

THE HEART OF THE MATTER: EMOTION IN  
THE CRIMINAL LAW

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## ABSTRACT

This thesis examines the role of emotion in the criminal law. It identifies the current understanding of emotion in the law, and challenges this understanding as it is revealed in the rules of criminal liability. It offers a new approach to understanding emotion which has important implications for the grounds of legal knowledge, the structure of the rules of criminal liability, and the process of judgment.

Chapter One reviews theoretical approaches to understanding emotion in philosophy, psychology and law. The chapter introduces a number of theoretical approaches to analyzing emotion, focusing particularly on the development in the understanding of the relationship between emotion and reason. Chapter Two examines models of moral and legal responsibility to identify their implicit understanding of emotion.

Chapter Three focuses on the role of emotion in the rules of criminal liability, and, in particular, in the criminal defences of provocation, duress and self-defence. The law understands emotion to be an entity explainable in terms of the 'mechanisms' of 'cognition' and 'affect' which underpin it. The chapter argues that the law adopts a different and conflicting understanding of these mechanisms in the rules of criminal liability, and that these differences have important normative implications.

Chapter Four challenges the grounds of knowledge upon which assessments of criminal liability are based. Emotion becomes a metaphor for the need to reconceive the rules of criminal liability and the process of judgment. The chapter adopts a social constructionist approach to understanding emotion. Using this approach, it reassesses the role of emotion in the criminal defences of provocation, self-defence and duress, and explains the process of judgment as an emotional phenomenon. The thesis concludes that a constructionist approach to understanding emotion is well suited to the assessment of conduct in its spatial, historical and cultural context; and for this reason ought to be emphasized in the legal assessment of liability and punishment.

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**For Vera**

## INTRODUCTION

Emotion is ubiquitous. A day will not go by without our feeling a range of emotions. Our emotional state affects how we behave - our performance in the work place, the quality of our relationships and our physical health. Recent literature suggests that emotion is integral to intelligence<sup>1</sup> and rationality<sup>2</sup>.

Crime is full of it. Criminal acts are perpetrated in hatred, greed, envy, jealousy, anger, compassion and fear. The results of crime produce grief and hatred in victims; sorrow, remorse, self-loathing and anger in perpetrators; and a desire to punish within the wider community which is channeled into the conduct of police, prosecutors and judges.<sup>3</sup> The media feeds the emotions of each of these actors and adds a unique, and too often misdirected, hysteria.

Despite the prevalence of emotion in all aspects of life and crime, its place in the criminal law is ambivalent. The etiquette of the courtroom demands that actors suppress their relevant personal emotions: The judge a picture of calm, rational authority; the family of the victim glaring coldly and silently at the accused; the accused, eyes averted, staring blankly at the floor; court

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<sup>1</sup> See Daniel Goleman, *Emotional Intelligence* (New York: Bantam, 1995); "The EQ Factor", *Time Magazine*, October 16, 1995.

<sup>2</sup> See Ronald deSousa, *The Rationality of Emotion* (Cambridge, Mass.: MIT Press, 1987); Jon Elster, "When Rationality Fails" in Cook and Levi, *The Limits of Rationality* (Chicago: University of Chicago Press); Antonio Damasio, *Descartes' Error: Emotion Reason and the Human Brain* (New York: Grosset/Putnam, 1995); Robert Solomon, *The Passions* (Notre Dame: University of Notre Dame Press, 1976).

<sup>3</sup> See William Connolly, "Desire to Punish" in *The Ethos of Pluralization* (Minneapolis, University of Minnesota Press, 1995); Michel Foucault, *Discipline and Punish: the Birth of the Prison* (New York: Pantheon Books, 1977).



orderlies, clerks and stenographers reporting, cataloguing and snoozing; lawyers addressing the judge as if all the others were not even there.

The adversarial system distinguishes what is 'factual' from what is 'emotional'. Examination and cross-examination keep stories free of emotional content - "Please tell the court what *happened*, Mr. Jones, not what you *felt*". The method of questioning is logical and methodical. If the voice is raised in passion, it is often as a tactical ploy. The ability of witnesses to convey the appropriate emotional state is vital to their credibility.<sup>4</sup>

Emotion is marginalized in the rules of criminal liability. The law focuses on actors' conduct, and specifically, on issues of voluntariness and intention. Emotion is only explicitly considered in criminal defences. Actors are considered to always be capable of reason, unless mentally ill, or unless temporarily suffering from an extreme psychological condition.

Emotion is an ambiguous concept. There are many branches of psychology studying emotion but there is no consensus as to its nature or as to its effect on human action. I analyze emotion in the criminal law using two theoretical approaches in psychological literature. I describe these approaches as the 'mechanistic' and the 'social constructionist' approaches. They derive from different epistemological foundations. The mechanistic approach is concerned with the bio-physical and psychological causes and effects of emotion. It proceeds from an assumption that these causes and effects can be known, or at least meaningfully approximated. The law has

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<sup>4</sup> Accused persons might not testify because of what their emotions will reveal. In the most publicised murder trial in Australia's history, *R v. Chamberlain* (1983) 153 C.L.R. 514, some reports suggested that the accused, Lindy Chamberlain, was convicted because her emotional demeanour during the trial was not that of a mother who was recounting the story of the loss of her child to a wild dog.

traditionally adopted various forms of a mechanistic understanding in the rules of criminal liability. The social constructionist approach, on the other hand, suggests that the bio-physical and psychological causes and effects of emotion cannot be known with any meaningful degree of accuracy, and that, in any case, emotion is more usefully explained in terms of the relationships between people in their unique spatial, cultural and historical contexts. The law's understanding of emotion has an important impact on its understanding of what capacity for control or choice actors possess. This in turn has an impact on how it formulates and applies the rules of criminal liability.

In this paper, emotion is brought to centre stage. With emotion as the focus of inquiry, it is possible to confront difficult questions surrounding its true significance in the criminal law. I focus my inquiry on the role of emotion in the law of homicide drawing my examples mainly from the formulation of the law in the *Canadian Criminal Code*<sup>5</sup>, and superior court decisions in Canada, Australia and the United Kingdom. I concentrate on the law of homicide because there is a unique range of defences to the crime of murder which lend themselves to comparative analysis. The crime of murder carries the harshest penalty of all crimes under the common law. Since in most circumstances there is little question of the wrongfulness of the act, the focus can be shifted to the existence of excusatory conditions. On the other hand, when grounds for questioning the wrongfulness of the act are present, the law of homicide reveals how uncompromising rules of criminal liability can be.<sup>6</sup>

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<sup>5</sup> R.S.C. 1985, c. C-46 (hereinafter cited as the *Criminal Code*).

<sup>6</sup> The eminent American criminal theorist George Fletcher suggests that in the Western conception of homicide, "killing is an assault on the sacred, natural order." *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978) at 235 -236. According to Fletcher, in the Bible the slayer was believed to acquire control over the blood of the victim. The only way to remove this control was through execution, regardless of the blameworthiness of the slayer.

I make a number of assumptions in my analysis. I accept a process of judgment which utilizes the centralized structures of courts, prosecution units, lawyers, police forces and penitentiaries. I assume that a system of criminal law imposed by the state has a legitimate role in expressing and enforcing minimum moral standards and in preventing harm to citizens by maintaining a safe environment for the flourishing of human activity. I accept the enforcement of standards through a centrally created and monitored moral code. Although I make this assumption for the purpose of analysis, my conclusions suggest that the structure of the criminal law might be in need of review. Specifically, I conclude that the hierarchy inherent in a state-based criminal law is an impediment to an emotional process of judgment. Finally, I assume that considerations of personal responsibility should occur in the assessment of liability, and not in the attribution of punishment.<sup>7</sup>

My analysis operates at a number of levels. It inquires into the personal responsibility of actors and questions how it ought to be reflected in legal models of liability. It challenges the structure of the existing rules of criminal liability by revealing inconsistencies in their understanding of emotion. To conclude, it offers a new understanding of emotion which challenges the

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<sup>7</sup> I make this assumption because at the stage of attributing punishment, the inquiry is constrained by the fact that liability has already been determined. A finding of liability for an offence identifies the actor as belonging to a particular category of offender. The assessment of punishment then proceeds from the premise that the actor is tainted by the commission of the crime, and that there is an appropriate range of punishment to be applied. The defendant is constrained to arguing that punishment ought to be at the lower end of that range. Also, in the separation of liability from punishment, relevant factors might escape the legal inquiry altogether, though relevant to both liability and punishment. This is particularly the case for offences in which there is no defence available, such as mercy killings. Since there is no partial or complete defence for mercy killing, it is indistinguishable from murder; and since in most common law jurisdictions there is a mandatory minimum sentence for murder, the penalty imposed must be within the range for murder. If compassion were a consideration in the determination of liability, a distinction might be drawn between 'mercy' killing, and cold-blooded murder.

epistemological foundations of the criminal law. The concept of emotion evolves throughout the paper. In Chapter One, it is the subject of inquiry. I peruse historical and contemporary insights into emotion of philosophers, psychologists, and legal theorists. In Chapters Two and Three, emotion is a tool for analyzing the structure of the criminal law. I use a 'mechanistic' understanding of emotion to explore models of responsibility and the rules of criminal liability. I examine the influence of emotion on the construction of these models and rules, and the influence of these models and rules on the understanding of emotion. In Chapter Four, emotion remains a means for analyzing the rules of criminal liability. But in addition, it becomes a metaphor for an epistemological crisis common to psychology and the criminal law. I argue that a new epistemology demands greater attention to the context in which emotion arises in the formulation and application of the rules of criminal liability. Since emotion is central to both disciplines, it is the perfect vehicle for reconceiving the rules of criminal liability and the process of judgment. Emotion emerges not as a peripheral consideration in the criminal law, but as the very heart of the matter.

## CHAPTER ONE

### Understanding Emotion

There are many modes of discourse used to explain emotion. In one mode, emotion is a semantic term to describe a particular feeling state which is distinct but related to a number of other states such as appetites and moods. Appetites are defined in purely physiological terms. Examples are hunger and thirst. Emotion has a more complex etiology requiring some form of mental process before or after a physiological arousal. Moods are similar to emotions but tend to have less specific objects. The mood of depression, for example, might be said to be aimed at the world in general. One can be depressed without being able to specify a particular object. Emotion, on the other hand, is experienced *at*, *with*, or *about* something in particular. When a mood can be attributed to a specific object, it is likely to be associated with emotions. If a student is depressed about her grades, this is likely to be concomitant with emotions of fear about her future prospects of employment, or anger at herself for not studying harder. A related discourse is concerned with categorizing and naming emotions, and creating taxonomies to encompass human emotional experience.<sup>8</sup> I am not concerned with the details of these distinctions and taxonomies.

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<sup>8</sup> See Charles Darwin, *Expression of Emotions in Man and Animals* (London: John Murray, 1892); Carl Lange "The Emotions: a Psychological Study" in James/Lange, *The Emotions* (New York: Hafner Press, 1967) at 35; Jean-Paul Sartre, *The Emotions: Outline of a Theory*, trans. Bernard Frenchtman (New York: Philosophical Library, 1948) at 71; Carroll Izard, *Psychology of Emotions* (New York: Plenum Press, 1991). For a critique of taxonomies of emotion, see Errol Bedford, "Emotions and Statements About Them" in *The Social Construction of Emotions*, ed. Rom Harré (Oxford: Blackwell, 1986).

There is a mode of discourse concerned with the distinction between what is a healthy, and what an unhealthy, emotion. Although to experience emotion is normal, to experience it when given the wrong cues or to experience it on the right cues but disproportionately to those cues might be considered unhealthy, or even pathological.<sup>9</sup> I do not attempt to identify a precise point at which healthy and unhealthy emotion begins and ends. The idea that there is a definable 'normal' range of behaviour is problematic. One of the objects of this paper is to challenge the law's categorization of what is considered to be normal in relation to the experience of emotion.

There is a mode of discourse concerned with the primary characteristics which define emotion; in particular, the extent to which emotions are associated with or caused by 'affective', 'cognitive' or 'social' processes.<sup>10</sup> The relationship between emotion and reason, and emotion and self-control is examined in this discourse. These relationships are of particular importance to the process of determining criminal liability. My discussion in this chapter is limited to contributions to this mode of discourse.

There is an immense body of literature on emotion in philosophy and psychology. The following analysis is not intended to be exhaustive of this literature. Many perspectives are left unexplored. However, the discussion traces a development in the understanding of emotion

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<sup>9</sup> Conditions accepted by the Courts as mental illnesses in Canada and the U.S. are contained in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*. (Washington, D.C.: American Psychiatric Association, 1995) (Hereinafter *D.S.M. IV*).

<sup>10</sup> These terms will be given specific definitions below.

which is important for placing the legal treatment of emotion in subsequent chapters into an historical context.

### **Early Philosophical Perspectives**

Aristotle (384 -322 B.C.) provided one of the earliest definitions of emotion. Emotion is that “which leads one’s condition to become so transformed that his judgment is affected, and which is accompanied by pleasure and pain. Examples of emotion include anger, fear, pity, and the like, as well as their opposites.”<sup>11</sup> For Aristotle, emotion is an ethical concern. It is of interest because it reflects on a person’s character. It does this negatively to the extent that a person’s character reveals an inability to control impulsive behaviour. The stronger a person’s moral training and the stricter his ethical principles, the more control he has over his emotion.

Christian teachings in the Middle Ages perpetuated an image of emotion as opposed to reason, and antagonistic to a good life. Emotions were linked to the sinful nature of sexual urges and the need to control them. As good was opposed to evil, or salvation to damnation, reason was opposed to emotion, and as with evil and damnation, emotion was a state to be overcome.<sup>12</sup>

The theologian Thomas Aquinas (1225 - 1274), the most important philosopher of the Middle

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<sup>11</sup> Aristotle, *Rhetoric*, trans. W. Rhys Roberts (New York: Modern Library, 1954), quoted in Robert Solomon, “Philosophy of Emotions” in *Handbook of Emotions*, eds. Michael Lewis and Jeannette Haviland (New York: Guildford Press, 1993) at 4.

<sup>12</sup> See for example, St. Augustine, *Confessions*, trans. Vernon Bourke (Washington: Catholic University of America Press, 1966) at 300. “Is thy hand, O all powerful God, not strong enough to heal all the diseases of my soul and to extinguish with thy more abundant grace these lascivious passions, even during my sleep? Thou wilt increase, O Lord, Thy gifts more and more within me, so that my soul, escaping from the vicious snare of concupiscence, may follow me to Thee, so that it may not rebel against itself.”

Ages<sup>13</sup>, had a sophisticated theory of reason and emotion which was grounded in his understanding of the relationship between the body and the soul. For Aquinas, the body has lower and higher states. The lowest state is the 'vegetative' which is the level that plants attain. 'Brute' animals reach the next level of the 'sensitive', and only 'man' reaches the highest level of the 'intellective'. These bodily states have a soul to animate them. Although characterized by the intellective, man's being (or soul) encompasses the other states. His action is motivated by the intellective and the sensitive.

Of factors that can change man, some are physiological and others psychological. The latter may be sensible or intelligible, and the former again may be practical or theoretical. Of the first, the strongest is wine; of the second, women; of the third, the power of government; of the fourth, truth. They should be subordinate to one another in the reverse order.<sup>14</sup>

Human emotion is a complex phenomenon which emanates from the 'sensitive'. There are two kinds of emotion, the 'concupiscible' (sexual) and the 'irascible' (aggressive). The two are integrally linked. "Anger starts from desire and leads to it".(254)

Aquinas' philosophy reveals a tension between the intellective and the sensitive. Although reason "governs the emotional life by civil rule, because the sense-appetite has something of its own, [it can] ... resist the commands of reason".(255) Despite this tension, it is clear that Aquinas believes the rational mind can control the sense-appetite. Only from "imperfect appreciation of purpose" does there follow "incomplete voluntary activity [and] .... spontaneous

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<sup>13</sup> Peter Kreeft suggests that if St. Thomas is not "history's greatest philosopher, . . . he was certainly the greatest philosopher for the two thousand years between Aristotle and Descartes." in Peter Kreeft ed., *A Summa of the Summa: The Essential Theological Passages of St. Thomas Aquinas' Summa Theologica* (San Francisco: Ignatius Press, 1990) at 13.

<sup>14</sup> *St. Thomas Aquinas Philosophical Texts*, ed. Gilby (London: Oxford University Press, 1951) at 200.



desire which is typical of animals".(256) His philosophy suggests that man is responsible for all his actions. The intellective capacity has the power to overcome the 'lower' urges and desires of the sense-appetite. "When we want to rise from lower to higher things, first, senses come to our aid; then, imagination; then, reason; then, understanding; then, intelligence; and, in the highest place, there is wisdom, which is God himself."<sup>15</sup>

Aquinas' relation between the intellective and the sensitive was transformed by Rene Descartes (1596 - 1650) into an opposition between reason and emotion. Whereas for Aquinas both are functions of the body (and therefore corruptible), for Descartes, reason is a faculty of the soul and emotion an uncontrollable function of the body.<sup>16</sup> The two are unique in substance and have different influences on human action.

