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# Constitutional Principles in Substantive Criminal Law

Benjamin L. Berger

*Osgoode Hall Law School of York University*, [bberger@osgoode.yorku.ca](mailto:bberger@osgoode.yorku.ca)

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## **Constitutional Principles in Substantive Criminal Law**

Forthcoming in *The Oxford Handbook of Criminal Law* (2014)

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**Editors:**

Peer Zumbansen (Osgoode Hall Law School, Toronto; Canada Research Chair in Transnational Economic Governance and Legal Theory – Editor in Chief)

Stephen Ji (Osgoode Hall Law School, Toronto – Production Editor)



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## **Constitutional Principles in Substantive Criminal Law**

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### **Abstract:**

Since Milsom's famous dismissal of the "miserable history of crime in England," criminal law has undergone a revolution in constitutional significance. The rise of rights constitutionalism as the heart of the modern liberal rule of law has given criminal law a new life in which it is subject to substantial justice-based innovation through appeal to the internal and basic norms of the legal system itself. Far from the marginal and exceptional status once ascribed to it by Milsom, this chapter argues that criminal law is now best understood and approached as a species of constitutional reflection. Substantive criminal law has become a laboratory for the constitutional, focussing and advancing classic questions of constitutional concern, while at the same time traditional questions of criminal law theory have themselves begun to translate into a constitutional register. Thematically, this chapter considers the way in which substantive criminal law has become a site for reflection on sovereignty and state violence; the anthropology of the legal subject; the rule of proportionality; and the relationship between judgment, discretion, and mercy. The chapter then turns to the constitutionalization of questions of the limits of the criminal law, fault, criminal defences, and standards for punishment. Juridical exploration of the relationship between substantive criminal law and constitutional principles has been uneven across national traditions; accordingly, this chapter draws significantly from the Canadian jurisprudence, which has been at the vanguard of this process. Ultimately, the chapter identifies a challenging irony: that despite a profound change in the imaginative relationship between criminal law and the larger legal structure, more of Milsom's assessment remains apposite than we might have hoped – the contemporary history of criminal law is still invested with its share of misery and much criminal justice is still left to be done in spite of the law.

### **Keywords:**

Constitutional Law, Criminal Law, Sovereignty, Proportionality, Mercy, Legal Subject, Fault, Punishment, Defences

### **Author(s):**

Benjamin L. Berger  
Associate Professor  
Osgoode Hall Law School  
York University, Toronto  
E: [bberger@osgoode.yorku.ca](mailto:bberger@osgoode.yorku.ca)

## CONSTITUTIONAL PRINCIPLES IN SUBSTANTIVE CRIMINAL LAW

Benjamin L. Berger  
Osgoode Hall Law School\*

Viewed in the *longue durée*, criminal law has undergone a contemporary revolution in constitutional significance. Consider Milsom's inimitable assessment of the historical place of criminal law in the development of the common law legal system:

The miserable history of crime in England can be shortly told. Nothing worth-while was created. There are only administrative achievements to trace. So far as justice was done throughout the centuries, it was done by jurors and in spite of savage laws.<sup>1</sup>

For Milsom, criminal law was an exception to the development of the common law, at best an embarrassing outlier in the development of the common law, and at worst a field of savagery and misery. To be sure, it was a field from which little could be learned about the evolution of the common law conceptions of just legal rule.

However true this assessment may have been, that it could be plausibly advanced is sufficient to mark the tremendous shift that has occurred in the imagined location of criminal law within the landscape of the key elements of legal rule, or what we might call criminal law's place within the framework of modern constitutional essentials. The history of criminal law reform is of course deep, with great periods of creative legislative innovation and political activity in ideas of criminal justice. Yet with the rise of rights constitutionalism as the heart of the modern liberal rule of law, criminal law has begun a new life in which it is subject to substantial justice-based innovation through appeal to the internal and basic norms of the legal system itself. It has transformed from a marginal arena of law, as Milsom described it, to the quintessential site for the working out of central constitutional themes. With the ascendance of rights protecting constitutions, the criminal law – with its liberally

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<sup>1</sup> S.F.C Milsom, *Historical Foundations of the Common Law*, 2d ed. (1999), 403.

transfixing confrontation between state and citizen – has offered itself as the paradigmatic place for working out liberal conceptions of justice. And so criminal law has been fused to constitutional law, with key constitutional themes expressing themselves through debates about criminal law, and traditional criminal law issues and debates entering a constitutional idiom. Far from the picture painted by Milsom, criminal law is now best understood and approached as a species of the constitutional, or so this chapter will argue.

The tethering of criminal law and constitutional law has two aspects. The first section of this chapter will explore the ways in which substantive criminal law – the principles of criminal liability – has become a laboratory for the constitutional, focussing and advancing classic questions of constitutional concern. The nature of sovereignty and the role of state violence, basic understandings of the nature of the legal subject, the guiding logics of constitutional judgment, and the role of discretion and mercy in legal rule – all preserves of constitutional thought – are issues that have been exercised and explored most dramatically through debates around criminal responsibility.

The second part of this chapter will explore an equally notable trend, which is the translation of classic criminal law debates into constitutional questions, the movement of traditional concerns of substantive criminal law into a constitutional register. From the limits of the criminal law and the basic requirements of fault to the role of criminal defences and the nature of just punishment, core questions of criminal law theory have become irreducibly constitutional, guided by claims of rights and the basic norms of the legal order.

The extent to which courts have explored the constitution foundations of criminal law has been extremely uneven across national traditions. Certain broad and essentially formal principles can be found across a number of countries, such as the principle of legality found in the constitutional law of Germany, France, Japan, South Africa, and indeed most constitutional orders.<sup>2</sup> Yet when it comes to the application of constitutional principles to the general part of the criminal law, exploration has often been rather modest. The United States Supreme Court, for example, has engaged in extensive constitutional reflection on criminal procedure, but “has ventured forth with great trepidation”<sup>3</sup> when

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<sup>2</sup> See Kevin Jon Heller and Markus D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (2011).

<sup>3</sup> George Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* (2007), 99.

it comes to substantive law. By contrast, Canada has been at the vanguard of constitutional criminal law. The combination of its young bill of rights (the *Charter of Rights and Freedoms, 1982*), its unitary criminal law, and its involved Supreme Court has generated intriguing case examples and a dynamic contemporary jurisprudence on the topic. George Fletcher has observed that these factors have combined to make the Canadian Supreme Court “one of the leading jurisdictions in the world in applying constitutional provisions to the general part of criminal law.”<sup>4</sup> The Canadian jurisprudence is thus a particularly fruitful point of illustration and will therefore serve as a kind of case study in this chapter exploring the mutual imbrication of criminal law and modern rights constitutionalism.

The Canadian case is also valuable, however, because it sounds a cautionary note to those who might imagine that the constitutionalization of criminal law would lead inexorably to its progressive development. Much of value has been generated through the fecund interaction of substantive criminal justice and constitutional principles. Yet this interaction has proved as likely to limit change and entrench the old as to offer a lever for enlightened reform. In all of this, the Canadian cases are offered as instructive, not as exemplary.

