

Policing Necessity

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ABSTRACT

It is a common assumption that substantive criminal law applies to everyone, whereas the law of criminal procedure governs the behaviour of agents of the state in particular—and, notably, police officers. This paper addresses a specific judicial challenge to this assumption encountered in both Canada and the United States. Namely, it explores the parallel ex post facto development, by courts, of the general criminal law defense of lesser evils and the ancillary police powers doctrine of criminal procedure (as it is known in Canada), in light of the idea of necessary illegality that anchors both. I argue that both doctrines can be helpfully compared in terms of their similar rationale and, to a meaningful extent, structure. However, their applicability criteria should be differentiated based on the kinds of actors they address. For one thing, for the general defense to be invoked successfully, the lesser evil in pursuit of which one violated the criminal law may well only have to be ‘less’ than the evil that would have ensued from adherence to a criminal prohibition. Yet, the demands of the role of police officer and the collective nature of the state militate in favour of the application of a stricter necessity standard under the ancillary powers doctrine. Furthermore, given that it is state agents that are empowered under this doctrine, and the state tends to have access to greater resources than ordinary individuals to address social problems, the legal alternatives judged reasonably available when assessing the genuine necessity of new police powers should take this fact into account. I conclude by arguing that, despite forceful criticisms of the ancillary powers doctrine, it is, for rule-of-law reasons, as—if not more—needed, in countries like Canada and the United States, as a general lesser evils defense. That said, its parameters should be better calibrated given its particular addressees.

ABOUT THE SPEAKER



Professor François Tanguay-Renaud is an Associate Professor of Law at Osgoode Hall Law School, and a member of the Graduate Faculty of the Department of Philosophy, at York , in Toronto. There, he is the Director of the Jack & Mae Nathanson Centre on Transnational Human Rights, Crime, and Security. He holds law degrees in both civil and common law from McGill University, as well as a D.Phil in Law from the University of Oxford, where he was a Rhodes Scholar. His work focuses on the philosophical foundations of criminal law, criminal procedure, public law, and public international law, as well as on the rule of law, emergencies, collective agency and responsibility, and war ethics. It has been published in leading journals including *Ethics*, *Law and Philosophy*, *Legal Theory*, and *Criminal Law and Philosophy*. He is also editor (with James Stribopoulos) of *Rethinking Criminal Law Theory: New Voices in the Philosophy of Domestic, Transnational, and International Criminal Law* (Hart Publishing, 2012). Of note, he was once an exchange student at Faculty of Law of the National University of Singapore, and published his first law review article in what is now known as the *Singapore Year Book of International Law*.

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