The passions are aroused by perception. The sensory faculties such as sight and hearing receive signals from the outside world which cause a disturbance in the heart. The heart then sends 'animal spirits' flying. These reach the 'pineal gland' at the centre of the brain, and lead to action. The influence of the passions over the animal spirits is counteracted by the actor's reason which originates in the soul. Reason allows the actor some control over the number,

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<sup>15</sup> Thomas Aquinas, *Truth*, vol. II. (Chicago: Henry Regency, 1953) at 267.

<sup>16</sup> Rene Descartes, "Passions of the Soul" in *Philosophical Writings of Descartes*, vol. 1, trans. J. Cottingham, R. Stoothoff, D. Murdoch (Cambridge: Cambridge University Press, 1985) The opposition created between body and soul has come to be known as the 'Cartesian' duality. The term 'Cartesian' originally described Descartes' theoretical methodology. His method of philosophical investigation was to inquire from the subjective standpoint. He considered individual experience and reflection on that experience to be the best source of knowledge. The term has adopted a broader meaning to encompass some of the most enduring concepts in Descartes' philosophy - the dualities of the mental and the physical, body and soul, inner and outer, subject and object, and reason and emotion.

type and level of excitement of the animal spirits reaching the pineal gland. It accounts for volitional action.<sup>17</sup>

The conflict between reason and emotion takes place at two stages: First, there is a conflict over the level of arousal of the animal spirits which reach the pineal gland; and second, once the animal spirits have reached the pineal gland and triggered a series of messages to the muscles through the nerves, there is a conflict over the intensity and the direction of the movements of the body that result. At this second stage, the most that can be done “is not to yield to its [passion’s] effects and inhibit the movements of the body. For example, if anger causes the hand to strike a blow, the will can usually restrain it; if fear moves the legs to flight, the will can stop them.”(345) When the passion aroused is sufficiently strong, reason cannot even prevent the reactions it causes. At this point, the actor is out of control.

The common law’s understanding of emotion is still influenced by the philosophy of Aquinas and Descartes. The language Descartes uses to describe the emotions is evident in contemporary common law terminology: ‘heat of passion’, ‘loss of self- control’, and ‘time for the passions to cool’.<sup>18</sup>

In the 18th century, the distinction between reason and emotion was still fundamental to philosophical discourse. For Immanuel Kant (1724 -1804), morality is in the realm of reason which dictates the will. Emotions are linked to natural inclinations for procuring pleasure. They

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<sup>17</sup> Descartes gives a graphic description of the arousal of anger. See *infra* note 134 and accompanying text.

<sup>18</sup> See for example *Criminal Code* Section 232, *supra* note 5.

have no moral quality in themselves, but take on moral significance if the will of man is made subservient to them. The human will "is the kind of will that is affected but not determined by impulses."<sup>19</sup> Although Kant's theory of reason and morality contains an understanding of emotion, emotion is de-emphasized in his philosophy. Unlike Descartes, he does not proffer a detailed account of the causes and effects of emotion on human action. He looks primarily to a person's willful responsibility for action. Only if this fails to explain conduct is emotion considered as a separate entity of inquiry.

The theory of morality of G.W.F. Hegel (1770 - 1831) was based on a similar relationship between the will and emotion to that of Kant. According to Hegel, the will can be exercised as a product of reason and can therefore be judged according to its moral consequences without consideration of emotion. In discussing the role of determinism in the fixing of punishments, Hegel acknowledges the difficulty of a psychology which "addresses in addition the strength of sensual impulses"<sup>20</sup>, but suggests that the moral attitude of the actor, which might be affected by psychological stimuli and impulses "too strong for reason" are irrelevant to the central moral question which is the righting of the wrong.<sup>21</sup>

Kant and Hegel do not dismiss the power of emotion to influence the will. However, they assert that the important questions of morality and justice can be assessed in terms of reason since reason is capable of overcoming the impulses of emotion. Questions of the influence of emotion

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<sup>19</sup> Kant, *Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965) at 13.

<sup>20</sup> Hegel, *Philosophy of Right*, trans. T.M. Knox (Oxford, Clarendon Press, 1967) at 72.

<sup>21</sup> *Ibid.* at 70.

on the will are complications best omitted from the moral inquiry. There is no need to examine physical impulses in a moral assessment, only the reasons for action and the particular harm done. In order to focus on this aspect of action, they are prepared to focus exclusively on the will.

David Hume (1711 - 1776), a contemporary of Kant, inverted the relationship between reason and emotion.<sup>22</sup> For Hume, models of reason can not explain a good deal of human behaviour. He describes the passions as being of a higher order than reason, for it is the passions which move us to action. Reason has no such power. Actors make decisions not based on objective reasons but on idiosyncratic emotional whims which draw the person in a particular direction. We can give a modern example. Let us say that a university graduate is interested in teaching law, practising law or working in public policy. On rational grounds, there may be advantages to each choice - comparatively higher wages, benefits of life-style or job satisfaction. However, even if the graduate is satisfied that one career path will yield greater financial returns and another is likely to bring greater job satisfaction, these factors cannot be rationally weighed. In the end, emotional considerations such as whether the person has a good feeling about one of the jobs will be determinative.

Hume's theory is utilitarian. His argument is that passions dictate where our pleasure lies and reason simply has to interpret the passions. The theory may have important implications for the level of control that actors can be expected to have over strong desires and consequently, the level of their responsibility for acting in accordance with such desires. If the passions move us

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<sup>22</sup> Hume, *A Treatise of Human Nature*, eds. Green and Grose (Scientia Verlag Aalen, 1964), *passim*.

to action, we have no power to stop them. The question of responsibility is then not what reason suggests is acceptable conduct, but what can be expected of an actor's emotion. Dewey reconciled the opposing positions of Kant and Hume by arguing against the understanding of reason and emotion as distinct entities. For Dewey, both reason and emotion are only "functioning factors in the whole process of determining action". There can be no action without a combination of the two.<sup>23</sup>

Friedrich Nietzsche (1844-1900) states that for any serious philosophical investigation of moral responsibility it is important to recognize the frailty of human nature.<sup>24</sup> In so stating, Nietzsche rejects a responsibility which makes any assumptions about the human capacity to reason. He observes a tendency to assume a basic human nature from which reason can operate. Nietzsche recognizes that psychological investigation is a rich source of knowledge of human action and therefore of the morality of that action. He also recognizes that such investigations have their dangers. Scientific investigations in general, and psychological investigations in particular, can reach ends of which they are not mindful.<sup>25</sup> Nevertheless, Nietzsche endorses the awakening of moral observation: "Mankind cannot be spared the horrible sight of the psychological operating table, with its knives and forceps."<sup>26</sup>

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<sup>23</sup> John Dewey, *Lectures on Psychological Ethics*, ed. Donald Koch (New York: Hafner Press, 1976) at 106. As will become evident in Chapter Three, the defence of provocation seems to grant the emotion of anger such a dominant position in the defence of provocation.

<sup>24</sup> Nietzsche, *Human, All too Human: a Book of Free Spirits*, trans. Marion Faber (Lincoln: University of Nebraska Press, 1984) at 39.

<sup>25</sup> The ethical consequences of determining that violent aggression is a natural expression of human nature might be devastating. Aggression might be thought always to be worthy of excuse. This is not so much a problem of finding aggression to be natural, as a difficulty in incorporating such a finding into a valid expression of community values. The defence of provocation will be my primary example of this problem in Chapter Three.

<sup>26</sup> Nietzsche, *Human, All too Human*, *supra* note 24 at 41.

There is a constant theme in this short survey of the understanding of emotion held by important pre-20th century philosophers. Although philosophers throughout the ages differ in their opinion of the worthiness of emotion, and its importance relative to reason, they all conceive of an opposition between reason and emotion. It is not until the emergence of modern psychology that this opposition begins to be challenged. The work of these philosophers has influenced the contemporary legal jurisprudence of personal responsibility and criminal liability. For example, in a discussion of the theoretical foundations of the defence of necessity in the seminal Canadian case of *R. v. Perka*, Wilson J. of the Supreme Court stated:

The entire premise expressed by such thinkers as Kant and Hegel [is that] man is by nature a rational being, and that this rationality finds expression both in the human capacity to overcome the impulses of one's own will and in the universal right to be free from the imposition of the impulses of others.<sup>27</sup>

### **Psychological Perspectives**

In the 20th century, psychologists have made many of the important contributions on the philosophy of emotion. There are a number of branches of psychology engaged in the study of emotion. I discuss the work of theorists who analyze emotion in terms of its biological and physiological determinants and effects,<sup>28</sup> in terms of its psychological origins and expression<sup>29</sup>

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<sup>27</sup> Wilson J. in *Perka v. R* (1984) 14 C.C.C.(3d) 385 (S.C.C.) at 415.

<sup>28</sup> See for example, James/Lange, *The Emotions*, *supra* note 8, Zajonc, "On the Primacy of Affect" (1984) 39 *American Psychologist* 117; Izard, *Psychology of Emotions*, *supra* note 8; Damasio, *Descartes' Error*, *supra* note 2.

<sup>29</sup> See for example, Plutchik, *The Psychology and Biology of Emotion* (New York: Harper Collins College, 1994); Sandra Thomas, "Emotions and How They Develop" in *Women and Anger*, ed. Thomas (New York: Springer, 1993); Lazarus, "Thoughts on the Relation between Emotion and Cognition" (1982) 37 *American Psychologist* 1019; Frijda, "Appraisal and Beyond" (1993) 7 *Cognition and Emotion* 225.

and as a social construction.<sup>30</sup> There is no absolute consensus among the proponents of each approach. However, there is agreement that emotions influence perceptions, thoughts and actions in some way and that they have distinct physiological conditions and behavioural traits.<sup>31</sup> More contentious is the subjective experience of emotion and, in particular, what degree of control actors have over their behaviour while in an extreme emotional state.

### Theorists Emphasizing Affect

Empirical psychology might be said to have its origins in the work of Charles Darwin.<sup>32</sup> However, it was the work of William James and Carl Lange which first espoused a comprehensive psychological theory of emotion in terms of affect.<sup>33</sup> The theories of these men emphasize that emotion is a physiological change which is subsequently experienced as a particular feeling state or emotion. "[T]he bodily changes follow directly the Perception of the exciting fact, and ... our feeling of the same changes as they occur *is* the emotion. . . . [W]e feel

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<sup>30</sup> See for example, Rom Harre, *Social Being* (Oxford: Blackwell, 1993); Claire Armon-Jones, "The Thesis of Constructionism" in *The Social Construction of Emotions*, ed. Rom Harre (Oxford: Blackwell, 1986) at 135; John Greenwood, *Realism, Identity and Emotion* (London: Sage, 1994); Janis Bohan ed., *Seldom Seen, Rarely Heard: Women's Place in Psychology* (Boulder: Westview Press, 1992).

<sup>31</sup> There are exceptions to this rule. For Descartes, it was possible to acquire absolute power over the emotional state. This was done by learning to perceive the emotion in a way that would not lead to a rise in the passions. For example, through changing habits, a situation which previously aroused the passion of fear and a desire to flee could be transformed into a situation in which courage was aroused. Although it was possible to control the direction of the flow of energy so that a different passion was aroused; once aroused, there was no way of controlling the conduct that resulted from the passion. See *Philosophical Writings*, *supra* note 16 at 345.

<sup>32</sup> Charles Darwin, *Expression of Emotions*, *supra* note 8. There is a large body of research, inspired by Darwin, into changes in facial expression when individuals are confronted with scenarios which engender different emotions. See for example, Izard, *Psychology of Emotions*, *supra* note 8.

<sup>33</sup> James/ Lange, *The Emotions*, *supra* note 8. See also James, *Principles of Psychology* (New York: H.Holt, 1905); "What is an Emotion?" (1884) 9 *Mind* 188.

sorry because we cry, angry because we strike, afraid because we tremble.”<sup>34</sup> The James/Lange theory dominated behavioural psychology at the beginning of the 20th century. It resulted in an explosion of empirical research into the bio-physical causes and somatic affects of emotion as theorists took up Nietzsche’s challenge not to be spared the ‘horrible sight of the psychological operating table’.<sup>35</sup> I will use the term ‘affectivists’ to describe psychologists who emphasize the bio-physical origins of emotion.

The discipline of neuroscience has added new approaches to analyzing the affective origins of emotion. Neuroscientists look to the brain as the source of emotion. Some theorists argue that the brain is no more than a complicated, pre-programmed computer, and that all affective reactions can be explained in terms of chemical properties and set reaction patterns of the brain.<sup>36</sup> Others draw a clear distinction between the human brain and computers, rejecting analyses which compare brain functions with computer programming.<sup>37</sup>

In recent work on the affective mechanisms of emotion, neurologist, Antonio Damasio, was surprised to find that one of his patients in whom a disease had destroyed the part of his brain

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<sup>34</sup> James, *The Emotions*, *supra* note 8 at 13.

<sup>35</sup> However, the willingness to analyse emotions empirically may have been at the expense of a coherent philosophy of the emotions. Anthony Kenny, a philosophical psychologist prominent particularly in the 1960s, suggests that the explosion of empirical research may be explained by the fact that physiological changes in the body in response to particular stimuli could be accurately measured. “There was a temptation to experimental psychologists to pretend that in measuring these phenomena, they were measuring emotion”. Kenny, *Action, Emotion and Will* (London: Routledge and Kegan Paul, 1963) at 34.

<sup>36</sup> See for example, Jauregui, *The Emotional Computer* (Oxford: Blackwell, 1995).

<sup>37</sup> Gordon Globus suggests that the human brain defies analysis in terms of its programming. It is self-organizing and capable of metaphysical enlargement. Globus, *The Postmodern Brain*. (Amsterdam: John Benjamin, 1995).



which experiences feeling but in whom all the reasoning faculties were functioning perfectly, suffered a profound defect in his ability to make decisions.

I had before my eyes the coolest, least emotional, intelligent human being one might imagine, and yet his practical reason was so impaired that it produced, in the wanderings of daily life, a succession of mistakes, a perpetual violation of what would be considered socially appropriate and personally advantageous.<sup>38</sup>

This phenomenon led Damasio to explore the neurological relationship between reason and emotion more closely. He concluded that,

human reason depends on several brain systems, working in concert across many levels of neural organization, rather than one single centre ..... [E]motion, feeling and biological regulation all play a role in human reason. The lowly orders of our organism are in the loop of high reason.<sup>39</sup>

Just as emotion is integral to effective reasoning, so is cognition central to emotion. Damasio establishes a complex relationship between reason and emotion which can only be understood “in the context of the organism’s interacting in an environment”.<sup>40</sup>

Damasio does not reject the possibility of a powerful affective component to emotion, but understands the connection between the affective and other components of emotion to be complicated. There is little doubt that some instincts derive from chemical reactions in the brain and the body. However, these instinctual drives do not exist in isolation but are influenced by, and in turn influence, consciousness, reasoned deliberation and emotional appraisal. According

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<sup>38</sup> Damasio, *Descartes’ Error*, *supra* note 2, introduction.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

to Damasio, such considerations usually prevent "explosive anger . . . proceeding . . . unchecked . . . toward . . . murder." (129)

Most affectivists now concede a role for cognition in the generation of emotional states. Others point to empirical research which suggests that there are circumstances in which there is no room for a thinking process in emotion and reactions. They maintain that the explanation for these reactions must lie purely in affect with the cognitive appraisal occurring after the emotional reaction.<sup>41</sup> Affectivist theories are united in their assertion that affective processes have a significant influence over reason.<sup>42</sup>

### Theorists Emphasizing Cognition

In the early 1960s, two American psychologists, Schachter and Singer, devised an experiment which was designed to rebut the James /Lange theory.<sup>43</sup> The experiment involved injecting a

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<sup>41</sup> R.B. Zajonc, "On the Primacy of Affect" (1984) 39 *American Psychologist* 117, Andrew Papanicolaou, *Emotion: A Reconsideration of the Somatic Theory* (New York: Gordon and Breach, 1989). There is a large body of research on the effect of emotional stimuli on facial expressions. External events make us smile or frown spontaneously and, it is claimed, without time for a cognitive process to have occurred. See for example, Carroll Izard, *Psychology of Emotions*, *supra* note 8. At least one theory suggests that facial expressions affect brain temperature which in turn affects the sensation of emotion. Zajonc, Murphy and McIntosh, "Brain Temperature and Subjective Emotional Experience" in *Handbook of Emotions*, *supra* note 11.