And it is here that one arrives at a challenging irony. Despite the profound change in the imaginative relationship between criminal law and the larger legal structure – with the migration of criminal law from the margins of legal history to the centre of our constitutional imagination – more of Milsom’s assessment remains apposite than we might have hoped, with the contemporary history of criminal law still invested with its share of misery and much criminal justice still left to be done in spite of the law. Ultimately, the intimate relationship between these two legal fields has drawn into sharper relief the ineluctably political nature and social functions of the criminal law.

## **I. Critical Constitutional Themes in Criminal Law**

To claim that contemporary substantive criminal law must be understood as a species of constitutional reflection is to assert a certain coincidence in the thematic preoccupations that organize thought and debate in both fields. This section identifies four central concerns of modern constitutional theory that have found forceful and focussed expression in the central problematics of contemporary criminal law.

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<sup>4</sup> *Ibid*, 101.

Examination of these “constitutional dimensions” of criminal law reveals not only the way in which criminal law has become a laboratory for the constitutional, but also the deeper constitutional register in which the more specific criminal law issues addressed later in this chapter work themselves out.

### **1. Sovereignty and state violence**

Legal theory has seen a renaissance of interest in the nature and relevance of the concept of sovereignty in modern constitutional orders. Some of this scholarly attention has been generated by contemporary challenges to the nation state form, challenges posed by a variety of phenomena, including new patterns of global migration and the emergence (or recognition) of transnational legal orders. Others have returned to the question of sovereignty in view of particular exercises of exceptional executive action taken in reaction to perceived existential threats to society. This return to the concept of sovereignty has brought renewed engagement with the work of Carl Schmitt, who put sovereignty at the heart of his constitutional theory, and that of his contemporary re-interpreters, most notably Giorgio Agamben.<sup>5</sup> Such scholarship has turned attention to the somewhat mysterious manner in which the apparently antiquated concept of sovereignty has nevertheless continued to express itself in modern liberal constitutionalism. Paul Kahn has offered among the most serious and searching engagements with these themes, exposing the anxieties and paradoxes that afflict the attempt to square the liberal culture of law’s rule with the on-going political salience of ideas of sovereignty.<sup>6</sup>

The criminal accused is a palimpsest for state sovereignty, a layered expression of the variety of ways in which contests over and assertions of sovereignty are an abiding feature of our constitutional lives. At one very concrete level the criminal accused continues to show what Foucault claimed so powerfully, that the work of sovereign power is marked on the body.<sup>7</sup> Sovereignty is asserted and exercised through the very physical business of criminal punishment. The monopoly on the legitimate use of

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<sup>5</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2005); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998); Giorgio Agamben, *State of Exception* (2005).

<sup>6</sup> Paul W. Kahn, *Putting Liberalism in its Place* (2005); Paul W. Kahn, *Political Theology: Four Chapters on the Concept of Sovereignty* (2011).

<sup>7</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2d ed. (1995).

violence that Weber identified as the calling card of state sovereignty is most habitually and routinely asserted in the modern state through the ascription of criminal responsibility and the punishment that follows.<sup>8</sup> For constitutional theory that insists on the violence at the foundation of legal authority, the figure of the criminal accused becomes central, as it was for Robert Cover.<sup>9</sup> Talk about the violence of sovereign authority sheds any comfortingly metaphorical character when attention is turned to the work of the criminal law.

But at another layer, the criminal accused also stands as a challenge about the source of that sovereign authority: on whose behalf is one called to account by the criminal law? Where does one find the sovereign will that must, in constitutional theory, underwrite this coercive exercise of authority? The criminal law persistently raises this issue of who the constitutional “we” is, who the criminal law reflects and on whose behalf it speaks. Debates about the nature of the reasonable person – so central to substantive criminal law – are one expression of this issue, as is the classic theoretical concern over morals legislation and the limits of criminal law. Yet the use of criminal law as an assertion of the political sovereignty of a certain community takes on far more concrete and literal forms as well. In Canada, the extension of Crown sovereignty over a vast territory already inhabited by Indigenous societies was carried out in substantial measure through the expanded reach of the criminal law and the performance of sovereignty through criminal trials.<sup>10</sup> Today, Indigenous rights and title remain the fundamental challenges to state sovereignty in Canada; and today, we still see criminal law playing a significant role in the political domination of Indigenous peoples, with soaring rates of Aboriginal incarceration, a crisis to which the Supreme Court of Canada has itself called attention.<sup>11</sup>

Finally, the boundaries of ordinary criminal law have been the chief site for the contemporary reappearance of certain forms of executive action that trouble prevailing orthodoxies about the nature of sovereign

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<sup>8</sup> Max Weber, ‘Politics as a Vocation’, in Hans Heinrich Gerth, C. Wright Mills (eds.), *From Max Weber, Essays in Sociology* (2009), 77 ff.

<sup>9</sup> Robert M. Cover, ‘Violence and the Word’, (1986) 95 *Yale LJ* 1601 ff.

<sup>10</sup> See, e.g., Hamar Foster, ‘The Queen’s Law is Better Than Yours: International Homicide in Early British Columbia’, in Jim Phillips, Tina Loo, and Susan Lewthwaite (eds.), *Essays in the History of Canadian Criminal Law, Vol 5: Crime and Criminal Justice* (1994), 41 ff.

<sup>11</sup> See *R. v. Ipeelee*, [2012] 1 S.C.R. 433.



authority in a constitutional democracy. One sees this in the array of executive-empowering responses to terrorism and security concerns around the world, for which Guantanamo Bay stands as a kind of apogee.<sup>12</sup> Again, the criminal accused takes centre stage. As the wrongdoer has floated between ordinary criminal law norms and the exceptional spaces and rules created in response to extraordinary threats – as crime becomes terror and the criminal becomes the enemy combatant – he has marked the complexity and arguable instability of sovereign authority in modern constitutional life.

## **2. Anthropology of the Legal Subject**

The extension of a package of constitutional rights and freedoms depends on a tacit anthropology. Constitutional rights are animated by a more or less explicit set of assumptions about what is of irreducible value in the human subject, such that it calls for legal regard and protection. So, at one level, one can cull a peculiar picture of a flourishing human life from the fundamental freedoms, claims about equality, and other duties and liberties inscribed in the central texts of a legal system. But at a deeper level, the content of these rights will be shaped by a sense of what faculties and aspects of the legal person will have relevance for legal analysis. Indeed, as certain legal theorists have provocatively explored, the contemporary rule of law asserts and relies on a particular sense of the nature and psychology of the legal person, whose fundamental attributes both entitle her to legal rights and make her a fit and appropriate subject for the exercise of legal power.<sup>13</sup> It comes as little surprise that a liberal constitutional culture assumes a fundamentally liberal subject.

With the contemporary confluence of constitutional and criminal law, an intriguing mirror has been held up to these features, turning the bases for the enjoyment of rights into the prerequisites for criminal responsibility. As these two fields of law have fused, coherence is quite naturally sought in the image of the individual who is subject to state power, whether for the purposes of protecting her from that power or making her a proper subject of its coercive exercise. The former becomes the basis for rights protection, the latter for criminal responsibility. With the constitutionalization of criminal law, that which is valued in the

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<sup>12</sup> See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (2011).

