomplete or faulty information but, in so doing, weighs competing reasons incorrectly.⁶⁴ It is, after all, often the case that a person in a crisis situation must respond to it in spite of a lack of evidence. Indeed, we might say that is the *normal* state of affairs when making decisions in emergencies. We do not, as Tanguay-Renaud observes, necessarily want

60. *Supra* note 34 at 52.

61. *Ibid* at 42.

62. Thorburn, “Justifications, Powers, and Authority”, *supra* note 8 at 1081–82, 1091–92.

63. *Supra* note 34 at 46.

64. *Ibid* at 46–47.

to say that the responder is merely excused; we want to say that she acted in a permissible way given the evidence before her.

This blurs the line between justification and excuse in tantalizing ways. Following Antony Duff, we might want to refer to conduct that is permissible relative to the evidence available to the actor as “warranted”.⁶⁵ I am inclined to agree that we should move beyond the either/or model of justifications and excuses. Doing so, however, poses a problem for Tanguay-Renaud and Gardner in their argument with Thorburn. Duff’s talk of “warrants” shines a light on what it is. We are most likely to use the language of warrants in the police powers context. It has a clear connection to the defence of lawful authority: in acquiring a search or arrest warrant, the authorized police officer is granted permission to engage in what would ordinarily be described as a theft, assault or kidnapping.⁶⁶ It may be that the warrant was sought and issued in error. Nonetheless, the officer would be entitled to say that she should not only be excused, but judged to have acted appropriately under the circumstances.

Indeed, Akhil Reed Amar has offered a persuasive (if unorthodox) reading of the warrant requirement in the Fourth Amendment of the United States Constitution,⁶⁷ arguing that it was historically treated as a sub-standard means of protecting citizens from trespasses by law enforcement agents.⁶⁸ In the absence of a warrant, police officers would have had to decide whether to conduct searches and seizures in the knowledge that if they incorrectly weighed the competing reasons for and against doing so, they would face civil or criminal liability.⁶⁹ The warrant emboldened law enforcement agents to perform searches that were not strictly speaking justified, assuring them that their conduct

65. Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007) ch 11. Tanguay-Renaud does cite Duff, but does not say just how far he would be prepared to follow him. See Tanguay-Renaud, *supra* note 34 at 47, n 60.

66. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, Conn: Yale University Press, 1998) ch 4 [Amar, *Bill of Rights*]; Akhil Reed Amar, “Fourth Amendment First Principles” (1994) 107:4 Harv L Rev 757 [Amar, “Fourth Amendment First Principles”].

67. US Const amend IV (“the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”).

68. Amar, “Fourth Amendment First Principles”, *supra* note 66.

69. See Amar, *Bill of Rights*, *supra* note 66 at 69–70.

would be judged not on a correctness standard, but on a more forgiving reasonableness standard. The warrant system was, on this account, not just power-conferring, but designed to encourage more searches by officers.⁷⁰

This does not just square nicely with Thorburn's analysis of police powers. It forces us to ask how often the language of warrants best captures what is going on in cases of self-defence or justificatory necessity. If it turns out that those acting *in extremis* situations *typically* make decisions on the basis of incomplete or faulty information—if warranted conduct is the norm, and justified conduct the exception—then it no longer makes sense to criticize Thorburn for advancing a model of “justification” that blurs the lines between justification and excuse. In short, the observation that Tanguay-Renaud makes that at least some “justifications” are really hybrid justification-excuses threatens to tip the scales in the Thorburn-Gardner debate in Thorburn's favour.

Some of the confusion may well be attributed to Gardner himself. He has argued that the structure of excuses broadly echoes that of justifications: in deciding whether an action was excused, we ask whether the actor had good reasons for thinking that she had good reasons for acting as she did.⁷¹ The excused actor, then, is no less rational than the justified actor—only less successful in her reasoning. Furthermore, because the agent had good reasons for thinking herself justified, it is inappropriate to blame her for her mistake since it was the sort of mistake that any rational actor in her position might make. The difficulty is that on this analysis, the category of excuses blurs into the category of warrants, which is ostensibly why there is no room for warrants on Gardner's account. But we could just as easily say that on Gardner's model, the field of excuses has been largely colonized by warrants.⁷² That being the case, we should again be suspicious of claims that Thorburn's model of justifications fails (more