<sup>42</sup> See for example, Konrad Lorenz, *On Aggression*, trans. Marjorie Wilson (New York: Harcourt, Bruce and World, 1963) at 248. "By itself, reason can only derive means to achieve otherwise determined ends; it cannot set up goals or give orders. Left to itself, reason is like a computer into which no relevant information conducive to an important answer has been fed; . . . The motive power . . . stems from instinctual behaviour mechanisms much older than reason and not directly accessible to rational observation. . . . The deepest strata of human personality are, in their dynamics, not essentially different from the instincts of animals."

<sup>43</sup> Schachter and Singer, "Cognitive, Social and Physiological Determinants of Emotional State" (1962) 65 *Psychological Review* 379. The primacy of cognition for emotional reactions actually has its origins in the work of Aristotle. See *Nichomachean Ethics*, trans. J.E.C. Weldon (London: Macmillan, 1912) at 135.

number of subjects with a drug which caused a state of arousal in them, and then subjecting them to two scenarios; one in which a person was acting towards the subject light-heartedly and frivolously, and one in which a person was acting in a manner designed to irritate the subject. It was found that the same state of arousal (that is, the same dose of the same drug) gave rise to different emotional states depending on the subject's appraisal of the circumstances. Schachter later drew the conclusion that what distinguishes a physiological arousal as a particular emotional state is the appraisal of why the arousal has occurred. There is only a general, indistinguishable arousal which is transformed into an emotional condition by the interpretation of events surrounding the arousal. Later theorists extended the work of Schachter and Singer further, claiming that arousal itself is the result of an appraisal or judgment of a situation. Lazarus stated, "emotion without thought would be mere activation without the directionally distinctive impulses of attacking in anger or fleeing in fear".<sup>44</sup> For these theorists, 'cognition', the thought process behind appraisal, is present at all phases that lead to the incidence of an emotional state.

What is meant by cognition is not clear. It cannot be equated with the legal concept of intention since it need not be "deliberate, rational, or conscious".<sup>45</sup> Furthermore, "cognition cannot be

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<sup>44</sup> The main proponent of this theory is Robert Lazarus, "Thoughts on the Relation Between Emotion and Cognition", *supra* note 29. See also, Lazarus, *et al.*, "Cognition, Emotion and Motivation: Doctoring Humpty-Dumpty" in *Approaches to Emotion*, eds. Klaus Scherer and Paul Ekman (Hillsdale, N.J.: L. Erlbaum, 1984); Lazarus, "On the Primacy of Cognition" (1984) 39 *American Psychologist* 124; Lazarus, *et al.*, "In Search of the 'Hot' Cognitions: Attributions, Appraisals and Their Relation to Emotion" (1993) 65 *Journal of Personality and Social Psychology* 916; Lazarus and Smith, "Appraisal Components, Core Relational Themes and the Emotions" (1993) 7 *Cognition and Emotion* 233. See also Nico Frijda, "Appraisal and Beyond", *supra* note 29; Frijda, "Lazarus' Labour of Love" (1994) 8(5) *Cognition and Emotion* 473; Solomon "On Emotions as Judgments" (1988) 25 *American Philosophical Quarterly* 183; Solomon, "Sympathy and Vengeance: the Role of Emotion in Justice" in *Emotion: Essays on Emotion Theory*, eds. Stephanie Van Goozen, Nanne Van de Poll and Joseph Sergeant (Hillsdale, N.J.: L. Erlbaum, 1994).

<sup>45</sup> Lazarus, "Thoughts on the Relation Between Emotion and Cognition" *supra* note 29 at 1022.

equated with rationality. The appraisals that shape our emotional reactions can distort reality as well as reflect it realistically.”<sup>46</sup> It is controversial whether cognitive processes are conscious or sub-conscious; reflective or unreflective; deliberate, habitual or instinctive. What is meant by cognition affects the level of personal responsibility a person has for his or her emotional reaction. Without attempting to resolve these uncertainties, I describe as ‘cognitivists’ theorists who emphasize the elements of appraisal, thought and judgment to explain emotion.

Rationality theorist, Ronald deSousa, describes the role of emotion in making decisions as “breaking the ties of reason”.<sup>47</sup> Thus, the University graduate deciding what career to follow<sup>48</sup> will not be left powerless to make a decision because she is able to distinguish between her choices on emotional grounds.<sup>49</sup> For deSousa, emotion fulfills this task in a number of ways. First, it provides a *desire* to make a decision which motivates the person to action. Rational decision-making might provide many good reasons to make a decision, but emotion provides the motivation to choose. Second, emotion helps reduce the number of factors deemed relevant to the choice so that the reasonable choice is more evident.

Robert Solomon incorporates a cognitive understanding of emotion into a broader philosophy which aims “to return to the passions the control and defining roles in our lives that they have so long . . . been denied.”<sup>50</sup> He describes emotions as an expression of a personal value system.

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<sup>46</sup> *Ibid.*

<sup>47</sup> deSousa, *Rationality of Emotion*, *supra* note 2 at 16.

<sup>48</sup> This example was discussed *infra* note 22, and accompanying text.

<sup>49</sup> deSousa, *Rationality of Emotion*, *supra* note 2 at 15.

<sup>50</sup> Solomon, *Passions*, *supra* note 2, preface.

The arousal of a particular emotion is an indication that the person experiencing the emotion has evaluated the circumstances in which they are placed in a particular way. Emotions can therefore be judged according to the values they expound.<sup>51</sup> "Every emotion . . . is a personal ideology, a projection into the future, and a system of hopes and desires, expectations and commitments and strategies for changing our world."<sup>52</sup>

The division between cognitivists and affectivists is a division in the wider debate concerning the relationship of emotion and reason.<sup>53</sup> Affectivists hold that emotions are internal phenomena which emanate from the person under particular conditions. Emotions are distinct from, and not controllable by, reason. Cognitivists understand that there is an inextricable connection between emotion and reason. Emotion is a result of appraisal and appraisal depends largely on an actor's understanding of, and relationship with, his or her physical and social environment.

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<sup>51</sup> See generally, Solomon, *Passions*, *supra* note 2; *A Passion for Justice* (Reading, Mass.: Addison-Wesley, 1990); "Philosophy of Emotions" *supra* note 11; "Sympathy and Vengeance", *supra* note 44; "On Emotions as Judgments", (1988) 25 *American Philosophical Quarterly* 183.

<sup>52</sup> Solomon, *Passions*, *supra* note 2 at 212.

<sup>53</sup> See for example the debate between Zajonc, "On the Primacy of Affect" (1984) 39 *American Psychologist* 117; and Lazarus, "On the Primacy of Cognition" (1984) 39 *American Psychologist* 124. At one level the difference is one of emphasis: affectivists concentrating on biological and physiological changes in actors to explain the incidence of emotion and emotional reactions, and cognitivists concentrating on the role of appraisal and judgment.

### Social Theories of Emotion

Human beings, and consequently their emotions, are understood by social theorists to be constituted by their interpersonal relationships.<sup>54</sup> Some social theories are a direct extension of theories emphasizing cognition. They understand emotion to be an appraisal of surrounding circumstances, and place a particular emphasis on the role of the social environment in shaping that appraisal.

In my analysis in Chapter Four, I will draw on a recent movement in psychology, social constructionism, to explain the role of emotion in the criminal law which has explanatory power outside the language of cognition and affect. Constructionism arose primarily as a reaction to positivist research methods which, it asserts, ignore the complex influence of the social environment on the incidence of emotion. Whereas theories emphasizing cognition and affect, and more traditional social theories, attempt to explain emotion in terms of the 'mechanisms' which cause it, social constructionists are more concerned with the symbolic meaning of the incidence of emotion in a particular environment. Constructionists are impatient with definitive statements about emotions and the partisan nature of the debate over their origin and expression. They merge the psychological and the philosophical, and the empirical and the metaphysical, into a single theory which suggests complex and integral relationships between reason and emotion, and between the affective, cognitive and social origins of emotion. Constructionists reject traditional research methods and modes of explanation which yield

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<sup>54</sup> See Solomon, *A Passion for Justice*, *supra* note 51; deSousa, *Rationality of Emotion*, *supra* note 2; Harre, *Social Being*, *supra* note 30.

universal truths based on objective empirical observation because they believe human psychology is location and context specific.<sup>55</sup> They understand the role of the psychologist to be in the realm of cultural studies such as anthropology, and emphasize cross-cultural and trans-historical influences on human interaction.<sup>56</sup>

Rom Harre describes people and what they do as “products of social processes”.(2) He rejects the notion of there being ‘basic’ human emotions and describes the categorization of emotions as “not much more than an illegitimate a priori projection of a local biologism onto other forms of life”.(4) Instead, he argues that psychology should be the study of “forms of symbolic interaction”.(12) He does not deny that affective and cognitive processes are present in human action, but views them not as immutable, preconditioned attributes but as patterns of behaviour which are “elaborated and transformed as they are absorbed into the symbolic universe of actual human associations”.(11) As such, a person’s emotions can only be understood in a space and time specific context.

A constructionist understanding of emotion has important ideological and epistemological implications. It challenges the way the criminal actor is constructed and perceived; how the actor is categorized (as normal or abnormal, responsible or irresponsible, virtuous or ignoble), and whether it is possible to possess the knowledge and understanding required for fair and effective judgment of human action. I will use a constructionist approach as the basis for my analysis of the criminal law in Chapter Four.

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<sup>55</sup> For a criticism of constructionist research methodology, see Greenwood, *supra* note 30 at 141. “Emotions are not themselves constituted . . . by our socially constructed descriptions of them.”

<sup>56</sup> Harre, *Social Being*, *supra* note 30.

## Legal Perspectives

There is very little work by legal scholars explicitly considering the role of emotion in the criminal law. Some legal theorists have contributed their own understandings to the theory of affect in relation to the partial defence of provocation.<sup>57</sup>

The American legal pluralist William Connolly emphasizes a social aspect of emotion in his examination of the desire of the community to punish perpetrators of crime.<sup>58</sup> Connolly unpacks the language of responsibility to find seething beneath it a strong desire to punish. Desire is “an organization of energy, beyond [the need for food, clothing or nurturance], to possess, caress, love, emulate, help, befriend, defeat, stymie, boss, fuck, kill, or injure other human beings.”<sup>59</sup> He describes two elements of desire in punishment. The first is a desire to protect society. Although the various rationales for punishment are inconclusive and contestable, the rhetoric of responsibility continues to rely on these rationales. The desire to punish is poured into this rhetoric to hide the unarticulated and denied second element of desire; to seek revenge. Connolly calls for closer attention to the desires at work in the process of punishing and demonstrates how fundamental is emotion, in the form of desire, to the attribution of responsibility.(50)

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<sup>57</sup> See for example H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 183. In one line, Hart dismisses emotion as no more than involuntary affect. “If you strike me, the judgement that the blow was deliberate will elicit fear, indignation, anger, resentment: these are not voluntary reactions.” See also Peter Brett, “The Physiology of Provocation” [1970] *Criminal Law Review* 634.

<sup>58</sup> William Connolly, *Ethos of Pluralization*, *supra* note 3.

<sup>59</sup> *Ibid.* at 49. Connolly adds, however, that a satisfactory theorization of desire probably cannot be found.



Recent work by US legal theorists Dan Kahan and Martha Nussbaum is directly related to my analysis of emotion in the criminal law.<sup>60</sup> They focus on how two concepts of emotion, the 'mechanistic' and the 'evaluative', influence the interpretation and application of criminal laws. They describe the mechanistic understanding of emotion in extreme affectivist terms which allows no room for cognition.<sup>61</sup> Emotions are described as "impulses or drives that go their own way without embodying reasons and beliefs".(279) They "follow laws of their own".(278)

They describe the 'evaluative' understanding of emotion in the language of cognition. According to this view, emotions themselves contain an evaluation of the object. As such, they are capable of being evaluated, both in terms of the values expounded through the experience of having the emotion, and the values expounded through the action chosen to express the emotion.<sup>62</sup> They identify different species of the evaluative concept of emotion each of which places different degrees of emphasis on the cognitive components involved. At one level, the 'necessary conditions' species simply requires that there can only be an emotion when there is a belief in conditions which would give rise to emotion. The 'constituent parts' species requires that this cognitive element be part of the emotion. The sufficient condition species argues that the cognitive element alone is sufficient for there to be an emotion. Finally, the identity species argues that the emotion is nothing more than its cognitive correlates.<sup>63</sup> They acknowledge the role of social factors in the development of emotion but do not explore the possibility that these

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<sup>60</sup> Kahan and Nussbaum, "Two Concepts of Emotion in the Criminal Law" (1996) 96 *Columbia Law Review* 269.

<sup>61</sup> *Ibid.* at 279 - 282.

<sup>62</sup> *Ibid.* at 285. Kahan and Nussbaum draw a clear distinction between arousal and expression.

<sup>63</sup> *Ibid.* at 293 - 295.

factors might be constitutive of emotion in themselves. Instead they look to how well the mechanistic and evaluative conceptions account for social factors.

Kahan and Nussbaum's analysis polarizes emotion in terms of cognition or affect. They argue persuasively that the criminal law has traditionally adopted a mechanistic understanding of emotion. They criticize this understanding, and strongly endorse an evaluative concept of emotion in the rules of criminal liability. They argue that the evaluative concept has greater descriptive power and lends itself better to a normative inquiry.<sup>64</sup> My analysis differs from that of Kahan and Nussbaum in a number of ways. First, my discussion of emotion in terms of cognition and affect does not require the acceptance of one theory over another. On the contrary, I argue that the law should not be contributing to the vast literature on the origins of emotion by accepting any theory as paramount. As a result, I do not feel compelled (as Kahan and Nussbaum do) to explain each element of the defence in these terms. Second, I argue that merely by focusing the understanding of emotion on the debate over its origin and expression is to be trapped in a narrow understanding of emotion, for it assumes the existence of a separate entity called 'emotion' and requires the consideration of how this entity is expressed through action in any given scenario. The focus of the inquiry into responsibility must then be the thoughts and beliefs contained within the entity 'emotion', and the reasonableness of those beliefs. I argue in Chapter Four that understanding emotion as an 'entity', even if normatively conceived, adds unnecessary complication to the rules of criminal liability and the process of

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<sup>64</sup> However, by casting the mechanistic in such extreme terms, I believe the analysis of Kahan and Nussbaum fails to capture some difficult scenarios which lie between cognition and affect, and are not well explained by either.

judgment. The entity itself risks being the 'thing' of value, removing the focus from the context in which human action occurs.

I agree with Kahan and Nussbaum that if the law must make a choice between a mechanistic and evaluative concept of emotion in the rules of criminal liability, the evaluative concept, as they describe it, is eminently preferable. However, by focusing on the affective and cognitive components of emotion at all, I believe Kahan and Nussbaum are limited to discussing what I more broadly conceive of as the 'mechanisms' of emotion. I believe a cognitive, or 'evaluative', understanding of emotion is also mechanistic and, as I discuss in Chapter Three, can also be used to answer important normative questions in the language of a psychological reality. Kahan and Nussbaum acknowledge the difficulty of applying a standard of reasonableness to an evaluative concept of emotion in particular social environments. They ask the pertinent question, "whose ideas of reasonableness?",<sup>65</sup> but omit the equally important question, "whose ideas of emotion?". In asking this latter question, emotion itself is revealed to be a social construct, arising in a particular cultural, social and historical condition.<sup>66</sup> The appeal of a social constructionist approach to emotion is that by avoiding the language of cognition and affect altogether, questions challenging the context in which legal rules are enforced such as the above, become central to the inquiry into criminal liability.

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<sup>65</sup> Kahan and Nussbaum, "Two Concepts of Emotion", *supra* note 60 at 297. "When we are asking about anger, for example, do we look for our norm of reasonableness to the Utku Eskimos or to the ancient Romans, or to some critical norm that transcends both cultures?"

<sup>66</sup> In Chapter Four, I discuss how the whole mechanistic/evaluative debate arose within a particular scientific paradigm which was underpinned by a belief in attaining absolute understanding through the acquisition of knowledge. This belief is contained in what I call the 'modernist epistemology'. See discussion *infra* note 184, and accompanying text.

## Conclusion

An historical investigation of psychological, philosophical and legal perspectives reveals a diverse and changing understanding of emotion. Prior to the 20th century, the dominant theories of emotion and therefore those which influenced the rules of criminal liability and the process of judgment were the work of a small number of men. The understanding of emotion has become more complex in the 20th century due to the existence of a huge body of literature from various theoretical perspectives.<sup>67</sup> Some of these perspectives have challenged the very grounds of our knowledge of emotion. This work has important implications for the criminal law.