<sup>13</sup> See, e.g., Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

anthropology of the legal subject also becomes the foundation for the assignation of blame.

The priority given to the faculty of choice in Canadian rights analysis provides a sharp example of this instinct to coherence in the anthropology of the criminal/constitutional subject. Some version of a focus on the exercise of will and the faculty of choice has influenced a range of constitutional rights and protections. Choice has become central to the jurisprudence on equality – a particularly fertile soil in which to find claims about human nature – such that the presence or absence of choice is a key diagnostic for detecting discrimination.<sup>14</sup> Freedom of religion is cast around the figure of the highly autonomous and free-choosing self, the guiding question being whether the individual retained a “meaningful choice” to practice his or her religion.<sup>15</sup> Even rights associated with the criminal process, such as the right to silence and right to counsel, now turn on claims about individual choice.<sup>16</sup> In each instance, the critique that has been levelled at the jurisprudence has been that this image of an autonomous, free-choosing agent is an impoverished one that ignores the influence of the social and the economic on the exercise of will.

Meanwhile, choice has also been central to the constitutionalization of substantive criminal law in Canada. The freely choosing agent is entitled to certain rights and protections, but is also one who can be blamed and punished. In a mirror image of the rights jurisprudence, choice has become the lodestar for criminal liability, with the Supreme Court holding that punishment cannot take place absent “meaningful choice.”<sup>17</sup> Resonant with the kinds of claims found in much equality jurisprudence, the Court holds that the failure to honor this principle offends the dignity of the human subject.<sup>18</sup> The language of voluntariness has haemorrhaged throughout substantive criminal law, setting the

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<sup>14</sup> See Hester Lessard, ‘Charter Gridlock: Equality Formalism and Marriage Fundamentalism’, in Sheila McIntyre, Sandra Rodgers (eds.), *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 291 ff; Diana Majury, ‘Women are Themselves to Blame: Choice as a Justification for Unequal Treatment’, in Fay Faraday, Margaret Denike, M. Kate Stephenson (eds.), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (2006), 209 ff.

<sup>15</sup> Benjamin L. Berger, ‘Law’s Religion: Rendering Culture’, (2007) 45 *Osgoode Hall LJ* 277 ff.; *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567.

<sup>16</sup> See *R. v. Spencer*, [2007] 1 S.C.R. 500; *R. v. Sinclair*, [2011] 3 S.C.R. 3.

<sup>17</sup> *R. v. Ruzic*, [2001] 1 S.C.R. 933.

<sup>18</sup> *Ibid.*

constitutional threshold for the law of *actus reus* and, as I will explore below, criminal defences. Yet as the understanding of the legal subject is mirrored in constitutional and criminal law, so too are the critiques. The conceptions of choice that arise in the confluence of constitutional and substantive criminal law also turn out to be too bare and impoverished, ill-fitted to taking meaningful account of the complex ways that choices are made real, are shaped by history, social and economic inequality, and mental health.

### 3. The Rule of Proportionality

The ascendancy of proportionality review as the defining characteristic of modern constitutionalism is well observed.<sup>19</sup> Despite the variation in the historical traditions and legal cultures shaping constitutionalism in modern western democracies, there is striking convergence on the idea that constitutional judgment is ultimately an exercise in the refined and careful deployment of proportionality review. Some have described proportionality and balancing as the very task of the constitutional judge<sup>20</sup> and even the “ultimate rule of law.”<sup>21</sup> The rise of proportionality as the dominant logic of contemporary constitutionalism reflects a particular way of imagining the relationship of law to justice. It is a way of conceiving of the constitutional order that is intimately linked to a claim about reason as the essence of the contemporary rule of law.<sup>22</sup> As Kahn puts it, “[p]roportionality is nothing more than the contemporary expression of reasonableness.”<sup>23</sup>

As criminal law debates have shifted into a constitutional idiom, the grammar of proportionality has left a strong imprint on a substantial range of criminal law issues. Indeed, this aspect of modern constitutionalism is well adapted to an encounter with criminal justice.

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<sup>19</sup> See, e.g., Paul W. Kahn, ‘Comparative Constitutionalism in a New Key’, (2003) 101 *Mich L Rev* 2677 ff; Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008) 47 *Colum J Transnat’l L* 72 ff; Benjamin L. Berger, ‘The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination’, (2011) 61 *UTLJ* 579 ff.

<sup>20</sup> Aharon Barak, *The Judge in a Democracy* (2006).

<sup>21</sup> David M. Beatty, *The Ultimate Rule of Law* (2004).

<sup>22</sup> See Berger, (n. 19).

<sup>23</sup> Kahn, (n. 19), 2698.

The constitutional logic of proportionality appeals to something genetic in criminal law theory, the influential idea of proportionality as the philosophical lodestar for just punishment, a principle emblematically articulated by Cesare Beccaria in his volume *On Crimes and Punishment*.<sup>24</sup> Furthermore, the principle of proportionality has long been central to the law of criminal defences, playing a particularly patent role in the law of self-defence, wherein the core criterion in justifying otherwise criminal violence is the measure of proportionality. Indeed, one might be moved to say that the notion of proportionality as the governing ethic for legitimate violence has generalized to become the foundational constitutional ethic for all rights-affecting government activity. Perhaps, then, the lines of influence should be reversed, with contemporary constitutional law having come around to the logic of criminal punishment.

Whatever the best version of the history of the migration of legal ideas, proportionality analysis has found fertile soil in constitutional reflection on criminal law issues. Again, the Canadian experience, in which the rule of proportionality is the heart of constitutional analysis and pervasive in the criminal law, is merely illustrative of broader trends. Given what I have discussed, perhaps the least surprising appearance of the rule of proportionality in the criminal law is in constitutional principles governing criminal punishment. What was, in Beccaria's hands, criminal justice theory, and later a banner under which criminal justice reformers marched, has now become a constitutional standard. As I will discuss further below, the constitutional law governing cruel and unusual punishment has worked itself out using concepts of gross disproportionality.

But the rule of proportionality has had an even more pervasive influence on substantive criminal law. In a world in which limits on rights are assessed through an "all things considered" balancing of means and ends, the whole of the criminal law, with its intrinsic limitation of basic liberties, becomes subject to that logic. And so as rights become the language in which the legitimacy of criminal law is questioned – be it in terms of constraints on expression, association, privacy, or just general claims to liberty – and courts become the forum in which reform is sought, the very question of the justified limits of substantive criminal law reduces to a question of constitutional proportionality. In Canada, this overarching logic of constitutional analysis even touches upon *mens rea* requirements, with proportionality between the degree of moral fault and the gravity of the crime/seriousness of the penalty becoming a principle of

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<sup>24</sup> Cesare Beccaria, *Of Crimes and Punishments* (1996).

fundamental justice and the constitutional measuring stick for constitutionally acceptable levels of fault.