70. See *ibid.*

71. Gardner, “Justification under Authority”, *supra* note 12 at 86.

72. How true that is may depend on what we make of Gardner's claim that excuses can be grounded not only in justified mistakes but in justified emotions. See John Gardner, “The Logic of Excuses and the Rationality of Emotions” (2009) 43:3 *Journal of Value Inquiry* 315. Though I agree that it would make no sense to say that police officers are “warranted” in acting on the basis of their emotions—as Gardner himself argues, we expect cool-headedness from law enforcement agents—I am not so sure that we could never use that terminology in cases of justified emotion. For my purposes here, though, I set that point aside.

than other accounts) for want of conceptual clarity on the distinction between justification and excuse.

V. Gardner and Acorn on Mental Disorder and Stigma

Gardner's theory of defences presupposes that human beings are defined by their ability to exercise practical reason. It is because human beings can be responsive to competing reasons for action that, in his view, the law can sometimes withdraw its guidance and allow citizens to decide for themselves whether it is appropriate to apply force to others and why the idea of justification is so central to Gardner's theory of criminal defences. But that understanding of personhood opens Gardner to attack from another direction. Though I argue this attack probably misses the mark, it is nonetheless instructive.

Gardner argues that not all defences are created equal. To the self-respecting moral agent, he claims, negative defences are preferable to positive ones, justifications are preferable to excuses, and excuses are preferable to assertions that one lacked responsibility.⁷³ All other things being equal, the self-respecting defendant would rather be in a position to deny wrongdoing at all. But if she cannot, she would rather say that she engaged in wrongdoing for good reasons rather than bad reasons, and would rather make either claim than assert that she was unable to weigh reasons at all. The self-respect we have as human beings is tied to our capacity (and relative ability) to engage in practical reason. Gardner remarks:

[O]ne's responsibility is something to be proud of and (if possible) to defend. One's responsibility is closely bound up with the one's humanity, and to have it called into question is, with the best will in the world, degrading. Naturally one may still regret, and seek to avoid, the adverse normative consequences that one's responsibility sometimes brings with it. But the self-respecting way to avoid these is not by denying one's responsibility. Rather it is by offering a justification or an excuse.⁷⁴

73. John Gardner, "In Defence of Defences" in John Gardner, *supra* note 5, 77 at 87–88.

74. *Ibid* at 85–86.

The difficulty lies in Gardner's suggestion that a person who claims to have a mental disorder and asserts a lack of responsibility for her actions would be right to regard herself as "degraded"—that "stigma *should be* attached" to a diminished responsibility verdict.⁷⁵ As Annalise Acorn argues,⁷⁶ this view is tough to square with the contemporary therapeutic approach to mental illness:⁷⁷

The capacity to have and to give reasons for action is not especially important to the therapeutic understanding of the self. From the therapeutic perspective, not knowing why one did what one did, being subject to complex irrationalities buried in the subconscious, is endemic to the human condition. A capacity for an archaeology of the self directed towards greater knowledge of the mental injuries one has suffered displaces rationality as the distinctively human capacity. One seeks to understand the ways in which past injuries may have given rise to present illness. However, what is distinctively human is to acknowledge that one's actions are driven by irrational causes, to scrutinize one's past to uncover formative wounds and to work towards healing for the future. From within this therapeutic persuasion therefore, claiming impaired rationality and an inability to give reasons for one's actions does not demean.⁷⁸

The question Acorn sets out to address is primarily whether the therapeutic perspective itself encourages individuals to think about themselves in a way that could be described as degrading.⁷⁹ With important qualifications, she concludes it does. To explain why, she draws on PF Strawson's distinction between "participant reactive attitudes" and "objective attitudes".⁸⁰ Strawson argued that, in our interactions with other human beings, we will adopt one or the other understanding of their behaviour. When we adopt the reactive point of view, we treat those with whom we interact as having intentions and attitudes toward us.⁸¹ This is important for Strawson because our relationships with others, no matter what kind

75. John Gardner & Timothy Macklem, "No Provocation without Responsibility: A Reply to Mackay and Mitchell" (2004) *Crim L Rev* 213 at 216 [emphasis in original].