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<sup>67</sup> The last few decades have seen the emergence of a women's movement in psychology, which challenges traditional empirical and theoretical methods, and aims to make women's voices heard in the field. See for example, Janis Bohan ed., *Seldom Seen, Rarely Heard*, *supra* note 30; Rhoda Unger and Mary Crawford, *Women and Gender: A Feminist Psychology* (Philadelphia: Temple University Press, 1992); Sandra Thomas ed., *Women and Anger* (New York: Springer, 1993); Anne Campbell, *Men, Women and Aggression* (New York: Basic Books, 1993). This movement in itself has had a direct impact on the role of emotion in the criminal law with the admissibility of evidence of Battered Woman Syndrome in self-defence trials which is based primarily on the work of Lenore Walker; *Battered Woman Syndrome* (New York: Spring, 1984); *The Battered Woman* (New York: Harper and Rowe, 1979).

## CHAPTER TWO

In this Chapter, I examine the role of 'personal responsibility' in the assessment of criminal liability. I then examine different legal models for the assessment of personal responsibility and identify the underlying understanding of emotion that these models reveal.

### Emotion in Models of Responsibility

The word responsibility has many connotations.<sup>68</sup> It can mean simply a physical connection of a force to an event. Thus, a hurricane might be said to be 'responsible' for blowing down a house.<sup>69</sup> It can mean the attitudes of a person toward his duties which reflect on his values and character. Thus, a person who is conscientious and reliable might be described as "responsible".<sup>70</sup> The most common use of the word responsibility in the law is responsibility as "ownership" of conduct.<sup>71</sup> Actors own their conduct if they are causally responsible for an event<sup>72</sup>, have the 'freedom' to physically control their connection to the event and are 'aware' that the event is taking place. This is what I mean by 'personal responsibility'.<sup>73</sup>

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<sup>68</sup> This classification of the terms follows closely the work of Sistare, *Responsibility and Criminal Liability* (Dordrecht: Kluwer Academic Press, 1989) and Hart, *Punishment and Responsibility*, *supra* note 57.

<sup>69</sup> For Hart, this is 'causal responsibility' in *Punishment and Responsibility*, *supra* note 57 at 214ff..

<sup>70</sup> For Hart, this is 'role responsibility' in *Punishment and Responsibility*, *supra* note 57 at 212ff..

<sup>71</sup> Sistare, *Responsibility*, *supra* note 68 at 15.

<sup>72</sup> Omissions are an exception to this although it can be forcefully argued that not to intervene amounts to causal responsibility in many circumstances. If someone throws an egg to you and you omit to catch it, you are at least partially responsible for breaking it.

<sup>73</sup> This equates with Sistare's concept of 'imputative responsibility' in *Responsibility*, *supra* note 68 at 15. Also, it closely approximates Hart's concept of 'moral liability - responsibility' in *Punishment and Responsibility*,

The notion of freedom is perhaps the most difficult in the philosophy of responsibility. It has many connotations. At one level, it may mean freedom from physical coercion.<sup>74</sup> At another level, the question of freedom is connected to the broader question of determinism - is conduct ever the product of free-will, or is everything pre-determined? As will become increasingly evident, the understanding of emotion has important implications for understanding the nature of freedom and therefore of understanding personal responsibility. 'Awareness' is more easily quantified. Generally, a person may be said to be aware that an event is taking place if they are conscious at the time it occurs. However, the concept of awareness is not free of difficulty. For example, there is often controversy surrounding whether an accused person was 'aware' that they were engaging in non-consensual sexual intercourse.<sup>75</sup>

The final important distinction to be drawn is between personal responsibility and liability. Liability means "candidacy for punishment".<sup>76</sup> Reference is sometimes made to "holding a person responsible".<sup>77</sup> I will not use responsibility in this way. Under my terminology, people cannot be held responsible; they can only be held liable for their (personal) responsibility.

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*supra* note 57. For Hart a minimum requirement for moral responsibility is that the person "could have avoided doing" the wrongful act. What is a wrongful act is not a question of morals, but of law.

<sup>74</sup> This notion is itself divisible. Both physical coercion in which physical bodily movements are forcibly controlled and coercion in the form of a threat of physical injury might be considered to negate freedom.

<sup>75</sup> To put it another way, a woman, pushed into engaging in sexual intercourse with her partner, might be surprised to find that even if she exhibits considerable reluctance both verbally and physically, this may not have been sufficient, according to the law, to make her partner 'aware' of her non-consent. *Question of Law Reserved on Acquittal* (No. 1 of 1993), 59 S.A.S.R. 214 (S.C.).

<sup>76</sup> Sistare, *supra* note 68 at 17.

<sup>77</sup> Gilbert Ryle uses responsibility in this way in *The Concept of Mind* (New York: Barnes and Noble, 1969). He receives considerable criticism from Sistare for failing to distinguish responsibility and liability.

Liability is a purely normative concept. A person is liable when they engage in conduct designated as an offence employing a mode of engagement designated to be sufficient for liability to attach.<sup>78</sup>

Theorists throughout the ages have argued whether or not personal responsibility ought to be a necessary requirement for liability<sup>79</sup>, and if it is, what level of personal responsibility is required. Those requiring personal responsibility date back to the ancient Greek philosophers. Aristotle considered that ethics require an examination of individual 'virtue', and that it is only a lack of virtue which ought to lead to criminal liability. Other theorists talk of a moral imperative to consider justice to the individual. For example, the Australian legal philosopher Peter Brett argues that the criminal law embodies the ethical views of the community and that crime and punishment cannot be separated from guilt and blame.<sup>80</sup> Lord Denning takes his morals directly from Christian theology<sup>81</sup> to hold that "in order for an act to be punishable, it must be morally blameworthy".<sup>82</sup> The great American jurist Oliver Wendell Holmes understood the purpose of

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<sup>78</sup> For example, the mode of engagement for some offences requires a specific intent, while for others it requires no intention at all. The distinction between responsibility and liability accords closely to Hart's distinction between 'moral' and 'legal liability' responsibility. For Hart, legal liability responsibility is responsibility for a legal offence. It includes personal and vicarious responsibility and responsibility attaches whether the offence is absolute, strict or requires an element of mens rea. Moral blame is incidental. Hart, *Punishment and Responsibility*, *supra* note 57 at 218. Finkelstein argues that the failure of the law to make the distinction between what she calls responsibility and moral responsibility has led to a narrow concept of legal excuse. "Duress: A philosophical account of the defence in law" (1995) 37 *Arizona Law Review* 251 at 271.

<sup>79</sup> See generally, the discussion of Kahan and Nussbaum on the division between 'voluntarism' which requires some element of personal responsibility and 'consequentialism' which does not. "Two Concepts of Emotion", *supra* note 60 at 301 ff.

<sup>80</sup> Peter Brett, "Physiology of Provocation", *supra* note 57 at 63.

<sup>81</sup> "Without religion there can be no morality: and without morality there can be no law". Lord Alfred Denning, *The Changing Law* (London: Stevens, 1953) at 99.

<sup>82</sup> *Ibid.* at 112.

the criminal law to be to induce external conformity to rule.<sup>83</sup> However, Holmes does not deny the importance of personal responsibility. To do so, he states, would be to “offend the moral sense of any civilized community”.<sup>84</sup> English natural philosopher John Finnis argues that the Rule of Law requires that rules are “in no way impossible to comply with.”<sup>85</sup> In the criminal law this requires ‘substantive fairness’. (260) These elements are an essential part of the ‘Natural Law’ even though, Finnis concedes, their inclusion “very substantially modify the pursuit of the goal of eliminating or diminishing the undesired forms of conduct”. (260) The influential American criminal law theorist, George Fletcher, argues that there is an imperative to excuse on grounds of compassion. He argues that we ought to excuse those caught in a situation in which we recognize we might well have behaved in the same way. For Fletcher it is not a question of having the right to judge and deciding not to exercise it (which would be a decision based on ‘mercy’), but a question of not having the right at all.<sup>86</sup>

The above theorists stand in contrast to those who take a more relative, utilitarian position; in which there is no moral imperative to achieve ‘justice’ for the individual. Justice to the individual is just one of a number of competing concerns. Whether or not rules of criminal liability ought to consider personal responsibility is a pragmatic consideration. The need to protect victims, to uphold community standards and to keep the legal process efficient and

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<sup>83</sup> Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Co., 1945) at 50.

<sup>84</sup> *Ibid.* at 95.

<sup>85</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 270.

<sup>86</sup> Fletcher, *Rethinking Criminal Law*, *supra* note 6 at 808.



expedient may demand that liability and punishment attach to actors regardless of their personal responsibility.<sup>87</sup>

Utilitarian reasoning can be used to support considerations of personal responsibility in the determination of criminal liability. Hart argues that a highly objective view of liability, such as strict or absolute liability, offers individuals in the community the maximum protection, but at a significant price to the individual. There is a direct trade-off between objective certainty in liability conditions and the confidence of the individual that they can avoid breaking the law. Hart opines that it is sensible to limit objective certainty for the comfort of individuals.<sup>88</sup>

The purpose of setting out some of the arguments in this debate is to help place the following discussion in context. If personal responsibility is not required, the law needs no theory of emotion in the rules of criminal liability. Liability attaches regardless of the actor's emotional condition. In Canada, 'justice' to the individual accused person is an important principle guiding the imposition of liability and punishment, and justice requires some degree of personal responsibility.<sup>89</sup> But what degree of personal responsibility is required? How far need the law inquire into the personal circumstances of the individual to be satisfied that he or she is personally responsible? What precisely is the law looking for in this inquiry?

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<sup>87</sup> See for example Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, eds. J.H. Burns and H.L.A. Hart (London: Menthuen, 1982).

<sup>88</sup> However, Hart would have no ethical objection to a law with no provisions to excuse those who are not personally responsible for their conduct. Hart, *Punishment and Responsibility*, *supra* note 57 at 42ff, and at 181. Sanford Kadish refutes Hart's utilitarian reasoning. He argues that on utilitarian grounds we might be prepared to give up the freedom of individual certainty, preferring the risk of accidentally being victims of law enforcement to reduce the risk of being victims of crime. "Excusing Crime" (1987) 75 *California Law Review* 257.

<sup>89</sup> This principle finds expression in Canada in Section 7 of the *Charter of Rights and Freedoms* (Constitution Act, 1867: Pt. 1, as enacted by the Canada Act, 1982 (U.K.), c.11). (Hereinafter the *Charter*).

As to the first limb of this question, Jeremy Horder argues that personal responsibility starts with the actor's actual knowledge of the risk of wrongdoing. A second 'dimension' focuses on what risks of wrongdoing the actor ought to have been aware of and the degree of attention the actor ought to have devoted to the question of risk. A third dimension looks to the circumstances in which it is proper to excuse wrongdoing stemming from desires associated with emotions. "These desires associated with emotions which understandably and excusably give temporary priority to action that leads to wrongdoing .... such as desires associated with compassion and fear".<sup>90</sup> If Horder is right, the degree of personal responsibility required for criminal liability will depend largely on the law's understanding of emotion which brings us to the second limb of the question: what is the law looking for in its inquiry into the personal circumstances of the actor? The answer to this question lies in legal models of responsibility, to which I now turn.

### **Legal Models of Responsibility**

There are a number of perspectives from which to analyze personal responsibility. The first is the 'agent'<sup>91</sup> theory of responsibility in which responsibility is held to originate in the agent.<sup>92</sup>

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<sup>90</sup> Jeremy Horder, "Cognition, Emotion and Criminal Culpability" (1990) 106 *Law Quarterly Review* 469 at 485ff.

<sup>91</sup> The terminology of 'agent', 'dialogical' and 'social' theories of responsibility is taken from a discussion in William Schweiker, *Responsibility and Christian Ethics* (Cambridge, Cambridge University Press, 1995).

<sup>92</sup> Theories of agential responsibility are dominated by the free-will/determinism debate. For determinists all action is preordained. The human agent has no influence over the decisions they make. There are a number of determinist arguments. Some argue from a theological perspective; that all action is pre-determined by an omnipotent God. Some argue from a naturalist perspective; that all action is a product of biological instincts and mechanical processes or is a predictable response to particular environmental conditions over which agents have

If responsibility resides squarely in the agent, so also must any grounds of excuse. This theory of responsibility accords squarely with an understanding of emotion as an internal phenomenon. Under an affectivist understanding of emotion, the agent could only be understood to be responsible free of determinism, if reason (the ground of responsibility) is understood to be opposed to emotion (the ground of excuse). The excuse is available when an agent's emotion is so extreme that it dominates his reason. Kahan and Nussbaum strongly oppose this analysis. Their evaluative concept of emotion is also consonant with an agent theory of responsibility. Emotion is still internal, but responsive to external conditions as they are evaluated and appraised. The agent's personal responsibility is not negated by emotion, but can be judged in terms of the values espoused by the agent through his or her emotional response.

A second theory of personal responsibility, the 'social' theory, examines responsibility as a product of the social environment. In examining the responsibility of an agent, the focus will be on their role within the social order. The degree of responsibility will vary according to such factors as the relative power and opportunities of actors within the social order. Elements of the social theory are evident in the law. For example, an agent's personal liability for environmental crimes committed by a company will be greater if he or she is a director of the company and not just a shareholder. In the social theory, emotion need not be linked to an innate pre-existing instinctual response. Under this theory, extreme emotion is not relevant as an element which reduces personal responsibility, but, on the contrary, might increase the level of responsibility

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no control. Nietzsche discussed the influence of determinism on our attitudes towards personal responsibility. "Those evil actions which outrage us most are based on the error that that man who harms us has free will, that is, that he had the *choice* not to do this bad thing to us. This belief in his choice arouses hatred . . . ; whereas we get much less angry at an animal because we consider it irresponsible." [Emphasis in the original] *Human All too Human*, *supra* note 24 at 69.

depending on the impact of the actor's emotional response in the social environment.<sup>93</sup> Again, Kahan and Nussbaum's evaluative concept of emotion explains well this ground of excuse.

A third theory of responsibility, the 'dialogical theory', focuses on the *encounter* between agents as the site for responsibility. Responsibility resides in relationship and, in particular, in the appropriateness of responses within the relationship. In a dialogical theory, emotion must be understood to be generated by, and constitutive of, relationship. Emotion under this theory can only be judged within the framework of the relationship, and within a particular social context. The evaluation is not simply an internal phenomenon, but one which is highly influenced and generated by the social environment. It is not enough to isolate the actor and his or her evaluations and motivations to determine responsibility. These lack symbolic and practical significance if detached from the actor's historical, cultural and spatial context.

All three theories are closely interrelated. However, for the purpose of determining criminal liability, the understanding of the role of emotion in the law limits the extent of its inquiry predominantly to the agent model. The law is not interested in more abstract notions of responsibility except to the extent that they increase or mitigate personal responsibility as it arises within the actor. The law's focus on the agent model means the understanding of the origin and expression of emotion is crucial to the level of an agent's responsibility for their conduct. The debate between cognitivists and affectivists is of central importance. If emotion is separate from and in the control of reason, its significance is minimal. If it is separate from and

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<sup>93</sup> For example, under the social theory of responsibility, Hitler would be personally responsible for the Holocaust because his emotion created the climate of hysteria in which the Nazis committed mass exterminations of the Jews. His responsibility is established regardless of whether he gave direct orders for the exterminations (which might be required by the agent theory).

not in the control of reason, there may be occasions in which a person is simply not responsible for their conduct. Alternatively, if emotion and reason are integrally connected, it may be impossible to ignore the role of emotion in ascribing personal responsibility. The further question of *how* emotion interacts with reason is then of importance. Different levels of responsibility could attach to actors depending on what perspective is adopted in the psychological debate over the origin and expression of emotions. For the remainder of this chapter and in Chapter Three, I focus on the agent model of responsibility and analyze how emotion operates within the confines of the model. In Chapter Four, I challenge the foundations of the law's construction of the actor as the repository for all questions of responsibility. I argue that the very fact that the actor is the focus of the inquiry into liability is indicative of a particular belief in the potential for knowing or understanding the actor's emotional condition. I challenge the grounds of this knowledge and argue that the new concept of emotion that emerges necessitates a shift of emphasis to a dialogical model of responsibility.

### **Theories of Personal Responsibility under the 'Agent' Model**

There are three theories commonly used to explain the personal responsibility of the actor under the agent model: one is based on the 'choices' available to the actor, another is based on the, 'capacity' of the actor, and the last is based on the 'character' of the actor. The models are interrelated. Proponents of one theory generally do not reject out of hand the alternatives but argue that the theory they support has the greatest power in explaining the rules of criminal liability. Which model is chosen is indicative of a particular understanding of emotion.

### Choice

Choice theory assumes that actors are capable of reason. Choice is the function of reason.