#### **4. Judgment, Discretion, and Mercy**

The commodious standard of proportionality seems to offer itself to all legal decisions. This extension of the rule of proportionality is part of an aspiration to see all legal judgment, all justice, bound by a legal rule. This is a cherished hope in the project of modern constitutionalism. It is one expression of the rule of law, the constitutional ambition to have a government of standards and law, not discretion and power. The saturation of criminal law with concepts of proportionality is, thus, expressive of this larger pattern and set of constitutional hopes. The criminal law is a text on which this ambition has been written.

But the criminal law also challenges the adequacy of this powerful modern constitutional imagination. It has persistently raised instances in which the circles of justice and law have not been coextensive, in which the tools of liberal legal rule have seemed inadequate to the task of doing justice in response to crime and victimization. In these instances criminal law has reminded constitutional theory of the irrepressible role of discretion, of conscientious judgment, and of mercy in the constitutional order – that there remains passion and compassion in the fabric of constitutionalism.

Such passion and feeling in claims of justice has nefarious expressions, of course. The uses of and exceptions from ordinary criminal justice to respond to terror post 9/11 are one such instance. The criminalization of migration around the world stands as another example<sup>25</sup> and, of course, the criminal law has been a tool for the expression of homophobia and racism. Such cases have forced constitutional law to reckon with its capacity to respond to fear, ignorance, and the associated excesses of executive and legislative authority.<sup>26</sup>

Yet the criminal justice system has also consistently reminded constitutional law of the unruly but ineradicable place of mercy and equity as a part of our constitutional lives.<sup>27</sup> The criminal law, invested so

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<sup>25</sup> Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', (2006) 56 *Am U LR* 367 ff.

<sup>26</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Air Transport Security Case*, BVerfG, 1 BvR 357/05 vom 15.2.2006, Absatz-Nr. (1 - 154).

<sup>27</sup> I develop these themes at length in Berger, (n. 19).

thoroughly as it is with human sorrow and tragedy, has insisted that judgment in a just constitutional order cannot be exhausted by tests (or, in Alexy's hands, formulae)<sup>28</sup> of proportionality. Judgment cannot be satisfied by reason alone, but will instead draw on faculties of compassion and mercy (in addition to fear and contempt). And so, when Robert Latimer faced a jury of his peers, charged with the murder of his severely disabled and ill daughter who had only a life of pain ahead of her, that jury sought to ignore the law, calling for a parole ineligibility period of only 1 year, when the law demanded 10. Although the Supreme Court of Canada refused to give force to the jury's recommendation, insisting on the 10-year minimum, the case ignited debates about criminal and constitutional justice *despite* the law.<sup>29</sup> As a conservative-populist crime agenda has taken hold in Canada and minimum sentences, along with other "tough on crime" policies, have proliferated, issues of constitutional exemptions, the need for discretion, and the virtue of a system with room for mercy have taken on renewed salience. Equity and mercy have also continued to imprint on fundamental doctrines of criminal responsibility, often enlisting constitutional norms to find exceptions to traditional principles. Extraordinary cases, calling for compassion and concession to the harsh realities of human experience, have stretched and challenged the law of criminal defences, which has always been a repository for principles that acknowledge the affective realities that law's reason must accommodate.

All of this reflects yet another way in which fundamental issues of legal and political theory have worked themselves out at the confluence of criminal and constitutional law. With devices like jury nullification, the extraordinary justice of pardons, the day-to-day exercises of discretion on which the system depends, and its endless supply of truly *hard cases*, the criminal law has played an important role in insisting on the place of discretion and mercy in our constitutional lives. At the same time, constitutional law has offered itself as a modern language of principle in which judges can speak when justice must be done outside the received shape of criminal law.

## II. The Constitutionalization of Substantive Criminal Law

One theme of this chapter is the way in which the criminal law has been a stage for the dramatic display of key issues in contemporary

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<sup>28</sup> Robert Alexy, *A Theory of Constitutional Rights*, transl. Julian Rivers (2002).

<sup>29</sup> *R. v. Latimer*, [2001] 1 S.C.R. 3.

constitutionalism. Those interested in understanding the core problematics of contemporary constitutionalism must have regard to the dynamics and dilemmas found in substantive criminal law. The selection of themes canvassed in the first half of this chapter offer a starting point for further research into these deeper structural relationships between constitutional and criminal law.

Yet there is another dynamic involved in the confluence of these two areas of law, one that has arguably had more concrete and immediate effects. The constitutionalization of criminal law has also meant the migration of traditional substantive criminal law debates into new constitutional registers. What were once matters of substantive criminal law policy would now be debated as issues of fundamental freedoms, rights to equality and liberty, and the scope of permissible state interference in such rights and freedoms. Constitutional law would give a doctrinal foothold for traditional philosophical debates in substantive criminal law, old saws and hobbyhorses of criminal law theory now taking on new juridical salience.

In Canada, this translation of substantive criminal law into a constitutional idiom was accompanied by hopes for the advancement and liberalization of criminal law doctrine, as well as the insulation of issues of crime and punishment from populist expressions of politics. Yet both ambitions have been unevenly realized, disappointing some and teaching all something about the limits of the transformative potential – and perhaps even certain dangers – of rights constitutionalism. It would be wrong to conclude that, in the Canadian case at least, no progress was made with the application of constitutional concepts in the criminal law; certain constitutional protections have made criminal law more temperate and humane. It would be very wrong, however, to be too sanguine about the achievements of constitutional criminal law: the experience has just as often been one of constitutional rights deflecting legal debate from aspirational principles to mere minimum standards. Each of the following examples tells a part of this complex story of the constitutionalization of substantive criminal law, while also giving concrete expression to the broader themes discussed above.

### **1. The Limits of the Criminal Law**

The issue of the substantive limits of criminal law has long been grist for the criminal law theory mill. Explored most famously in the Hart-

Devlin debate,<sup>30</sup> this foundational policy issue within substantive criminal law has asked whether there are principled boundaries on the kinds of activity can be regulated by criminal law, and what kinds of social concerns are appropriate subjects for this most coercive form of state regulation. Can the criminal law legitimately be used to pursue moral aims, encoding in the law the views and sentiments of the dominant community, as Devlin argued it could? Or, as Hart argued, echoing Mill's classic assertion of a "harm principle" limiting the permissible scope of legislation, must the criminal law be underwritten by some claim that it is preventing a more or less tangible harm to others?

What was a matter of legal theory and criminal law policy has, with the constitutionalization of criminal law, become a question of legality. In this, the reframing of this issue in the language of rights and its transformation into a justiciable issue serves as an interesting instance of the legalization of politics in liberal constitutional orders. Comaroff and Comaroff argue that the contemporary appeal to legal instruments and procedures to address matters once remitted to democratic politics is a neoliberal response to the challenges of deep ethical difference.<sup>31</sup> The apparent neutrality of legal language offers an appealing respite from the political, and the movement of morally charged policy debates about the uses of criminal law into the courtroom is an outstanding case in point. Constitutionalization has given the judiciary a new role in defining the substantive limits of criminal law and some of the most contentious moral and ethical issues in western democracies – abortion, hate speech, and the rights of sexual minorities, to name just a few – have thereby transferred from the domain of representative politics to the courts.

