

PREFACE

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

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

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

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

Preface

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

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

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

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