Models of responsibility based on choice theory are strongly influenced by the Kantian concept of free will. Emotion is only relevant, if at all, where it restricts or precludes the ability to choose.

For an act to be chosen, there must at least be a conscious voluntary act committed with some understanding of the context in which the choice is made. Having met these threshold criteria, there are many circumstances in which action might be considered not to have been chosen, some of which amount to conditions of legal excuse. First, it might be considered that a choice also requires an acceptable alternative to the commission of the act. This requirement for choice approximates Fletcher's excusatory condition of 'normative involuntariness' in which the freedom to choose is so restricted that the wrongdoing that results can not be considered to have been chosen. The actor's freedom might be considered to be restricted in this way when the actor faces a number of options none of which she would choose of itself. Fletcher borrows this idea from Aristotle's application of the concept of 'prohairesis'. An action only flows from prohairesis if it flows from the actor's concept of the good, but this is only possible if the actor has the opportunity to choose what accords with their concept of the good.<sup>94</sup>

An actor's freedom to choose can be restricted for many reasons and to varying degrees, only some of which are legally recognized. Restricted choices might be a result of a person's

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<sup>94</sup> Aristotle, *Nicomachean Ethics*, *supra* note 43.

historical circumstances; including their socio-economic background and the number of supportive relationships in their lives. If an actor has no money, no job, no education and no friends, any number of her choices are restricted. If she has no food, she has fewer options for how to procure it. She might be considered to have no choice but to steal.<sup>95</sup> Material advantages are no guarantee of choice. If an actor has the advantages of money, employment, education and friends, but is told while sailing on a ship that he must eat an orange very soon or die of scurvy, an argument that the actor's choices have been restricted may be equally as compelling. If the only orange on the ship is in a fruit basket in the Captain's quarters, the actor might be thought to have no choice but to steal it.

The ability to make a choice might be restricted by the period of time in which it must be made. A person who has five minutes to decide where to invest a sum of money might be considered to have less choice than a person who has a week. Similarly, a person who has to choose to save his own life or sacrifice it in favour of another's life might be considered to have less choice when the decision is made under immediate threat of death, than when it is made with time for contemplation. The ability to make a choice might be restricted by the context in which it is made: Whether made in isolation, or surrounded by consultants; whether made while under physical coercion or while listening to soothing music.

The time period in which actors must choose and the context in which their choice must be made affects their level of emotional stress. Emotional stress in itself might be considered a

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<sup>95</sup> Some theorists argue that such a lack of choice ought to give rise to a legal defence of necessity. See discussion *infra* note 204 and accompanying text.

factor in reducing the ability to make choices. In fact, in the defence of provocation it is understood to preclude the ability to make choices altogether. Finally, a person might have restricted choice because, suffering from a pre-existing physical or mental disability, she is incapable of choosing regardless of the circumstances.

In general, the more extreme the choices to be made and the more adverse the environment in which they must be made, the lower the capacity of the actor to make a choice. At some point on this continuum, choice theory merges with the theory of capacity.

### Capacity

Capacity theory excuses actors because they do not have the ability to choose correctly. There are differing opinions on what constitutes an actor's capacity to control their behavior. At one extreme, "there are still some who hold a modified version of the Platonic doctrine that Virtue is Knowledge and believe that the possession of knowledge (and muscular control) is per se a sufficient condition of capacity to comply with the law".<sup>96</sup> For Hart, "the capacities in question are those of understanding, reasoning and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning those requirements, and to conform to decisions when made."<sup>97</sup>

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<sup>96</sup> Hart, *Punishment and Responsibility*, *supra* note 57 at 32.

<sup>97</sup> *Ibid.* at 227.



At one level, incapacity is a threshold test in the law. Criminal liability requires a minimum level of physical and mental competence. There is a list of officially recognized mental illnesses in psychiatry which the law deems to be incapacities which remove criminal liability.<sup>98</sup> At another level, actors not suffering from mental illnesses can still be considered to possess relevant incapacities despite their directed, intentional conduct. They might be considered 'incapacitated' to the extent that they are momentarily compelled, in their emotional condition, to act illegally.<sup>99</sup> Actors might be considered temporarily incapable of correctly perceiving their options. For example, an actor might simply not consider the available option of ringing the police given their preoccupation with the threat they face.<sup>100</sup> Finally, actors might be temporarily incapacitated to the extent that they are incapable of exercising an option which they do in fact perceive. For example, an actor might not be physically capable of calling a telephone number to seek help because her hands are shaking in extreme fear.<sup>101</sup>

In practice, it is difficult to distinguish between different degrees of incapacity and whether they originate from a failure of the cognitive faculties (which, according to Hart, are understanding and reasoning) or bio-physical faculties (muscular control). The capacity of an extremely stupid person or a person ignorant as to the existence of material facts may be difficult to distinguish from the incapacity of a person of normal intelligence under extreme fear or other emotional

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<sup>98</sup> In Canada and the US, these are contained in the *D.S.M. IV*, *supra* note 9.

<sup>99</sup> This level of incapacity is found in the concept of a "loss of self-control" in the defence of provocation. However, as will become clear in Chapter Three, the nature of this incapacity is far from clear.

<sup>100</sup> A theory of capacity in this form is found in the legal determination of the reasonableness of the belief in the necessity of self-defence.

<sup>101</sup> This form of incapacity might be contained in Lamer C.J.'s concept of "human frailty" in relation to the defence of duress in *R. v. Thibert* [1996] 1 S.C.R. 37.

conditions. To determine whether an incapacity was the cause of wrongful conduct, it is necessary to consider two variables: first, the strength of the impulse to act illegally; and second, the fortitude of the actor; that is, their ability to overcome the emotional stress in order to act lawfully. The first of these variables requires the law to adopt a general understanding of the effect of different emotional conditions on actors. The second requires an analysis of characteristics peculiar to each actor.

The law deals with these difficulties in a variety of ways. Occasionally, it simply refuses to grant incapacity any role as an element of excuse by demanding a uniform standard of conduct "regardless of background, education or psychological disposition".<sup>102</sup> Alternatively, the law gives broader scope to the concept of incapacities and tries to provide a genuine consideration of their excusatory power.<sup>103</sup>

The common law is uniform in accepting one type of 'incapacity' as the basis of excuse - the incapacity to maintain self-control under grave provocation. However, in the defence of provocation, incapacity is not alone a sufficient condition of excuse. The law requires that the fortitude or courage of the actor reach an objective standard. The existence of this standard means it is possible that an actor will not have the capacity to choose to act lawfully but will

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<sup>102</sup> This would seem to be the approach of McLachlin J. in *R. v. Creighton* [1993] 3 S.C.R. 3 at 60ff. McLachlin J. does not countenance the possibility that conditions of emotional stress, or other contextual factors, might transform what is 'unusually excitable' into an average, normal response. McLachlin J. would seem to give some role to incapacity, but only in the form of a pre-existing condition which is not linked to the particular context.

<sup>103</sup> In *Creighton*, Lamer C.J. would seem to give broader scope to incapacity in his consideration of 'human frailties'. *Ibid.* at 29. He endorsed this approach in *R. v. Hibbert* [1995] 2 S.C.R. 973. See discussion in Chapter Three, *supra* note 174 and accompanying text.

still be liable. The existence of this standard cannot be explained by either choice or capacity theory. It is explained by a theory of character.

### Character

Character theory excuses actors when “no negative inference can be drawn from the act to the actor’s character”.<sup>104</sup> The analysis of character is underpinned by a notion of free will.

Individuals are assumed to have the ability to reflect on and to develop their characters. Actors are personally responsible for this development. They are expected to make decisions that shape their characters positively.

The judgment of character requires consideration of the “variations in individuals’ assessments of their circumstances and in their fears, interests, strengths, motivations, aspirations, desires, failings, and every other aspect of character.”<sup>105</sup> Character theory expresses well the objective standards required of citizens in the community because it assumes that actors are in the position to make positive choices with respect to their characters.

[Standards] require [every man] at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions such as infancy and madness. [I]t is . . . those who are most likely to err by temperament, ignorance or folly, that the threats of the law are the most dangerous.<sup>106</sup>

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<sup>104</sup> Fletcher, *Rethinking Criminal Law*, *supra* note 6 at 799. Fletcher advocates imposing standards that “relate the act to the actor’s character traits and then assess whether the actor should be expected to control his propensities to act in a particular way”.

<sup>105</sup> Kyron Huigens, “Virtue and Inculpation” (1995) 108 *Harvard Law Review* 1423 at 1438.

<sup>106</sup> Holmes, *The Common Law*, *supra* note 83 at 50.

Differences in levels of income, education and employment opportunity, and distinctions based on class, race and gender make any assumption of equal responsibility for the formation of character problematic. Holmes might acknowledge this, but he would still require of all citizens a single standard of conduct.

According to character theories, crime is evidence of a "lack of judgment" on the part of the actor. Virtue requires that the individual "respond to the infinite challenges of practical life with regard for the common good."<sup>107</sup> A person's virtue is established over the course of his or her life. The mark of virtue is "practical wisdom - an excellence of deliberation in an active, engaged life". A person of virtue will correctly judge what are good ends and choose to follow them. Therefore the choice a person makes in any given circumstances reflects on his or her virtue. Actors are held criminally liable because their lack of judgment reveals a lack of virtue in their characters.

Claire Finkelstein advances a similar theory based on the healthy dispositions we form such as to family and loved ones. These dispositions sometimes lead people into committing prohibited acts but in a way which does not reflect negatively on their characters. "Having nurtured and protected the development of . . . strong . . . commitments, we will be unable to abandon them in rare, unexpected situations in which it might be better from the standpoint of the general welfare to act contrary to the disposition".<sup>108</sup> Excuses are situations in which we put aside the judgment of the act because of the countervailing judgment of character. For example, if a

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<sup>107</sup> Huigens, "Virtue and Inculcation" *supra* note 105 at 1426.

<sup>108</sup> Claire Finkelstein, "Duress: A Philosophical Account of the Defense in Law" (1995) 37 *Arizona Law Review* 271 at 275.

woman kills a person she has just witnessed sexually abusing her child, this does not reflect negatively on her character. The extreme love she feels for her child is a healthy disposition and the law, according to a theory of character, might be expected to provide an excuse which is not available under a theory of choice or capacity (since the woman may have the capacity to restrain herself and chooses not to). Finkelstein's theory is not that the excuse precludes an analysis of character, but that an analysis of character reveals that a person of good character could have responded as the accused responded although the act was wrong.

There are a number of problems with character theory. First, the basis of excuse is deontological. The assessment of character is a general assessment of 'traits' that exist over a long period of time (though it does expect a development in those traits). It does not assess well whether the reaction of a person while in a momentary emotional 'state' to a circumstance never before encountered can properly be said to reflect on his or her character.<sup>109</sup> Second, character is a nebulous quality. It is measured by numerous variables: honesty and dishonesty, courage and cowardice, generosity and parsimony, compassion and callousness. The fact that a person lacks courage in unusual circumstances might not reflect on other aspects of their character such as their exemplary honesty, generosity and compassion. Finally, even if the reaction in particular circumstances does reflect negatively on the person's character, if the circumstances are very unusual and never likely to be encountered again, the weakness of character might seem insignificant. It might be questioned whether a weak character is a good basis for determining liability.

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<sup>109</sup> For a discussion on the distinction between 'traits' and 'states', see Izard, *Psychology of Emotions*, *supra* note 8.

If a character theory focuses only on the particular trait which has been exposed as flawed, it will tend to impose a stricter standard of liability than choice or capacity theory. Actors will be held responsible for their lack of courage despite lacking the choice or capacity to act otherwise. Theories of choice and capacity are interested in criminal actors' particular 'states' and not in their 'traits'. They take account of unusual circumstances, explaining them as reasons why choices were restricted or why an actor suffered a particular incapacity. If, on the other hand, character theory focuses on the whole of the person's character, it might be more forgiving of the actor than choice or capacity theory which would only focus on the characteristic of the actor which led to the commission of the wrongful act. The theories of choice and capacity do not require a general understanding of relevant characteristics, but explain and judge characteristics as they become relevant to the legal inquiry. For example, they might only be concerned about a lack of courage because that is what led to the commission of the wrongful act, but not the fact that in the circumstances the actor has an exemplary character in all other respects.

Character, choice and capacity theories cannot adequately explain the ascription of liability alone. The excusatory power of particular defences will depend on what theory of responsibility is emphasized which in turn depends on the legal understanding of emotion. For example, the defence of provocation focuses on capacity. Under particular conditions, it is understood that actors will lack the capacity to control their conduct and the language of the defence suggests that the lack of capacity does not reflect on their characters (that is, the partial defence is available only if, in the circumstances, the ordinary person could also have lacked the capacity).

The question of choice is not considered at all. If it were considered, the excuse would disappear since the actor has a range of choices available to him. He could choose to simply walk away or express his anger other than through homicidal violence. Conversely, the defence of duress focuses on choice and character. Choices under duress are assumed to be 'coolly undertaken'. Even those acting in extreme terror under coercion are considered to have some degree of choice regardless of whether the ordinary person could or even would have acted in a similar fashion. Analyzing the same defences under a character model of responsibility, the defences suggest that succumbing to extreme fear reflects more negatively on an actor's character than succumbing to extreme anger. In the same way, other emotions including succumbing to despair, grief or compassion reflect more negatively on an actor's character than does succumbing to extreme anger. These disparities are discussed in more detail in Chapter Three.

### Conclusion

Models of legal responsibility provide the *framework* for the consideration of variables, such as emotion, in the process of judgment. If the framework is an assessment of capacity the focus is on emotional affect. If the framework is an assessment of available choices in the particular environment, a finding of lost self-control might be held to remove any opportunity for choice and the actor's liability judged to be reduced accordingly. Analyzing the rules of criminal liability in this way, the rules fit a simple formula. There is an air of confidence in the law's understanding of emotion within this formula. In the following chapters, I analyze whether this confidence is well-founded.

### CHAPTER THREE

In this chapter, I discuss the rules of criminal liability in terms of affectivist and cognitivist (or generically, 'mechanistic') theories of emotion. I adopt the language of these theories because the law articulates its understanding of emotion in such terms. I analyze how emotion is understood in each defence, and compare the understanding of emotion across defences. The analysis highlights, and in some cases suggests answers to, a series of questions. Should actors be held responsible for their emotional states and their action while in such states? Can a distinction be made between particular emotional conditions for the purposes of criminal liability? Specifically, should homicide committed in a state of anger be more excusable than homicide committed in a state of fear or committed out of compassion in a state of grief? Alternatively, is the attempt to draw such distinctions meaningful, or is it, in fact, an impediment to the legal inquiry into liability? Is there a standard of emotional control which can be fairly demanded of actors? Can emotions be assessed in terms of standards of reasonableness at all? The answers to these questions in turn raise further questions with important ideological implications. Is there a risk of gender or cultural bias in treating particular emotional conditions differently? Finally, the analysis sets the stage for a new understanding of emotion in the criminal law, which is discussed in Chapter Four.



## Elements of Legal Liability

The components for criminal liability are (1) a voluntary act, (2) committed with the requisite intention, and (3) which is not otherwise excusable under a criminal defence. Depending on how it is understood, emotion is potentially relevant to all these components.

### A Voluntary Act

The most fundamental requirement for liability is the existence of a voluntary act. A voluntary act requires more than just muscular movement. Some theorists have used the term “willed” to describe what else is required.<sup>110</sup> Finding this unhelpful, Hart stated that the movement must be “desired”.<sup>111</sup> The use of the language of desire is indicative of the potential role of emotion in voluntariness. However, in the law extreme emotion is understood not to affect the voluntariness of conduct. Instead, there is a limited list of circumstances in which action is considered not to be voluntary, which find expression in the legal state of “automatism”.<sup>112</sup> Theorists who focus on the bio-physical affect of emotion would argue that this list is too limited, and in particular, that there are circumstances outside the list in which actors in states of extreme emotional stress have no control (volition) over their actions.<sup>113</sup> For example, some

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<sup>110</sup> Austin, Lectures XVIII-XIX, 5th ed. 1885 at 411 ff., discussed and cited in Hart, *supra* note 57 at 97.

<sup>111</sup> Hart, *supra* note 57 at 99.

<sup>112</sup> The defence of automatism has traditionally been associated with dissociative states caused by external physical trauma such as a blow to the head causing concussion, or to a limited number of “normal” medical conditions including sleep-walking and hypoglycaemic states. Note also that common law jurisdictions draw a distinction between sane and insane automatism.

<sup>113</sup> See discussion of affectivist theories *supra* note 31 - 42, and *infra* note 136-144, and accompanying text.

theorists give graphic accounts of action in anger, describing it in terms of uncontrollable physiological and neurological changes within the actor. Although the law has a similar understanding of the effect of anger in its concept of “heat of passion” in the defence of provocation, it is not prepared to consider that on its own, anger can negate voluntariness.