Doctrinally, these issues appear in a variety of ways within different constitutional traditions. In the United States a number of questions concerning the constitutional limits of criminal law have arisen through the protection of privacy in the substantive due process clause,<sup>32</sup> with others taking the form of First Amendment protections on expression.<sup>33</sup> In other constitutional systems, similar issues have been framed

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<sup>30</sup> Patrick Devlin, *The Enforcement of Morals* (1965); H.L.A. Hart, 'Immorality and Treason', in Richard A. Wasserstrom (ed.), *Morality and the Law* (1971), 49 ff.

<sup>31</sup> Jean Comaroff and John L. Comaroff, *Theory from the South: Or, How Euro-America is Evolving toward Africa* (2012), 145.

<sup>32</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>33</sup> *R.A.V. v. St. Paul*, 505 U.S. 377 (1991); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).



differently.<sup>34</sup> Whatever the vernacular, the structure is the same: the threat of punishment makes criminal law a radical restraint on liberty and rights claims become the means of testing the boundaries of criminalization.

Canada has produced a rich constitutional jurisprudence on the limits of criminal law, with cases touching on matters such as prostitution, polygamy, drug policy, assisted suicide, and hate speech. I wish to focus on two themes or patterns that arise from this case law that will have resonance in other constitutional and criminal systems: the role played by the concept of “harm” and the salience and impact of equality norms.

The pivotal role played by the concept of harm in the history of debates about the limits of criminal law has persisted with the constitutionalization of the issue. The most direct appearance of the regulative idea of harm in the field of constitutional criminal law is the question of whether the harm principle is, itself, a constitutional principle limiting the scope of criminal legislation. In Canada this issue arose in relation to drug policy with the *R. v. Malmo-Levine* case.<sup>35</sup> The accused, charged with possession of a small amount of marijuana, argued that the prohibition on simple possession of the drug was unconstitutional because the conduct posed no risk of harm to others. Malmo-Levine argued that Mill’s harm principle was, in the language of s. 7 of the Canadian *Charter*, a “principle of fundamental justice” such that any criminal legislation was unconstitutional if the criminalized conduct did not cause tangible harm to others. Assisted by the trial judge’s findings of fact, which suggested that moderate use of marijuana did not cause serious harm to others, the case made its way to the Supreme Court of Canada. The Court held that, though it might be good criminal law policy, the harm principle was not a principle of fundamental justice for the purposes of the *Charter*.

Though it has been rejected as an independent constitutional limit on the criminal law, the harm principle nevertheless remains central to constitutional judgments about the boundaries of criminal legislation. The centrality of proportionality to the analysis of rights claims gives harm pride of place in the justification of limits on fundamental freedoms. Given the cultural appeal and purchase of arguments about harm, laws that limit expressive freedoms (like hate-speech crimes or the criminalization of obscenity) or religious freedoms (like polygamy prohibitions) will frequently be justified by reference to the harms caused by the conduct in question. In the means-ends rationality of modern

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<sup>34</sup> See, e.g., *Holocaust Denial Case*, 90 BVerfGE 241 (1994); *Jersild v. Denmark*, 19 EHHR 1 (1994).

<sup>35</sup> *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74.

constitutionalism, judgments about harm will be central to defending the use of criminal law as well-tailored and proportionate (and, therefore, constitutionally acceptable) limits on liberty. Of course, the normative dependence of these judgments – what counts as a harm and how seriously a given harm is treated – is another betrayal of the neutrality offered by the legalization of politics.<sup>36</sup>

The other notable aspect of the constitutionalization of questions around the limits of criminal law is the opportunity that this has given for the increased influence of equality norms on the shape and functions of substantive criminal law. As the substantive boundaries of criminal law becomes a constitutional matter, it comes into direct contact with equality norms that, although despairingly marginal in the historical development of criminal law, have such a central role in modern constitutional cultures. The imprint of constitutional equality norms on questions of the legitimate ambit of criminal legislation can be seen in a number of areas. First, equality rights and commitments have inflected the debates about harm canvassed above. Viewed through the lens of equality, certain harms come into focus that might not have been previously visible to the law, and other harms simply loom larger in the balancing used to justify limits on liberty. Thus, in cases that have challenged the constitutionality of criminal limits on obscenity,<sup>37</sup> the Supreme Court of Canada has recognized “communicative harms,” and in particular negative messaging about women apt to exacerbate gender subordination, as crucial to the justification for such crimes. Similarly, a decision upholding the constitutionality of the crime of polygamy leaned heavily on the practice’s potentially harmful effects on women.<sup>38</sup> Equality, arguably the basal norm of modern rights constitutionalism, conditions the analysis of harm.

But equality rights and values have had an even more direct role in the setting substantive limits to criminal law. Equality reasoning has increasingly served as the principal constitutional basis for the invalidation of certain crimes. Though often framed in terms of privacy or autonomy rights, the decriminalization of abortion is irreducibly about gender equality and anti-subordination.<sup>39</sup> *Lawrence v. Texas*,<sup>40</sup> again cast

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<sup>36</sup> Bernard Harcourt has called this the “collapse of the harm principle”: Bernard E. Harcourt, “The Collapse of the Harm Principle”, 90 *Journal of Criminal Law and Criminology* 109 ff.

<sup>37</sup> *R. v. Butler*, [1992] 1 SCR 452.

<sup>38</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

<sup>39</sup> See *R. v. Morgentaler*, [1988] 1 SCR 30; *Roe v. Wade* 410 U.S. 113 (1973).

as a privacy case due to the particularities of the U.S. constitutional provisions, was the American instantiation of a set of constitutional victories for the equality of sexual minorities that has taken place through debates about the limits of criminal legislation.<sup>41</sup> In Canada, challenges to the criminalization of prostitution have relied on the link between sexual violence and gender equality<sup>42</sup> and the principal rationale for the invalidation of the criminal bar on assisted suicide in Canada was the discriminatory effect that such a crime had on the severely disabled.<sup>43</sup> Thus, in a variety of ways, the transfer of philosophical debates about the limits of criminal law into a constitutional idiom has seen a greater role for equality in giving substantive shape to the criminal law.

## 2. The Constitutionalization of Fault

The greatest potential for the impact of constitutional principles on the structure and operation of substantive criminal law lies in their application to the law of *mens rea*. Principles of mental fault encode basic positions about fairness and fundamental justice in the attribution of blame, and have something to say about every matter brought to the criminal law. In this respect, this aspect of substantive criminal law seems uniquely well fitted to interact with constitutional norms and principles, setting limits on criminal law in a far more quotidian way than is found in time-to-time constitutional challenges to various offences.

And, indeed, this was the area of criminal law doctrine that attracted the most excited hopes and ambitions in Canada with the introduction of the *Charter of Rights and Freedoms*. To that point there had been a slow common law evolution regarding principles of criminal fault. Faced with a *Criminal Code* that was rarely explicit about *mens rea* requirements, judges had articulated interpretive principles regarding fault and had established common law presumptions. But in a context of true parliamentary sovereignty in matters of criminal justice, these remained just principles and presumptions. Would constitutionalization transform interpretive principles into constitutional imperatives, offering

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<sup>40</sup> *Supra*, note 32.