76. Annalise Acorn, "Responsibility, Self-respect and the Ethics of Self-pathologization" in Tanguay-Renaud & Stribopoulos, *supra* note 1, 141.

77. See e.g. *R v Luedecke*, 2008 ONCA 716 at paras 115–19, 93 OR (3d) 89.

78. Acorn, *supra* note 76 at 145–46.

79. At certain points in the paper, Acorn also expresses a concern that the therapeutic approach can be used to justify unlimited control and coercion.

80. Acorn, *supra* note 76, citing PF Strawson, *Freedom and Resentment and Other Essays* (London, UK: Methuen & Co, 1974) at 9.

81. *Ibid* at 6.

they are, presuppose some attitude or intention.⁸² Our involvement in social practices and institutions—in the human community—is otherwise unintelligible.⁸³ Even when individuals act involuntarily or make mistakes that give offence or injury, we still recognize them as intentional actors capable of both responding to us and recognizing our responses as themselves intentional.⁸⁴ We can accept that sometimes the unjustified⁸⁵ injuries people inflict do not warrant resentment, yet still see those who inflict them as members of the human community.⁸⁶

At times, however, we do not take the reactive attitude. Strawson argues, for example, that we often take the “objective” attitude when responding to small children or the seriously mentally ill.⁸⁷ He explains:

To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account of; to be managed or handled or cured or trained The objective attitude may be emotionally toned in many ways But it cannot include the range of reactive feelings and attitudes which belong to involvement or participation with others in inter-personal human relationships; it cannot include resentment, gratitude, forgiveness, anger, or the sort of love which two adults can sometimes be said to feel reciprocally for each other. If your attitude towards someone is wholly objective, then though you may fight him, you cannot quarrel with him, and though you may talk to him, even negotiate with him, you cannot reason with him. You can at most pretend to quarrel, or to reason, with him.⁸⁸

82. *Ibid.*

83. For discussion, see Michael E Bratman, “Responsibility and Planning” in Michael E Bratman *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge, UK: Cambridge University Press, 1999) 165.

84. See Strawson, *supra* note 80 at 7–8.

85. From the examples Strawson gives here—negligent conduct, mistakes, physical and normative involuntariness—it is reasonably clear that he does not have in mind justifications for inflicting injury.

86. See Strawson, *supra* note 80 at 7–8.

87. *Ibid* at 8–10. We do not only adopt the objective attitude when interacting with those who lack responsibility. We may also adopt it when we are acting as a non-participant observer of social life, whether as a social scientist or as a policymaker. *Ibid.* For a discussion on the different perspectives one can take on social practices, see Brian Z Tamanaha, “The Internal/External Distinction and the Notion of a ‘Practice’ in Legal Theory and Sociolegal Studies” (1996) 30:1 L & Soc’y Rev 163.

88. Strawson, *supra* note 80 at 9.

Acorn claims that the therapeutic perspective inherently involves the objective attitude. The modern approach to therapy may require the doctor to work with the patient, treating her as a person with intentions and goals worthy of respect, as a collaborator rather than a mere object to be acted upon or managed.⁸⁹ Nonetheless, Acorn argues, the doctor still occupies a position of authority over the patient. In the end, the patient must still be regarded as less than fully autonomous.⁹⁰ That is the message that the therapeutic perspective asks others (including the patients themselves) to internalize. To the extent that Gardner's view is incompatible with the therapeutic perspective, the problem may lie with the latter and not the former.

Intuitively, Acorn has a point. I would, however, make one or two observations with which I do not think Acorn would disagree. First, we should be careful about suggesting that it is inherently problematic to treat others (or oneself) as less than fully autonomous. Acorn is right to draw a moral distinction between the behaviour of Nurse Ratched towards McMurphy in *One Flew Over the Cuckoo's Nest* and that of Dr. Melfi towards Tony Soprano in *The Sopranos*.⁹¹ The difference is not simply that the treatment methods of one are less autonomy-affirming than those of the other. The difference is more than one of degree. Both deny their respective patient's autonomy to some extent, but Ratched's objectification of McMurphy goes well beyond that.⁹² At times, she seems to deny that he has any meaningful subjective life in the first place, regarding him as more or less interchangeable with other patients. In her dealings with McMurphy, she often proceeds as if he has no intentions or plans to speak of. Most importantly, Nurse Ratched treats McMurphy as an instrument to be used for her own ends—that is, to maintain her control and power over other patients in the hospital. It is far less clear that Dr. Melfi uses Tony in anything like the same way. There is, as Acorn notes, an (albeit limited) mutuality in their relationship that makes it qualitatively different from the Ratched-McMurphy dynamic.⁹³

89. See Acorn, *supra* note 76 at 155.

90. *Ibid* at 156.