### Intention

The second requirement for legal liability is an intention to act. In the separation of intention from the act, the law understands that action is separate from and always caused by a conscious thought process.<sup>114</sup> The most basic of mental processes can amount to legal intention. All that is required is that the person intended their body to act regardless of motive, desire, appetite or urge. Action can be aimless but intentional. Action can be regretful but intentional. It is not necessary to proffer a desire which is consistent with criminal intent, nor is it possible to negate the element of intention by establishing a contrary desire.<sup>115</sup> For example, in no common law jurisdiction do the courts countenance an argument that an intentional killing is not murder

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<sup>114</sup> As with voluntariness, there is a limited number of factors contained in a small list of automatic states that are understood to cause action outside conscious thought or to so affect the thought process that the thinking which takes place does not amount to criminal intention. The existence of such states affects criminal liability to varying degrees.

<sup>115</sup> See for example the decision of the Supreme Court of Canada in *R v Hibbert*, *supra* note 103. The Court addressed the question whether or not the mens rea for party liability of a “purpose” to aid the commission of the crime under s. 21(1) required a *desire* to commit the unlawful act, or a more basic intention. The Court interpreted “purpose” broadly as knowledge of the consequences that would flow from action, intending those consequences and choosing to bring them about. To satisfy “purpose” under s. 21(1), there was no additional requirement that the actor desire to achieve the particular result, or that purpose reveal the motive for action. Having restricted purpose to intent, the Court assumes that coercion cannot negate this intent. At most, extreme fear under duress can negate a “desire” to act. The decision accords with the general approach of the Supreme Court to the operation of criminal defences. Since *Perka*, the Court has tended not to consider how extreme emotion affects *mens rea*, preferring to move considerations of emotion into the developing jurisprudence of defences of excuse.

because it was committed out of compassion for the victim. If emotion was relevant to prima facie liability it might be argued that the compassion of the accused towards the victim should preclude a finding of liability because the compassion negates intent. The law rejects such arguments.<sup>116</sup>

Despite there being no necessity to prove motive or desire (and needing to show little more than that the act was committed consciously) lawyers invariably suggest a motive for crime, being prepared to speculate on what might have been the inclination, desire or emotion behind the intentional act. Lawyers are concerned with motive because they know that to convince judges and juries, they need an explanation for conduct beyond the voluntary act and basic intent.

More often than not, actors who are causatively responsible for offensive conduct will satisfy the elements of prima facie liability and must then argue one of the limited number of available defences. If the State can make out the elements of an offence, an evidentiary burden shifts to the accused to raise a defence. There are obvious practical reasons for this approach to establishing prima facie liability. The identification of a causally responsible actor for the commission of a prohibited act sets the procedures of the criminal justice system in motion. If emotion were considered to be an important consideration in determining voluntariness and intention, it might be more difficult to make out the elements of an offence. Act and intent would need to be considered in the context of the particular relationships which gave rise to

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<sup>116</sup> See for example, Margaret Ottowski, "Mercy Killing Cases in the Australian Criminal Justice System" (1993) 17 *Criminal Law Journal* 10; Paul Taylor, "Provocation and Mercy Killings" (1991) *Criminal Law Review* 111.

them. This would remove a good deal of artificiality from the construction of offences. The law avoids a more contextual approach to determining liability precisely because it opens up a whole new possible discourse to explain conduct. If the State had to take desires seriously before it could condemn, it would lose a significant degree of control over criminality. It might also have to recognize that its own concern to discipline and punish is a form of desire.<sup>117</sup>

### **Criminal Defences**

Since the elements of liability are kept uncomplicated, interesting questions of responsibility, and in particular, explicit consideration of emotion occurs in relation to the construction and application of criminal defences. The way the legal model of liability is constructed, what the law excuses reveals most clearly what the law punishes. Only in defences are explanations provided for the illegal conduct from which judgments can be made about the person's capacity, choice and character. Similarly, what the law excuses reveals the law's understanding of emotion and the role of emotion as an element of excuse. I concentrate on three defences in particular; self-defence, duress and provocation. I begin with an examination of the defence of provocation because it is the only defence which offers an excuse based specifically on the actor's emotional condition.

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<sup>117</sup> Connolly, *Ethos of Pluralization*, *supra* note 3.

**A Case Study: Emotion and the Availability of the Defences of Self-Defence,  
Duress and Provocation**

*Andrew and Catherine have a stormy marriage. At one point Catherine left Andrew and had an affair with Brian. The affair soured and Catherine returned to live with Andrew. Sometime later, Brian visits Andrew and Catherine. Brian is known by Andrew to be prone to violence. Brian had previously physically assaulted Catherine on many occasions. On this occasion, Brian is drunk and aggressive. He insults Andrew, extols in detail the sexual relationship he had with Catherine, and then grabs Andrew and threatens to kill him unless Andrew kills Catherine.*

Andrew is faced with a difficult situation. Assuming that Brian is in a position to carry out his threats and assuming that there is no safe avenue of escape available to him, Andrew has limited options. He can submit to the threat and kill Catherine or try to defend himself against Brian. To an external observer, with time to ponder the potential outcomes, the choice is no easier. Andrew is faced with two acts which he would not choose of themselves. Whatever option he chooses, he will cause harm and furthermore, his conduct will satisfy the basic elements of a serious offence (murder or assault).

If Andrew is apparently calm, the law treats him as if he were able to consider his options objectively. If in this state Andrew chooses to submit to the threat and kill Catherine, the only defence potentially available to him is duress. Duress is available as a defence to Andrew if the wrongful act was committed "under compulsion by threats of immediate death or bodily harm

from a person who is present when the offence is committed".<sup>118</sup> The threat must have been effective at the time of the commission of the wrongful act and there must have been no means of safely avoiding the threat. In the above scenario, Andrew might well satisfy all the elements of duress. However, under s17 of the Criminal Code duress is not available as a defence to murder.<sup>119</sup>

If while apparently calm Andrew chooses to attack Brian, and in doing so he kills Brian, the only defence potentially available to Andrew is self-defence. The focus of self-defence is on the reasonableness of the response to Brian's threatening actions and words which includes a consideration of whether there was "any reasonable alternative".<sup>120</sup> To determine the reasonableness of the response the first consideration is the reasonableness of the belief as to the necessity of self-defence at all. If this belief was reasonable, the consideration turns to whether the response in self-defence was reasonably proportional. If Andrew's belief is considered not to be reasonable as to either the necessity of self-defence or as to the degree of violence used in self-defence, the defence is not available to acquit Andrew or to reduce the offence from murder to manslaughter. This is so regardless of whether Andrew holds an honest

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<sup>118</sup> *Criminal Code*, s. 17.

<sup>119</sup> This may be subject to a challenge under the *Charter* following the decision of *R. v. Langlois* (1992) 80 C.C.C. (3d) 481, 19 C.R. (4th) 87 (Que. C.A.) which required that a defence be available to an actor who is "morally blameless". In the above scenario, an argument could perhaps be made that Andrew is morally blameless. Also, if Andrew was ordered on threat of death to show Brian where Catherine was hidden so that Brian could kill Catherine, and having found her Brian kills or seriously injures Catherine, the common law defence of duress may be available to Andrew, following *R. v. Hibbert*, *supra* note 103.

<sup>120</sup> *Criminal Code* s34(2). It is not conclusively established whether actors need always avail themselves of a safe avenue of escape to satisfy this element. See Wilson J. in *R. v. Lavallee* [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (hereinafter cited to S.C.R.); and Christine Boyle, "A Duty to Retreat?" in Donna Martinson *et al.*, "A Form on *Lavallee v. R.*: Women and Self-Defence" (1991) 25 *University of British Columbia Law Review* 23 at 60 ff..

belief in the necessity to kill.<sup>121</sup> In the circumstances, there seems little doubt that self-defence would be available and from an external point of view, we might applaud Andrew for the choice he makes.<sup>122</sup>

According to most of the theories of emotion discussed above, Andrew's reaction can never be considered only a product of his reason but is integrally connected to his emotional condition. Therefore, any choice he makes must be understood as a product of his emotional condition. However, in law, an assessment of his emotional condition is only made if Andrew claims that he was in a state of high emotional stress, and if there are external signs of such stress. The incidence of such an emotional state does not affect the availability of the defences of self-defence and duress.<sup>123</sup> It is, however, fundamental to the defence of provocation. The defence of provocation reduces murder to manslaughter if Andrew was so provoked by the words and conduct of Brian that in a 'heat of passion' he lost his self control, and if an ordinary person in Andrew's position, and with certain of Andrew's characteristics<sup>124</sup>, could have lost his self-control to such an extent that he could have acted in homicidal violence.<sup>125</sup>

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<sup>121</sup> *R. v. Brisson* [1982] 2 S.C.R. 227; 69 C.C.C. (2d) 97.

<sup>122</sup> Whereas in his choice to kill Catherine, Andrew might sensibly be excused, in his choice to attack Brian, his action is fully justified. There are cases in which this distinction is not nearly so clear, and many commentators in Canada reject the distinction. Eric Colvin, for example, prefers a distinction between defences of contextual permission, which would include self-defence and duress, and defences of mental impairment which might be more appropriate for the defence of provocation as it is now construed. See Eric Colvin, "Exculpatory Defences in Criminal Law" (1990) 10 *Oxford Journal of Legal Studies* 381.

<sup>123</sup> Establishing extreme emotion might, however, have evidentiary value, adding weight to the assertion that there was no safe avenue of escape, or that Andrew did in fact apprehend death or grievous bodily harm from Brian's threat. See for example, *R. v. Lavallee*, *supra* note 120.

<sup>124</sup> Relevant characteristics might include age and sex. It is up to the jury to decide what normal characteristics are relevant given the nature of the provocation. See *R. v. Hill* [1986] 1 S.C.R. 313, 25 C.C.C. (3d) 222; *R. v. Thibert* [1996] 1 S.C.R. 37, 104 C.C.C. (3d) 1 (hereinafter cited to S.C.R.).

<sup>125</sup> *Criminal Code* s232. If there was a sufficiently grave provocation, and the actor did in fact lose self-control, the defence could still be made out regardless of the manner used by A to kill B. In fact, a response which is of

In the defence of provocation, if the ordinary person could have lost their self-control, it does not matter that there was a range of other options available to the actor. It is understood that the actor is not capable of taking them. In the defences of self-defence and duress, what options are objectively available to the actor in the circumstances is the very focus of the defence. Extreme fear is a relevant factor, but only in providing context to the choices available to the actor. In the defence of provocation it is explicitly understood that the ordinary person might lose self-control. In the defences of duress and self-defence the accused is at all times understood to be capable of choosing available lawful alternatives to the commission of the offence. In the defence of duress, the accused is understood to have the capacity to choose a safe avenue of escape, and in the defence of self-defence, the capacity to respond only with necessary and proportional force to the threat faced. A standard of reasonable conduct is expected of the actor *despite* conditions engendering extreme emotional stress.

The scenario involving Andrew, Brian and Catherine demonstrates that all three defences can arise in a similar factual scenario and yet the incidence of emotion is considered explicitly as an excusatory factor only in the defence of provocation. In the following analysis, I will explore in more depth the role of emotion in each defence and discuss the implications of its disparate treatment.

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extreme violence is arguably evidence of a genuine loss of self control. See for example, the majority of the High Court of Australia in *Masciantonio v. R.* (1995) 129 A.L.R. 575 at 582. "Apart from the statement to police that he lost self-control, the very ferocity of his actions in stabbing the deceased repeatedly in the presence of a number of onlookers suggests a loss of self-control."



## The Defence of Provocation

The partial defence of provocation is contained in section 232 of the *Criminal Code*:

- (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the *heat of passion* caused by sudden provocation.
- (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the *power of self-control* is provocation for the purposes of this section if the accused acted on it on the sudden and before there was *time for his passion to cool*.
- (3) ... .  
[Emphasis added]

The section makes specific reference to emotion and uses terms describing it in terms of time, temperature and control which are characteristic of a mechanical understanding of emotion. The law gives particular content to these terms. I will analyze the law's understanding by drawing on work of psychologists who study the mechanics of emotion.

### Loss of Self-Control in a Heat of Passion

The traditional legal definition of a "loss of self-control" is that a person is rendered "not for the moment the master of their own mind"<sup>126</sup> or that he or she is acting under a "temporary suspension of reason"<sup>127</sup> For loss of self-control to exist as an independent excusatory condition in law, action under this state must still be voluntary and intentional.

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<sup>126</sup> See Tindall CJ in *R. v. Hayward* (1833) 6 C & P 157. Subsequently adopted in *R. v. Duffy* [1949] 1 All ER 932; and *R. v. Whitfield* (1976) 63 Cr. App. Rep 39.

<sup>127</sup> Sir Edward East, *A Treatise of the Pleas of the Crown*, vol. 1. (London: Butterworth; 1803) at 238.

The Relationship between Anger, and the Concepts of Intention, Voluntariness  
and Self-Control.

In a typical provocation scenario, the clear inference to be drawn from the degree of anger and violence directed towards the victim is that homicide was intended (the mind of the actor was intent on eliminating the source of his or her anger). The degree of anger and violence is also indicative of a loss of self-control. Simultaneously, anger is relevant to establishing an element of the defence, and is a central ground of excuse. It is difficult to reconcile these apparently contradictory roles of anger in the defence. The contradiction lies in the possibility of being both out of control, and possessing a specific intent. There are other ways to understand anger in the commission of an extremely violent act of homicide under provocation. Anger might be understood simply to affect the accused's ability to form a specific intent. If anger were understood to affect the personal responsibility of the actor in this way, there could be a partial excuse which reduced murder to manslaughter without having to demonstrate a "loss of self-control", or otherwise rely on the specific requirements of the provocation defence. The basis of a reduction in liability would be that although the actor had sufficient control over his or her mental faculties to know that he or she was causing bodily harm to the victim, the actor did not have sufficient control to know that in causing that harm death was likely to result.<sup>128</sup> There is some authority in Canada for the proposition that anger is relevant to establishing the mental state of the accused in this way.<sup>129</sup> However, this would seem to have been categorically

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<sup>128</sup> Todd Archibald, "Interrelationship between Provocation and *Mens Rea*: A Defence of Loss of Self-Control" (1985-1986) 28 *Criminal Law Quarterly* 454 at 461.

<sup>129</sup> In *R. v. Campbell* (1977) 38 C.C.C. (2d) 6 (Ont. C.A.), Justice Martin stated that evidence of provocative acts, uncontrolled anger or "rage", and drunkenness are all relevant to establishing the mental state of the accused regardless of any reliance on the defence of provocation. In *R. v. Wade* (1994) 18 O.R. (3d) 33, 89

rejected by the Supreme Court in *R. v. Wade*.<sup>130</sup> By holding that conduct under extreme anger is always performed with the specific intent for murder, the law would seem to place itself firmly in the cognitivist camp in the psychological debate on the origin and expression of emotions. And yet, a loss of self-control seems to be a product of affect.

The relationship between a loss of self-control and voluntary action is also difficult. The definition of a loss of self-control as conduct performed "while not for the moment the master of one's own mind" is indistinguishable from the definition of a state of dissociation in automatism. Automatism "connotes the state of a person who, though capable of action, is not conscious of what he is doing ..... It means unconscious involuntary action and it is a defence because *the mind does not go with what is being done*."<sup>131</sup> [Emphasis added.]

In the common law, the defence of automatism has traditionally been available when the dissociative state was caused by external physical trauma such as a blow to the head, or to a limited number of 'normal' medical conditions including sleep-walking and hypoglycemic states.<sup>132</sup> There is some authority for a psychological blow resulting in an autonomic state. It would seem from the authorities that to the extent that this is still a possibility, the

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C.C.C. (3d) 39, Doherty J.A. stated, "common experience tells us that rage may beget purposeful conduct. On the other hand, it may also cause a person to act without regard to or consideration of the consequences of his or her actions. Rage may precipitate or negate the intention required for the crime of murder." (58) See also, *R. v. Blackmore* (1967) 1 C.R.N.S. 286 (N.S.S.C.), discussed in Bayne, "Automatism and Provocation in Canadian Case Law" (1975) 31 C.R.N.S. 257.

<sup>130</sup> *R. v. Wade* [1995] 2 S.C.R. 737, rev'g (1994) 18 O.R. (3d) 33.

<sup>131</sup> *Bratty v. A-G Northern Ireland* (1961) 46 Cr. App. R 1 (H.L.). An identical test was adopted by Ritchie J. for the majority of the Supreme Court of Canada in *Rabey v. R* (1981) 54 C.C.C. (2d) 1.