<sup>41</sup> See also *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (2009).

<sup>42</sup> *Canada (Attorney General) v. Bedford*, 2012 ONCA 186, appeal to the Supreme Court of Canada heard June 13, 2013.

<sup>43</sup> *Carter v. Canada (Attorney General)*, 2012 BCSC 886, appeal to the British Columbia Court of Appeal heard March 18-22, 2013.

greater protection for the fair treatment of the accused – and restraint in the use of the penal law as a tool of governance – than was previously possible? The Canadian story provides an evocative point for reflection on – and perhaps some lessons about – the nature of the constitutionalization of fault.<sup>44</sup>

This story began dramatically with the Supreme Court of Canada’s decision in *Re B.C. Motor Vehicle Act*.<sup>45</sup> Over the course of the 20<sup>th</sup> century, with the rise of the regulatory state, the law of *mens rea* as it governed public welfare offences had undergone substantial change. Although there had been a traditional presumption that *mens rea* was required for true crimes, the long-standing position was that absolute liability – the absence of any fault requirement – would be acceptable for public welfare or “regulatory” offences.<sup>46</sup> By the late 1970s, however, the courts had become dissatisfied with imposing liability for offences – even regulatory offences – without any fault requirement whatsoever. In *R. v. Sault Ste Marie*,<sup>47</sup> the Supreme Court of Canada created a “halfway house” between the fault presumptions for true crime and a complete absence of a *mens rea* requirement. The Court articulated a common law presumption for strict liability in regulatory or public welfare offences. That is, unless the statutory language prohibited such an interpretation, the Courts would presume that an accused could not be convicted of a regulatory offence if he could show that he had exercised due diligence. In effect, carelessness was the new common law standard for fault in regulatory offences. *BC Motor Vehicles*, decided in 1985, was such a significant case because, as the Supreme Court’s first foray into the interaction of constitutional law, it held that this presumption would now be a constitutional requirement. Aided by some inventive work in the interpretation of s. 7 of the *Charter*, the Court held that the principles of fundamental justice meant that “a law that has the potential to convict a person who had not really done anything wrong”<sup>48</sup> – *viz*, absolutely liability – was unconstitutional if punishment

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<sup>44</sup> Certain examples of the constitutionalization of elements of fault can be found in other jurisdictions. See e.g. the German case of BverfG, 2 BvR 794/95 (2002), and the Judgment of Italian Constitutional Court, March 23-24, 1988, 31 *Revista Italiana Di Diritto e Procedura Penale* 686 (1988), dealing with status offences and mistake of law, respectively.

<sup>45</sup> [1985] 2 S.C.R. 486.

<sup>46</sup> *R. v. Pierce Fisheries*, [1971] SCR 5.

<sup>47</sup> [1978] 2 S.C.R. 1299.

<sup>48</sup> *BC Motor Vehicles*, *supra* note 45, at 492.

could result in the deprivation of liberty. This decision had two important effects. First, an important constitutional minimum was thereby set in Canadian criminal law: one could not combine imprisonment with absolute liability. Secondly, and of more general interest, the case reflected one possible mode of interaction between constitutional principles and the criminal law: the constitutional entrenchment of common law notions of fairness.

Canada had also been working out a great divide that mirrored a central theme in criminal law theory, the contest between subjective and objective theories of fault. While certain scholars of criminal law advocated for the greater use – or at least acceptability – of objective forms of fault,<sup>49</sup> the trend in Canadian common law had been towards subjectivity in criminal fault. By 1978, the Court had held that, absent language to the contrary, the strong presumption would be that any true crime, as distinct from regulatory offences, would require subjective *mens rea*. Would this presumption also be constitutionalized? The answer was interestingly ambivalent. On the one hand, the Supreme Court took the important step of invalidating Canada's constructive murder provisions on the grounds that such a serious crime – what the Court labeled a “stigma offence” – demanded full subjective *mens rea*.<sup>50</sup> The fact that the constructive murder provision allowed for conviction without subjective foresight of death made it constitutionally infirm. The conceptual basis upon which the Court made this decision is also notable – it employed a proportionality principle. The Court reasoned that the principles of fundamental justice required proportionality between the moral blameworthiness of the offender and the stigma and penalty associated with the crime. In the case of murder, this proportionality principle mandated subjective foresight of death.

Yet on the other hand, the Court swiftly contained the reach of this demand for subjective *mens rea* when met with the many forms of objective fault found in the criminal law, including reasonable foresight requirements, requirements for reasonable steps, and reasonable person standards. Only a very few offences would be labeled “stigma offences” and for the rest – the vast preponderance of true crimes (including manslaughter<sup>51</sup>) – objective *mens rea* would suffice. Proportionality between moral blame and stigma/penalty would also mean that a

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<sup>49</sup> George P. Fletcher, *Rethinking Criminal Law* (1978).

<sup>50</sup> *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Martineau*, [1990] 2 S.C.R. 633.

<sup>51</sup> *R. v. Creighton*, [1993] 3 S.C.R. 3.

minimum *degree* of carelessness would be required for true crimes,<sup>52</sup> but the principle had no real purchase in the meaty middle that, in fact, represented most crimes.

In effect, through constitutional analysis, the Court gave its blessing to a large margin of policy discretion for Parliament in the arena of criminal fault. When combined with a very low standard for causation, which has also received constitutional approval, the result is a substantive criminal law that casts the net of liability very broadly, indeed.<sup>53</sup> As Kent Roach had noted, a gap has opened up between the wisdom reflected in the common law of fault and the governing constitutional principles.<sup>54</sup> Crucially, in constitutional matters, such a gap is really a warrant, comforting a legislature that the only standard with which it need concern itself is the bare constitutional threshold. With this, we see another form of the interaction between constitutional principles and substantive criminal law: the translation of aspirational standards into mere minimums, with the consequent shift of attention from what is wise to what is permitted.

This unfolding also troubles the conceit that constitutionalism will naturally insulate criminal law from the populism and politics that so often sets upon the topic. No area of substantive law has a greater potential impact on the day-to-day efficacy of a crime control agenda than does the law of fault. Yet in Canada, despite the setting of important constitutional thresholds at the very high and very low end of the ladder of crime, the law of *mens rea* has been largely undisturbed by constitutional analysis. In this respect, constitutional law has served, rather than resisted, the radical expansion of crime control agendas. From time to time a crime is challenged as unconstitutional, and the result is both interesting and important. As we will see in the next section, constitutional law has had things of philosophical and even media interest to say about the (often extraordinary) law of criminal defences. But the story of the constitutionalization of fault in Canada is a reminder of the relative marginality of these intriguing cases from the everyday realities of governance through criminal law.

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<sup>52</sup> See, most recently, *R. v. Roy*, [2012] 2 S.C.R. 60.

<sup>53</sup> Gerry Ferguson, 'Causation and the Mens Rea for Manslaughter: A Lethal Combination', (2013) 99 *Criminal Reports* 351 ff.

<sup>54</sup> Kent Roach, 'Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault', (2011) 61 *UTLJ* 545 ff.