91. For a discussion of both, see *ibid* at 153–56.

92. In the brief analysis that follows, I am drawing heavily upon Martha C Nussbaum, "Objectification" (1995) 24:4 *Phil & Pub Aff* 249 [Nussbaum, "Objectification"].

93. *Supra* note 76 at 154.

Furthermore, Dr. Melfi treats Tony's plans and intentions as significant and in no way regards him as fungible with other patients.

It is worth emphasizing the special ways in which Ratched objectifies McMurphy—her implicit denial that he has any inner life worth respecting, her treatment of him as fungible with others, and her treatment of him as nothing more than an instrument to be turned to her own ends—because doing so underscores that one need not be capable of full autonomy or “self-authorship” to be worthy of respect as a moral agent. As Martha Nussbaum has argued, certain denials of autonomy can be benign or even positive when they give us a glimpse of ourselves as embodied persons connected (emotionally and physically) to others.⁹⁴ It is when objectification takes the form of instrumentalization that it becomes most morally problematic.⁹⁵ Nussbaum's analysis of objectification was accepted by Gardner (writing with Stephen Shute) in “The Wrongness of Rape”.⁹⁶ It is admittedly difficult to know just how far he accepted her approach, but there is no hint that just *any* sacrifice of autonomy or self-control disqualifies one from social life or should be accompanied by stigma.

With this in mind, we need not see Gardner's claim that stigma is properly attached to pleas of diminished responsibility as a challenge to the therapeutic view, so long as that view takes seriously the need for mutuality between doctor and patient and does not embrace the patient's complete relinquishment of control and autonomy. Gardner would condemn the kind of “therapy” described in *Cuckoo's Nest*—who wouldn't?—and would, as Acorn notes, reject those aspects of the criminal justice system that pressure defendants into humiliating themselves by falsely denying their responsibility.⁹⁷ But there is no inherent opposition between the therapeutic view and Gardner's.

It is likewise worth examining Gardner's position in light of Acorn's observation that the therapeutic perspective is “forward-looking”—that

94. “Objectification”, *supra* note 92 at 267. See also Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge, UK: Cambridge University Press, 1999); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011).

95. See Nussbaum, “Objectification”, *supra* note 92 at 265.

96. John Gardner & Stephen Shute, “The Wrongness of Rape” in Jeremy Horder, ed, *Oxford Essays in Jurisprudence*, 4th ed (Oxford: Oxford University Press, 2000) 193.

97. *Supra* note 76 at 152.

its focus is not on allocations of blame for past conduct, but on “tak[ing] responsibility for improvement into the future”.⁹⁸ Though Acorn expresses discomfort with this idea, suggesting that an “aspirational conception of responsibility may authorize [too great an] intrusion in individual freedom”,⁹⁹ in important ways Gardner’s views of responsibility are also tied to the aspirations we have for ourselves as rational agents. He has argued that although excuses involve conceding the all-things-considered wrongfulness of one’s conduct, the justifiability of one’s mistake makes it inappropriate to attribute blame to the agent. Indeed, in his reply to Hamish Stewart, he suggested that it would be inappropriate for the agent to reproach himself for his error.¹⁰⁰ And yet, Gardner explains, we would still expect someone who committed a wrong for no good reason to regret the fact that she was unjustified in acting as she did. We would expect her to experience what Bernard Williams described as “agent-regret”—or in Gardner’s words, “something more than regret, but less than remorse”.¹⁰¹ A self-respecting agent by definition aspires to something approaching perfect rationality and is disappointed when he falls short of that standard. That he has failed to *excel* as a rational agent, however, does not mean that he deserves any less respect as an agent. Gardner states:

[The agent’s] self-respect is threatened by his lowering his sights as a rational agent—by his being no less content to make an excuse than to claim a justification, or no less content to deny his responsibility for his actions than to do either of those things. It does not follow that he compromises his self-respect by the mere fact that he actually is excused rather than justified, *or actually does lack responsibility rather than being excused or justified*—so long as he is not indifferent to that being the case, so long as he does not approach with equanimity the question of which argument he is going to offer in his defence.¹⁰²

The key point in Gardner’s reply to Stewart is precisely that one’s self-respect as a person is “forward-looking”: so long as I aspire to exercise practical reason as well as possible, I am still part of the community of intentional actors. It is only when I give up on the idea that practical reason is even something worth trying to exercise that I effectively concede others’ right to treat me as a problem to be managed rather than

98. *Ibid* at 156.

99. *Ibid* at 158.

100. John Gardner, “Reply to Critics” in John Gardner, *supra* note 5, 239 at 273.

101. *Ibid* at 254.

102. *Ibid* at 274 [emphasis added].

a person to be reasoned with—as someone to be viewed with the objective rather than reactive attitude. The criminal trial, as a site that invites me to take responsibility for my actions, can be seen as a means of bolstering my self-respect.

Though Benjamin Berger's contribution to the volume does not directly engage Gardner's work, it is interesting to conclude by briefly considering some of its implications.¹⁰³ Berger points out that the criminal law has tended to define exculpatory mental disorders in a narrow fashion—one which particularly excludes illnesses that interfere with impulse control, like fetal alcohol syndrome, Asperger's syndrome and psychopathy.¹⁰⁴ These illnesses are common among those caught in the criminal justice system. Berger wants to say that the criminal law is invested in denying these (and other) disorders as exculpatory conditions because to acknowledge them would too radically call into question its very reason for being: the allocation of blame to wrongdoers.¹⁰⁵

Gardner, I think, would agree with much of this argument, but it is less clear that he would see it as a problem. Self-respecting moral agents should want to claim that they are responsible for their actions, and the criminal trial (in Gardner's view) exists to make it possible for them to do so. As members of the human community, he would say, defendants presumably would rather be blamed (or excused) for their conduct than eyed from Strawson's objective point of view, and the criminal justice system should not be too vigorous in tempting defendants into humiliating themselves by recognizing too many mental disorders.

Conclusion

It might seem surprising that a book purporting to show "Canadian perspectives" on criminal law theory would engage so extensively with the work of John Gardner—or indeed with any thinker whose central preoccupations are not with Canadian law. One might well ask what is so Canadian about a book featuring arguments that might take place just as easily at Oxford or Harvard as Toronto or Montreal. But even if some of

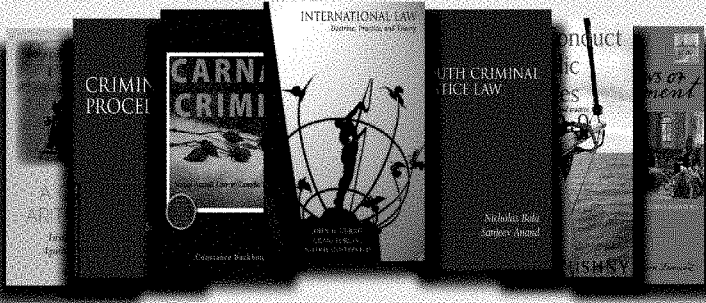
103. Benjamin L. Berger, "Mental Disorder and the Instability of Blame in Criminal Law" in Tanguay-Renaud & Stribopoulos, *supra* note 1, 117.

104. *Ibid.* at 126–31.

105. *Ibid.*

the arguments seem rather too geographically unmoored to be uniquely Canadian, maybe that is not the point. The point of *Rethinking Criminal Law Theory* is not to be parochial, but to show the contributions that Canadian scholars are making to a number of conversations that straddle national borders. With that in mind, it is no surprise that Gardner, one of the dominant voices in criminal law theory, would figure so prominently. Moving forward, it is fair to ask whether the presuppositions of British or American theorists are or must be the same as those that inform Canadian criminal law scholarship. For now, though, *Rethinking Criminal Law Theory* is a good conversation-starter.

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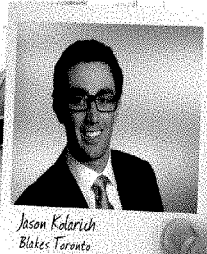


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