<sup>132</sup> Winifred Holland, "Automatism and Criminal Responsibility" (1982) 25 *Criminal Law Quarterly* 95.

psychological blow would need to be much more serious than the provocation required for a loss of self-control in the defence of provocation.<sup>133</sup>

The concurrence of a voluntary act, a specific intent and a loss of self-control is hard to reconcile logically. We are left with a state of anger in which the actor possesses sufficient cognitive ability to form the specific intent for murder but not sufficient control for the homicidal act to be committed in a state of controlled outrage, and yet, not such a state of dissociation that their conduct is indistinguishable from automatism. The concept treads a fine line between controlled outrage, unintentional conduct in extreme anger and a dissociative state characteristic of automatism or mental disorder. It is problematic whether there is so fine a line, and if there is, whether there is any hope of ascertaining it in a legal inquiry.

### The Path to a Loss of Self-Control

#### Affectivist Theories

The most extreme affectivist theorists would understand that a loss of self-control is the result of uncontrollable biological, physiological and neurological changes within the actor. Descartes

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<sup>133</sup> A defence of 'psychological' blow automatism was accepted in *R. v. K* [1971] 2 Ont. R. 401 (C.A.). However, in *R. v. Rabey* [1980] 2 S.C.R. 513; 54 C.C.C. (2d) 1, the Supreme Court all but closed the door on a defence of psychological blow automatism, affirming the judgment of Martin J.A. in *R. v. Rabey* (1977) 17 O.R. (2d) 1; 37 C.C.C. (2d) 461 (C.A.). In *R. v. Radford* (1985) 42 S.A.S.R. 266 the Supreme Court of South Australia unanimously held that the defence of automatism should be left to the jury when the automatic state was caused by a psychological blow. King CJ stated, "there seems no reason in principle for making a distinction between disturbance of the mental faculties by reason of stress caused by external factors and disturbance of the mental faculties caused by the effects of physical trauma or somnambulism." (276) Although deferring to the expert testimony in *Radford*, King CJ expressed doubt about the possibility of shooting a person seven times while not acting in response to the will.

gave a graphic description of the arousal of anger. Anger "involves great agitation of the blood." This agitation affects "primarily the bilious blood coming from the spleen and the small veins in the liver. This blood enters into the heart and there, because of its abundance and the nature of the bile with which it is mingled, it produces a heat more extreme and more intense than any that may be produced by love or joy."<sup>134</sup> For Descartes, in a state of extreme anger, passion is so overpowering that the soul has no chance of counteracting its effect on the pineal gland. Nietzsche also states that there is great difficulty in restraining oneself from action when passions are aroused. "[T]o have thoughts of revenge and to execute them means to be struck with a violent - but temporary - fever".<sup>135</sup>

In his controversial work, *On Aggression*, Konrad Lorenz suggests that aggression results from an internal build up of excitement in the instinctual centres within the nervous system which is spontaneously released when it has found an object on which to direct the aggressive energy.<sup>136</sup> This suggests a build up of angry tension which needs to be released like steam in a hydraulic system. Freud used this kind of theory in his discussion of the libido. "From the idea of emotions as "inner" entities . . . is the notion that they may spill out. Such a metaphor may reinforce the notion prevalent today that unwanted emotions can be ventilated and hence

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<sup>134</sup> Rene Descartes, *Philosophical Writings*, *supra* note 16 at 399.

<sup>135</sup> Nietzsche, *Human, All too Human* *supra* note 24 at 54-55.

<sup>136</sup> Konrad Lorenz, *On Aggression* (New York: Harcourt, Brace and World, 1966) at 49-56. Leonard Berkowitz criticises the lack of empirical evidence for such a build up and points out that there is no biological sight that could contain the instinctual drive. Berkowitz, *Aggression: Its Causes, Consequences and Control* (Philadelphia: Temple University Press, 1993) at 380. Carol Tavris also criticises the notion of a build up of anger and a need to express it. Tavris, *Anger: Misunderstood Emotion* (New York: Touchstone Books, 1982) at 120-143.

disposed of under controlled conditions".<sup>137</sup> One theory in neuroscience has reinforced the emphasis on instinctual drives, conceptualizing the brain as a complicated computer with preset programs which are triggered into action given the right circumstantial cues.

The biological laws which activate the emotional mechanism of anger, are laws which function with absolute independence from the individual's consciousness and free will . . . The urges to take revenge or to defend himself [are triggered] with an intensity mathematically calibrated by the neural computer, following a precise program - an 'eye for an eye'.<sup>138</sup>

Legal theorists have contributed their understandings of affect. Dewey talked of emotions "welling up from sources which are at the back of the individual's consciousness. . . . It is as much a source of surprise to the individual . . . when these great emotional waves roll in on him."<sup>139</sup> Jeremy Horder identifies degrees of anger from mild irritation in which one might grunt, to outrage in which one might scream, and finally to such a degree of anger that there is a "temporary displacing . . . in the process of practical reasoning of the normal absolute priority given to the obligations of reliability, and the ethical perspective of the abstract" in which one might lose self control.<sup>140</sup> When the anger is so extreme that self-control has been lost, a person is incapable of exercising moral judgment leaving only sensation and desire. Given that the actor is faced with a person who has severely provoked them, the desire might be to eliminate the provoker.

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<sup>137</sup> Keith Oatley and Jennifer Jenkins, "Human Emotions: Function and Dysfunction" (1992) 43 *Annual Review of Psychology* 55 at 57.

<sup>138</sup> Jauregui, *The Emotional Computer* (Oxford: Blackwell; 1995) at 206 - 207.

<sup>139</sup> Dewey, *Lectures*, *supra* note 23.

<sup>140</sup> Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 173.

From the most extreme affectivist perspective, the events leading to the state of a loss of self-control might be understood in the following sequence. First, an external event of provocation causes stress in the actor. Second, the emotional reaction to the stress is so extreme as to result in a loss of self-control which manifests in an internal event of the release of inhibitions and an external behaviour of lethal violence.<sup>141</sup>

### Cognitivist Theorists

Aristotle talked of anger originating not in the person but in the provocation. The merits of the person's response can only be determined by whether the provocation is in fact unjust.

Although the impulsive or emotional response is irrational, it is still capable of obedience to reason. Therefore, an emotional response, such as in anger, reflects on the person's character for which the person is responsible. The person of good character has control over his or her emotional reactions and will act with an increasing ferocity proportionate to the level of insult. There is an element of judgment in the response. The person of no self-control will react even when there has been no injustice.<sup>142</sup>

The most extreme cognitivist theorists would understand the path from anger to a loss of self-control to be a matter of choice. The actor judges or appraises the appropriate response to a situation to be anger and the appropriate action to be violent aggression and even homicidal

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<sup>141</sup> This analysis of the logical sequence leading to loss of self control is extrapolated from the discussion of Harold Hall on the defence of Extreme Emotional Disturbance in the U.S. Model Penal Code. Hall, "Extreme Emotion" (1990) 12 *University of Hawaii Law Review* 39.

<sup>142</sup> Aristotle, *supra* note 43, Book I, Chapter XIII.

violence. The factors considered in the appraisal which leads to an emotional reaction include how the person perceives "the relevance of the events for his or her goals and well-being, and the appraisal of his or her coping resources."<sup>143</sup>

Cognitive theories do not rely on the incidence of physiological changes in the person.

Although actors might have no control over the arousal of emotion, they have a significant level of control over how to deal with the feelings invoked. The translation of anger into aggression is a matter of choice. This finds support in neuro-psychological research. The ability to change behaviour in response to a fluctuation in environment in accordance with a desired goal (such as eliminating someone in hatred) is known as "skilled executive behaviour". This skill is "incompatible with both extreme mental and emotional disturbance" and is better understood as being the result of a choice to so act.<sup>144</sup>

Since for cognitivists there is always an element of choice in an emotional state, there may never be a loss of self-control. If a person's reaction in an extreme emotional state is chosen, the element of excuse may disappear altogether. With no loss of self-control, there is only a state of violence which is at all times connected in a complicated way to reason. Cognitivist theories might consider that there could only ever be a condition of lost self-control when a person is not capable of making a whole series of choices, including: a choice whether or not to get angry, a choice whether or not to work oneself up into a state corresponding to a loss of

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<sup>143</sup> Nico Frijda, "Lazarus' Labour of Love" (1994) 8(5) *Cognition and Emotion* 473 at 474. See also Bernard Weiner, *Judgments of Responsibility* (New York: Guildford Press, 1995) at 275. "[C]ognitive appraisals are necessary and/or sufficient antecedents of certain affective experiences. Specifically, anger follows from the perception that others are responsible for a negative plight."

<sup>144</sup> Hall, "Extreme Emotion" *supra* note 141 at 52-53.



self-control, and once in this state, a choice whether or not to act with homicidal violence. They might conclude that it is not possible to be devoid of so many choices regardless of the extremity of the (normal) emotional state.

From the most extreme cognitivist perspective, the events leading to the state of a loss of self-control might be understood in the following sequence. First, an external event of provocation causes stress in the actor. Second, a cognitive appraisal of the provoking stimuli occurs. The appraisal is based on the gravity of the provocative acts as they act upon the idiosyncratic characteristics of the defendant. Third, the cognitive appraisal is that an emotional reaction is an appropriate response. Fourth, an appropriate reaction is chosen.

#### Between Cognition and Affect

Between the two extremes, there are many theories which suggest complex connections between cognition and affect, and which are divided by more subtle distinctions. Although our knowledge of what happens to the body is vast, many fundamental questions remain unanswered as to the causes and effects of motivation for action. For example, it is uncertain whether cognitive appraisal or autonomic arousal comes first, and how bodily changes translate themselves into action.<sup>145</sup> Carroll Izard argues that affect is responsible for emotional states but not the resulting action under this state. He describes the reaction of a person in an extreme state of anger in graphic physiological terms but adds that there is a further inhibitory phase

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<sup>145</sup> For a discussion of these uncertainties, see James Kalat, *Biological Psychology*. (Pacific Grove, Cal.: Brooks/Cole, 1995).

between stimulus and reaction. "In anger the blood 'boils', the face becomes hot, the muscles tense. There is a feeling of power and an impulse to strike out, to attack the source of anger. The stronger and more energetic the person feels, the greater the need for physical action. In rage the mobilization of energy is so great that one feels one will explode if one does not ... act in anger in some way."<sup>146</sup> There is a strong feeling of impulsiveness and the 'dimension of control' is lower than for any other emotion. If there is to be a response, there is a high degree of uncertainty as to when it is likely to occur and the degree of its extremity. Although anger physiologically prepares the person for the aggressive response, "it does not compel [the person] to act".<sup>147</sup>

Some theorists emphasize a complex relationship between physiological arousal and cognition. Lazarus suggests that an emotional state can distort cognitive appraisal. There is a complex interplay between reason and emotion, with cognition being a combination of the two.

"Emotions appear to be powerful influences on how we think and interpret events. They are the result of cognition but in turn affect cognition. The causal linkages one perceives among emotion, motivation and cognition depend, in part, on where in an ongoing behaviour sequence one arbitrarily stops the action."<sup>148</sup> Perhaps self-control is not lost and there is a capacity to choose which is progressively affected as the intensity of the emotion increases. Frijda suggests that an emotional response is absolute with regard to the degree of insult and because of this,

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<sup>146</sup> Izard, *Psychology of Emotions*, *supra* note 8 at 299.

<sup>147</sup> Izard, *Psychology of Emotions*, *supra* note 8 at 248. It is this distinction between readiness for action and the resulting response which separates cognitivists from affectivists, and which throws doubt on the concept of a loss of self-control. See also Berkowitz, *Aggression*, *supra* note 136 at 20.

<sup>148</sup> Lazarus "On the Primacy of Cognition" *supra* note 53 at 126.

the response is single-minded without thought of the long-term, extraneous consequences.

Although there is still control over the action in response, it must be understood in light of the emotional state of the actor, and what this suggests about the actor's appraisal of the gravity of the insult.

Tancredi and Volkow talk of a complex connection between thought and instinctual drive in conduct under extreme emotion. "The occurrence of a violent act requires the interaction of various cerebral processes: perception; emotional responsiveness; analysis of alternative behaviours; planning of behaviours; consciousness of the act and its consequences; and moral mindedness."<sup>149</sup> Greenspan argues that although thoughts alone might suggest a particular course of action, the affective component provides an "extra-judgmental" reason for action. This extra component to the reasoning process might lead to a choice of inappropriate action which is rendered understandable because of the influence of the affective state.<sup>150</sup>

This list of approaches is not exhaustive, and even if it were, the law subscribes to none of the above theories absolutely. It has its own understanding of the influence of emotion on conduct in its relationship between self-control, intention and voluntariness. On occasions, courts have expressed dissatisfaction at the law's understanding. For example, in *R. v. McPherson*, Lord Goddard stated, "How can it be said that the appellant was acting in a gust of passion when he

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<sup>149</sup> Laurence Tancredi and Nora Volkow, "Neural Substrates of Violent Behaviour: Implications for Law and Public Policy" (1988) 11 *International Journal of Law and Psychiatry* 1 at 48. See also Berkowitz, *Aggression*, *supra* note 136; Izard, *Psychology of Emotions*, *supra* note 8; Lazarus and Smith "Appraisal Components, Core Relational Themes and the Emotions" (1993) 7 *Cognition and Emotion* 233.

<sup>150</sup> Patricia Greenspan, *Emotions and Reasons* (New York: Routledge, 1988) at 139. This approach resembles that of Descartes.

fires not one but four shots, and each shot involved the breaking of the gun to reload and the taking of cartridges four separate times.”<sup>151</sup> Lord Goddard recognizes that when a person is extremely angry, it is one thing for them to act out of character and perhaps to lose self-control, and quite another thing for them to be capable of intentional killing. The fact that the elements of voluntariness and intention are present means that the actor has picked up the knife, loaded the gun, or if they find the lethal weapon already in their hand, they have pointed the gun and pulled the trigger or thrust the knife with a great deal of force. The law asserts the possibility of this apparently rational, goal directed activity while under a state of lost self-control. It is difficult to distinguish the part of control that is lost from the part retained.

### An Ordinary Concept Out of Control

Control operates at a number of levels. It requires “the capacity for critical reflection: the ability to step back from one’s immediate desires and assess the actions they incline one to perform, in light of the moral reasons one has grasped and accepted”, the “capacity to make choices as a result of deliberation” and the capacity to translate choices into behaviour.<sup>152</sup> There are many theories for how these capacities for control can be lost.

In the legal concept of a loss of self-control, emotion is understood to be a powerful, irrational internal force which the individual cannot control. The emotion hinders the individual’s ability

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<sup>151</sup> *R. v. McPherson* (1957) 41 Cr. App. Rep. 213 at 215. Lord Goddard has trouble reconciling the purposive behaviour of firing and reloading a gun with a loss of self-control.

<sup>152</sup> R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge, London: Harvard University Press, 1994) at 158.

to act reasonably. This understanding is antithetical to some theorists' understanding of emotion as integrally connected to our ability to act and be responsible. Solomon goes as far as to say that emotions are the characteristic of life over which we have the most complete ownership, and therefore, the most control.<sup>153</sup>

Having established the concept of a loss of self-control, the law is faced with applying it to particular fact scenarios. Since the concept is central to the defence, only events which could be relevant to the affective reaction of a loss of self-control are considered. The defence looks particularly at the final provocative act and other conduct by the victim which renders the final provocation sufficiently grave for the actor to lose self-control. This fits perfectly into Lorenz's hydraulic concept of anger - prior provocative acts are the steam that fills the pump, the final act is when it discharges.<sup>154</sup>

The concept of a loss of self-control is left vaguely defined and therefore open to a potentially wide application in criminal defences. To narrow this potential, the law has placed specific limits on its application as a defence. However, these limitations are inconsistent with the notion of a loss of self-control and, therefore, render it logically untenable.

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<sup>153</sup> Solomon, *The Passions*, *supra* note 2, preface. See also discussion of Solomon's understanding of anger, *infra* note 208, and accompanying text.

<sup>154</sup> Lorenz, *On Aggression*, *supra* note 42.