### 3. Constitutional Principles and Criminal Defences

One can find an elaborate picture of the social and internal lives of individuals in the law of criminal defences. Criminal defences stake out perspectives on how emotion works on individual will, as evident in defences like provocation.<sup>55</sup> The law of necessity and duress trade on assumptions about the limits of human endurance and fortitude. Defences depend on conceptions of the sources and nature of vulnerability, both mental and physical. This area of law not only makes descriptive claims about these many aspects of human experience, it judges their significance to personal responsibility and, in so doing, shapes attitudes about appropriate responses to the extremities of life. Criminal defences thus say a great deal about judgment, mercy, and exceptions in the legal order, lending this area to constitutional reflection.

Constitutional principles have appeared in the law of criminal defences in a couple of distinctive ways. On the one hand, constitutional principles have been generated inductively from the structure of classic criminal law doctrine, resulting in guiding standards against which to evaluate criminal defences. On the other, a “soft” form of constitutional rule has seen the tacit norms of the constitutional order – what the Supreme Court of Canada has called “*Charter* values” – used to direct the development of the common law of criminal defences. Both of these influences of constitutional principles have transformed aspects of the criminal justice system, largely in the direction of greater compassion, making the criminal law more sensitive and responsive to a broader range of human experiences. Yet the abiding gaps in criminal defences, those areas of suffering and marginalization compounded rather than alleviated by the criminal law and about which constitutional law seems to have little to say, gesture to the structural limits of constitutional justice.

The organizing constitutional idea in the law of criminal defences in Canada has become the concept of “moral involuntariness.” Originally introduced in a celebrated necessity case,<sup>56</sup> the phrase lay largely dormant in the criminal law until 2001 and the case of *R. v. Ruzic*.<sup>57</sup> *Ruzic* was the crescendo in a long development in the interpretation of the defence of duress in Canada, which had both a broad common law test and a

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<sup>55</sup> See generally Benjamin L. Berger, ‘Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Law’, (2006) 51 *McGill LJ* 99 ff.

<sup>56</sup> *Perka v. The Queen*, [1984] 2 S.C.R. 232.

<sup>57</sup> *R. v. Ruzic*, [2001] 1 S.C.R. 687.

significantly narrowed statutory expression. Prior to the *Charter*, the Court was limited to interpretive techniques in softening the harshness of these statutory restrictions. *Ruzic* provided the opportunity for a constitutional *coup de grace*, in the full resonances of that phrase. The accused, living in Serbia, had been threatened with harm to herself and her mother if she refused to smuggle drugs into Canada. She was apprehended on arrival in Canada, charged with importing narcotics, and pled duress. The *Criminal Code* required that the threat that impelled the accused to commit the crime be imminent and that the threatenor be present when the crime was committed. *Ruzic* could not fit herself within these requirements, yet the facts of the case cried out for relief.

The Supreme Court of Canada held that these requirements were unconstitutional because the statute allowed for the conviction of the “morally involuntary.” The Court generated this novel “principle of fundamental justice” by canvassing the internal structure and assumptions of the criminal law itself. Crucially, the Court reasoned from the requirement for physical voluntariness noting that it reflected the informing principle that a person should only be punished for genuine expressions of their will. Indeed, the concept of “involuntariness” had already spread throughout the law of criminal defences, serving also as the basis for the defences of extreme intoxication<sup>58</sup> and automatism.<sup>59</sup> The Court held that the ubiquity of this principle reflected the criminal law’s concern for the autonomy of the human subject and its implicit commitment to respond to the individual’s capacity for meaningful choice. Translated into constitutional terms, the principle of moral involuntariness would mean that any law that would permit the conviction and punishment of the morally involuntary would be unconstitutional. With this, the Court articulated a new meta-standard for the constitutional scrutiny of criminal defences and arguably installed the concept as the touchstone for criminal blame. This new principle clearly bears the imprint of criminal law doctrine, inductively created as it was from other principles of criminal responsibility. Yet most interesting for present purposes is that, whether intended or not, this new principle brings criminal law into harmony with an important theme in liberal constitutionalism, discussed earlier: the analytic priority of “choice”. The creation of this moral involuntariness standard in criminal law thus reflects an inclination for coherence between criminal and constitutional logics.

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<sup>58</sup> *R. v. Daviault*, [1994] 3 SCR 63.

<sup>59</sup> *R. v. Stone*, [1999] 2 SCR 290.



Yet some of the most profound impacts of constitutional law in the realm of criminal defences have come through more subtle means. One important such influence has been the increased salience and force of equality norms – and, in particular, principles of gender equality – in the development of the common law governing criminal defences. The most celebrated example in Canada involved the reinterpretation of the law of self-defence to respond to the realities of spousal violence. The case was *R. v. Lavallée*<sup>60</sup> and although Justice Bertha Wilson nowhere explicitly applied the equality protections of the *Charter*, the dominant note in the decision is the need to ensure that women receive the equal benefit and protection of the criminal law. Permitting the introduction of evidence of “battered spouse syndrome” and ridding the interpretation of self-defence of any strict demand for imminence of apprehended harm, the heart of Justice Wilson’s decision was the demand that the ubiquitous concept of the “reasonable person,” upon which so much criminal law depends, must be sufficiently large to take account of the lived realities of battered women. A similar imprint of constitutional norms of equality on the common law construction of reasonableness can be found in the case of the internationally beleaguered defence of provocation. In Canada, the Supreme Court has held that so long as the defence continues to exist, the ordinary person – central to the defence – should not be informed by beliefs that are inconsistent with “contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*.”<sup>61</sup> Hence, it would be improper to ascribe homophobic or gender unequal beliefs to the reasonable person when evaluating the defence of provocation.

The substantive law of criminal defences has thus offered occasion for the expression of commitment to constitutional principles while being the site for significant advances and innovations in the doctrine. Indeed, I have left untouched one of the most dramatic transformations of substantive Canadian criminal law in view of constitutional principles: the invalidation of Parliament’s scheme for addressing the defence of insanity on the grounds that operation of the scheme was fundamentally unfair to mentally disordered accused and treated them on the basis of stereotypical views of dangerousness and mental illness.<sup>62</sup> The new scheme that

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<sup>60</sup> [1990] 1 S.C.R. 852.

<sup>61</sup> *R. v. Tran*, [2010] 3 S.C.R. 350 at para. 34.

<sup>62</sup> *R. v. Swain*, [1991] 1 SCR 933.

resulted modernized the law of mental disorder in Canada.<sup>63</sup> Yet, as much as it shows the progressive potential of constitutional principles at play in the law of criminal defences, the example of mental disorder also issues a important reminder about the capacity of criminal law to occlude some forms of injustice while addressing others. The narrowness of the legal definition of mental disorder means that, however constitutionally enlightened the legal procedures, a substantial criminalization of the mentally ill continues to take place.<sup>64</sup> Self-congratulation is precluded by the reality that the vicious results of gendered violence have already been suffered by the time modernized iterations of self-defence and provocation are applied in the courts. And poverty continues to be the chief ingredient in crime and punishment alike. On these points, constitutional principles have had precious little to offer.

#### **4. Constitutional Standards for Punishment**

Punishment is one of the most rawly exposed exercises of state sovereignty that remains in contemporary legal systems. In this, a great constitutional theme is worked out through the daily business of sentencing courts. That the law of sentencing and punishment has been comparatively undisturbed by overt constitutional analysis belies the intrinsically constitutional aspect of this dimension of criminal law. But in addition to its essential expression of the sovereignty that underwrites the criminal law, this area has also been a site at which the prevailing constitutional logic of proportionality has marked its insistent advance.<sup>65</sup> These are odd bedfellows: the antique drama of sovereignty and the modern juridical science of proportionality. Perhaps this is the reason that the area has thus far proven so resistant to robust constitutionalization, the exposed reality of sovereign force being ultimately indigestible by liberal constitutional thought.

There are really two questions that arise when one considers the relevance of constitutional law to the practices of criminal punishment:

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<sup>63</sup> *Winko v. British Columbia*, [1999] 2 SCR 625.

<sup>64</sup> See Benjamin L. Berger, ‘Mental Disorder and the Instability of Blame in Criminal Law’, in François Tanguay-Renaud, James Stribopoulos (eds.), *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (2012), 117 ff.

<sup>65</sup> In *R. v. Ipeelee*, [2012] 1 SCR 433, at para. 36, the Supreme Court of Canada stated that “proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.”

namely, the constitutional principles governing the forms of punishment, and those that structure and constrain the manner of sentencing.

With respect to the former, the crucial issue across criminal justice systems has been the constitutionality of capital punishment. In Canada, constitutional debates on this issue have drawn out the themes of sovereignty and proportionality in unique ways. Given that capital punishment is not available in Canada, constitutional reflection on the death penalty has arisen in the context of extradition to face the death penalty in another jurisdiction, a framing of the matter that brings the sovereign dimension of criminal punishment into high relief. Moreover, courts have interpreted the governing constitutional standard shared by a number of constitutional systems – a prohibition on cruel and unusual treatment or punishment – as amounting to a question of whether the impugned sentence is grossly disproportionate, such that it would “outrage standards of decency.”<sup>66</sup> Armed with that standard, in 1991 the Supreme Court initially found that extradition to face the death penalty did not offend the constitution,<sup>67</sup> but reversed course just 10 years later. In 2001, in view of the principles of Canadian criminal justice, the convergence of international consensus, and the domestic and international experience of wrongful convictions, the Court held that it was unconstitutional to extradite without assurances that the death penalty would not be sought.<sup>68</sup> The decision effectively rendered the death penalty unconstitutional.

Short of the extreme mark of capital punishment, however, constitutional law has thus far had little to say about the forms and real experiences of criminal punishment. Imprisonment is marked by violence, degradation, and needless fatalities. Prison conditions are often determined by low-level discretionary decisions that are insusceptible to meaningful review. Perhaps state acquiescence to foreseeable suffering will emerge as a constitutionally sufficient wrong; until then, the focus on formal state action in matters of criminal punishment have left constitutional law remarkably (perhaps blissfully) naïve to and disconnected from the realities of punishment.

When it comes to the *methods of sentencing*, rather than the forms of punishment, the challenge has come from mandatory minimum sentences and other forms of structured sentencing. Minimum sentences make immodest legal claims. They purport to define the threshold of just

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<sup>66</sup> *R. v. Ferguson*, [2008] 1 S.C.R. 96 at para. 14.

<sup>67</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

<sup>68</sup> *United States v. Burns*, [2001] 1 S.C.R. 283.

and appropriate punishment for each and every circumstance; they deny the possibility of the exceptional case. In so doing, they preclude the exercise of discretion and mercy, while frustrating the governing sentencing principle of proportionality.

Exceptional cases invariably arise in the criminal law, a truth to which the case law attests and that the law of affirmative defences in part acknowledges. The constitutional question is what to do about the injustices that are, thus, the inevitable spinoff of minimum sentences. This question has become particularly pressing in Canada where the current government favours the proliferation of minimum sentences as a means of advancing a “tough on crime” agenda. Although Canadian courts experimented with using constitutional law as a kind of safety valve, offering relief in the extraordinary case,<sup>69</sup> the ultimate position has been to reassert the primacy of the principle of proportionality, invalidating in its entirety any minimum sentence that runs afoul of the “gross disproportionality” standard on the facts of a given case, or even a reasonable hypothetical.<sup>70</sup> Of course, a great deal of unfairness can take place short of gross disproportionality. The “merely excessive” sentence is nevertheless an instance of the unnecessary state infliction of pain on the individual. And with this, the problem of mandatory minimum sentences in the field of sentencing law teases out a theme of crucial constitutional significance: that discretion and mercy seem to be ineradicable components of a fundamentally just criminal law.

### **III. Conclusion: The Constitutional Lessons of Criminal Law**

This chapter has pointed to the many ways in which criminal law has assumed a central position in the expression of constitutional principles and themes, and in which criminal law has been transformed by – or has remained stable in spite of – the influence of contemporary constitutionalism. Yet criminal law remains something of an embarrassing underbelly of the legal system, to be grudgingly acknowledged by constitutional theory, avoided if possible. Theories are spun with little sustained regard to the organizing principles and problematics in this crucible of constitutional justice. Even the philosophy of criminal law – concerned though it is with issues of blame, responsibility, and punishment – is too often a swing from one treetop to another, with little attention to the roots of criminal law, which are found

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<sup>69</sup> See *R. v. Latimer*, [2001] 1 SCR 3.

<sup>70</sup> *R. v. Ferguson*, [2008] 1 S.C.R. 96.

in the lived and messy realities of suffering, victimization, and punishment. And so despite the rich interactions between criminal and constitutional law that this chapter has canvassed, despite the claims made for the centrality of criminal law to constitutional reflection, perhaps we are not as far from Milsom's view of the criminal law's place in the system of justice as we ought to be.

It is the unseemly, exceptional, and legally unruly nature of criminal justice that should, in fact, attract our constitutional regard, just as it should have drawn Milsom's interest. Refocused attention on the constitutional dimensions of criminal law will enrich the study of both. As I have argued, criminal law is, in fact, a microcosm for the constitutional, a distilled expression of the concerns at the heart of constitutional reflection. Reginald Allen offered a compendious statement of the themes of this chapter when he described the constitutional aspect of criminal law thusly: "It is in the criminal process that the law and government most narrowly touch, beneficently and also dangerously, the lives of the governed. And it is here that instinct and passion beat hardest on rationality and restraint."<sup>71</sup> Criminal law is among the first arenas in which we see deeper constitutional commitments; it also reveals and tests the limits of the social justice that these commitments imagine. The poverty, illness, and social dislocation that continue to drive the criminal law point to the economic and social structures that are left largely undisturbed by constitutional law. The force of state power, the salience of sovereignty, and the need for conscience all so evident in the criminal law are a forceful reminder of the abiding role of less rational forms of the political in our constitutional lives.

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<sup>71</sup> Reginald Allen, 'The Trial of Socrates: A Study in the Morality of the Criminal Process', in Martin L. Friedland (ed.), *Courts and Trials: A Multidisciplinary Approach* (1975), 4 ff.