### The Logic of Proportionality

Courts have attempted to reconcile proportionality of response with the concept of a loss of self-control. In *Mancini v. R.*, Viscount Simon L.C. suggested that even when “out of control” the retaliation should be proportional to the provocative incident.<sup>155</sup> In *R. v. Phillips*, Lord Diplock attempted to interpret ‘loss of self-control’ so that it was consistent with this requirement:

The premise [that there is no intermediate stage between icy detachment and going berserk] must be based upon human experience and is, in their Lordship’s view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a weapon at hand, with that weapon.<sup>156</sup>

Lord Diplock discusses the response to the gravity of provocation in the same manner he might discuss a scale of compensation in torts. Just as the amount of compensation is directly proportional to the gravity of injury, the level of angry response is directly proportional to the gravity of provocation. This follows a simple, sequential logic which makes for ease of analysis and, one would hope, ease of distinction between reactions which are proportional and reactions which are not. Lord Diplock’s idea of proportional response implies a cognitive ability to assess the gravity of provocation and to respond accordingly even up to the point that homicidal violence is the correct response. A loss of self-control, on the other hand, suggests a proportionality of response up to the point at which self-control is lost, after which cognitive ability snaps and the person is no longer capable of acting with any restraint whatsoever

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<sup>155</sup> *Mancini v. R.* [1942] A.C. 1 at 9 (H.L.).

<sup>156</sup> *Phillips v. R.* [1969] 2 AC 130 at 137-138 (H.L.).

regardless of the reasonableness of the response. The analysis de-emphasizes the affective element in the concept of a loss of self-control. Lord Diplock seems to be more comfortable with a spectrum of emotional reaction which does not need an exclusively bio-physical explanation.

Lord Diplock's approach reflects his confidence in the ability to interpret human behaviour. Lord Diplock claims that his analysis is grounded in "human experience". There is no consensus among psychologists as to the origins of emotions, or as to their probable manifestation and, in particular, as to whether there are definable intermediate stages between icy detachment and going berserk as Lord Diplock so confidently asserts. Even if there were, how is it possible, as a matter of human experience, to assert when one stage has been passed and another entered in any given factual scenario? Later decisions have avoided such dissections of the concept of a loss of self-control altogether.<sup>157</sup>

The concept of proportionality of response can only be stated authoritatively as a normative device distinguishing partially excusable homicide from homicide which warrants no excuse at all. If Lord Diplock intends merely to espouse a normative principle, the language used ought to be normative, and ought not to assert the logic of human experience, or to imply the authority of a psychological reality. Once the concept of a "loss of self-control" is acknowledged to be

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<sup>157</sup> See for example Barwick C.J. in *Johnson v. R.* (1976) 136 C.L.R. 619 (H.C.) in which he suggests that the "critical consideration" is not whether the ordinary person could have had the precise violent reaction but whether he or she could have formed the intent to kill. (639) This still faces the logical problem of reconciling being out of control with being capable of forming such an intent. See discussion *infra* note 128, and accompanying text.

normative, its implications as a normative construction can be challenged uninhibited by claims of logic and authority.

### The Logic of The Gravity of Provocation

The most important limitation on the excusatory power of a loss of self-control is that only a sufficiently grave provocation is understood to be capable of leading to a loss of self-control in the ordinary person. The law makes no attempt to explain the limited availability of the defence in terms of the condition of a loss of self-control. More recently the link between the gravity of provocation and a loss of self-control has assumed greater importance with judges being careful not to remove the defence from juries if there is any possibility of them finding that the gravity of provocation could have led to a loss of self-control. Kahan and Nussbaum argue that the gravity of provocation can only be sensibly explained by an evaluative concept of emotion.<sup>158</sup> Thus, the gravity of provocation has its own logic as a cognitive phenomenon, but may be difficult to reconcile with the concept of a loss of self-control.

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<sup>158</sup> Kahan and Nussbaum cite a number of examples from the common law in which the provocation would have been the same in the mind of the actor, but in which the law withdrew the defence in one case but not the other, in "Two Concepts of Emotion", *supra* note 60 at 308. "A blow to the face was adequate, a boxing of the ears was not [Compare Sir Michael Foster, Crown Cases 292 (1809) (ear-boxing) with *Stewart v. State*, 78 Ala. 436, 440 (1885) (blow to the face)] the infidelity of a man's wife was adequate, the infidelity of a man's fiancée or girlfriend not. [Compare *Regina v. Mawgridge*, 84 Eng. Rep. 1107, 1115 (1707) with *Rex v. Palmer*, 2 K.B. 29, 30-31 (1913).]"



### Partial Defence

Clearly, the partial defence of provocation is a recognition that the homicidal act under provocation is distinguishable from cold-blooded murder. In discussing the defence of provocation, Kahan and Nussbaum acknowledge a place for a partial excuse based on "appropriate anger" which distinguishes the actor's conduct from murder.<sup>159</sup> It is difficult to see how the concept of appropriate anger is helpful to explaining the existence of a partial excuse. If anger is appropriate but violent conduct is not appropriate, on what ground does anger partially excuse the conduct? From an affectivist perspective, it is a question of voluntariness - the anger may mean that the ability to control conduct is reduced. This distinguishes the actor from the person who commits homicide in perfect control. From a cognitivist perspective, it is a question of the appraisal of the circumstances expressed through the anger, and a further appraisal while in a state of anger which gives rise to a judgment of what is the appropriate response. If the partial excuse is on the basis that the anger resulting from the first appraisal of the situation affects the actor's ability to make a further appraisal, this would seem dangerously close to the affectivist position which Kahan and Nussbaum are attempting to discredit. If the partial excuse is on the basis that the value expressed through the second response is made less inappropriate because of the pre-existing appropriate anger, why is it less inappropriate? It distinguishes those who express anger in inappropriate circumstances (those with a short fuse) from those who express anger only when appropriate (those of a more placid disposition). This in itself seems a petty reason for granting a partial excuse; little better than distinguishing actors

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<sup>159</sup> Kahan and Nussbaum, "Two Concepts of Emotion", *supra* note 60 at 314.

in relation to the appropriateness of other conduct preliminary to the homicidal violence such as the degree of courtesy shown to the victim.

For Kahan and Nussbaum, what makes the initial appropriate anger significant is that the anger in itself contains values which can be assessed as to their appropriateness. If this is the case, the basis of the excuse depends entirely on how the law evaluates the conduct in the particular circumstances which it does in any legal inquiry regardless of the emotional condition of the actor. Thus, for Kahan and Nussbaum emotion is simply a 'mechanism' of personal evaluation, not necessarily linked with particular feeling states. The mechanism would seem to have nothing to add to the legal evaluation of conduct except as a point of comparison between how the actor evaluated the circumstances at the time of their anger and how the law evaluates the circumstances in retrospect in an objective assessment of liability. The emotion itself has no excusatory power. Although a partial excuse makes perfect sense as a normative determination, this is regardless of the incidence of emotion. Furthermore, this understanding of the excusatory power of anger is inconsistent with the concept of a loss of self-control.

#### Time for Passions to Cool

In all common law jurisdictions, loss of self-control in the heat of passion is deemed to have a limited life. If too much time has elapsed between the provocative act and the homicidal violence in response, it is determined that the response is not under a state of lost self-control. Again, this seems a sensible normative limitation to the defence, but as phrased it suggests that

there is a definable end point to a loss of self-control that can be gauged with a sufficient degree of certainty to be considered as an element of the defence.<sup>160</sup>

There is no conclusive psychological evidence as to how long it takes for the intensity of an emotional reaction to subside. Theorists who emphasize the physiological causes of emotion tend to understand emotions as lasting between a few seconds and a few minutes, while those who emphasize cognition talk in terms of minutes or hours.<sup>161</sup> A number of empirical studies have demonstrated that the predisposition to respond aggressively to a provocative act can be quite enduring. In one study, researchers discovered that subjects who were provoked several weeks earlier while in a state of arousal were more likely to respond aggressively than those not so aroused when unexpectedly given the opportunity to retaliate a few weeks later.<sup>162</sup> Jauregui, a neuroscientist, argues that once a person is seriously insulted, the insult will remain with them for years, periodically intensifying. The images associated with the insult will continue to be present, unless the source of the insult is eliminated. He claims that even after the elapse of a

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<sup>160</sup> The law provides no criteria for determining how long it takes for the passions to cool. In *R. v. Lynch* [1975] A.C. 653, [1975] 1 All E.R. 933 (H.L.), (hereinafter cited to A.C.), the trial judge left the defence of provocation to the jury when the accused had gone away and then returned 10 minutes later. Lord Goddard in *R. v. McPherson*, *supra* note 151, infers that the time to load a gun a second time might be sufficient time for the passions to cool. In the US case of *People v. Ackland* 128 P. 798 (Cal. Ct. App. 1929), the Court concluded that as a matter of law seventeen hours was sufficient time for rage to cool. More recent cases have suggested that if there is a temporal gap even of only a few seconds between a first and subsequent attack this may be sufficient for the passions to have cooled. The High Court of Australia was divided on this point in *Masciantonio v. R.*, *supra* note 125; as was the Supreme Court of South Australia in *R. v. Radford* (1985) 42 S.A.S.R. 266 (S.C.).

<sup>161</sup> Frijda, "Lazarus' Labour of Love", *supra* note 143 at 476. "[E]motions usually last for some time, from minutes to hours, and during that time they manifest in 'flux' . . . are constantly changing appraisals, states of action tendency, and of activation."

<sup>162</sup> Study by Bryant and Zillman, cited in James Averill, *Anger and Aggression* (New York: Springer-Verlag, 1982) at 134. Averill suggests that anger can last for days, though the intensity will vary in this time. He also states that fear can last for hours, and grief for months. It must be noted that there is a distinction between the tendency towards an aggressive response and succumbing to the impulse towards aggression characteristic of a loss of self-control in the defence of provocation.

period of years, homicide is not cold-blooded murder but an understandable, and to some extent uncontrollable, reaction in anger.<sup>163</sup>

It is difficult to argue persuasively for any particular time limit. To make "the time in which the passions cool" an element of the defence is to claim a greater knowledge of the emotions than is actually possessed. In any case, the normative limits of the defence should not be determined in terms of time limits, but in terms of the social implications of allowing the defence in particular contexts. There may be contexts in which a long period of time between provocation and response ought not to preclude the defence, and others in which the defence ought not to be available despite the elapse of a very short period of time.<sup>164</sup>

#### Loss of Self-Control in Fear and Other Emotions

Anger has traditionally been the only emotion understood to lead to a loss of self-control and yet theorists who emphasize affect point to extreme reactions under other emotional conditions. For example, fear can cause such a level of over-activity in the autonomic nervous system that vital organs can overload even to the point of death. "Intense fear is experienced as complete insecurity or uncertainty about safety. There is a feeling that everything is running out of control."<sup>165</sup>

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<sup>163</sup> Jauregui, *Emotional Computer* *supra* note 41 at 218-219. Note that, like Descartes, Jauregui emphasises a constant struggle of actors to exercise control over their neural and biological urges.

<sup>164</sup> This is already the case in the law despite the arbitrary limit of the "time for the passions to cool."

<sup>165</sup> Izard, *Psychology of Emotion*, *supra* note 8 at 299. See also Lange, *The Emotions*, *supra* note 8 at 48, "At first, fear acts upon the heart in such a way as to cause an increased activity; but overwhelming fright seems to paralyse the heart and thus even cause death." Jean-Paul Sartre, *The Emotions: Outline of a Theory*, *supra* note

A close connection between anger and fear has been extended also to the emotion of sadness.<sup>166</sup> If this is the case, a good argument can be made for extending a defence relying on a loss of self-control to actors who kill under other emotional conditions such as compassion, depression or jealousy. There may need to be a defence for mercy killings, or for women who kill their husbands in despair at the disastrous state of their relationship.<sup>167</sup>

Mason C.J. of the High Court of Australia recognized that there can be a relationship between fear and loss of self-control.

[T]here can now be no convincing reason for confining the doctrine [of provocation] to loss of self-control arising from anger or resentment. The doctrine naturally extends to a sudden and temporary loss of self-control due to an emotion such as fear or panic . . . This extension . . . conforms . . . to the conceptual relationship between the doctrine and the mental elements in the offences of murder and manslaughter.<sup>168</sup>

If the normative framework of the defence of provocation is reconceived to extend the list of emotions which can lead to a state of a loss of self-control, there will be new practical difficulties. The provocative act leading to a loss of self-control and the external manifestations of the loss of self-control may be very different in fear and in anger. The loss of self-control in

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8 at 64, "[T]he true meaning of fear is apparent; it is a consciousness which, through magical behaviour, aims at denying an object of the external world, and which will go so far as to annihilate itself in order to annihilate the object with it."

<sup>166</sup> See Silvin Tomkins, *Affect, Imagery, Consciousness* (New York: Springer, 1963). Tomkins argues that anger and sadness are "activated by similar ingredients of neural firing". Quoted in Izard, *Psychology of Emotions*, *supra* note 8 at 196. Izard identifies a similar relationship between anger and fear which when combined with Tomkins hypothesis, "suggests the possible existence of a sadness - anger - fear bind." (196)

<sup>167</sup> See Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992).

<sup>168</sup> Mason J in *R. v. Van Den Hoek* (1986) 161 C.L.R. 158 (H.C.) at 168. Mason J. relies not on any developments in knowledge of the person in the social and natural sciences, but on a statement by Glanville Williams in *Textbook of the Criminal Law*, 2nd ed. (London: Stevens, 1983) at 524, "Anger is the domain of provocation, fear that of the law of private defence - though fear is also capable of amounting to provocation."

anger is traditionally characterized by external signs of rage and, in particular, the extremity of the violent response. Fear might be characterized by very different external signs which are not easily detectable; perhaps being characterized more typically by paralysis and submission (while retaining the ability to respond with a single decisive act of homicidal violence). It may be that the loss of self-control in sadness is not triggered by a "sudden provocation" but is something that increases gradually over time, there being no clear indicator when it has reached the point of a loss of self-control.

### Loss of Self-Control as an Evaluative Concept

Given the possibility that other emotions can lead to a loss of self-control, the focus of the defence on anger, the proportionality/loss of self-control dichotomy, and the time restrictions for a relevant emotional response, may all need to be reconsidered. If the defence is to retain any normative credibility, there may need to be a new understanding of what is a 'provocative act', and the coincidence of provocation and response.<sup>169</sup>

Kahan and Nussbaum argue that all the elements of the defence of provocation which are not explained well by the concept of a "loss of self-control" can be better understood by their 'evaluative' concept of emotion. They argue that regardless of the origins of emotion, it should be evaluated as to its appropriateness in the circumstances. They point out that the requirement

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<sup>169</sup> Although the defence does not accommodate women's experience of violence very well, some theorists advocate retaining the defence because when self-defence cannot be made out, it is the only form of defence potentially available for women who have killed their partners in anger and despair at their behaviour. See Laurie Taylor, "Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence" (1986) 33 *UCLA Law Review* 1679.

of a particular gravity of provocation seems on its very face to be an evaluative concept, the gravity being determinative of what is a reasonable angry response in a particular social context. Second, an evaluative concept of emotion explains well the existence of a partial defence. An assessment of behaviour is necessarily complex. Offering a partial defence is a means of recognizing a serious wrongdoing while still acknowledging this complexity. Third, the "time for the passions to cool" might be understood not to suggest anything definitive about the nature of the emotions and their duration, but alternatively, simply as a recognition that when a certain amount of time has passed since an event took place, in most cases the acceptable reaction should not be so extreme since there is the possibility to explore other ways to redress the wrong. Although their point is well made, for reasons I elaborate in Chapter Four, I believe the defence is so entrenched in the language of affect, and the ideological and normative implications surrounding the defence so intrinsically unacceptable, that there is no hope of redeeming the defence even under an evaluative concept of emotion. It is an ordinary concept, out of control.

### Self-Defence

The part of self-defence law dealing with the use of fatal force is contained in section 34(2) of the Criminal Code:

Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under *reasonable apprehension* of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he *believes, on reasonable grounds*, that he cannot otherwise preserve himself from death or grievous bodily harm.

[emphasis added]

On its face, emotion is not a consideration in the defence at all. The law looks only to beliefs and apprehensions. However, in practice emotion is important in making out a defence because it affects the reasonableness of the relevant beliefs and apprehensions.

The Supreme Court considered the role of emotion on the beliefs and apprehensions of the accused in *R. v. Lavallee*. In that case, the accused shot her partner in the back of the head after he had threatened to kill her.<sup>170</sup> The accused had lived with her partner for three to four years. Expert testimony in her defence at trial attested to an extremely abusive relationship which included a history of physical violence inflicted upon her. The testimony explained how the history of the battering relationship could affect her beliefs as to her opportunity to escape from her batterer on the night in question. The Supreme Court held that this testimony was relevant to placing the accused's actions in context, and to explaining how her apprehension of death could be reasonable in the circumstances she faced.(350) In determining whether there was a "reasonable apprehension of death" the Court held that , "the *mental state* of the accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality."(350) [Emphasis added.]

The focus of the defence is squarely on the cognitive elements of beliefs, mental states and apprehensions, and the reasonableness of these elements. Any discussion of emotion must be understood in this context. In her judgment for the Court, Wilson J. makes specific reference to the accused's fear on two occasions. She states, "without such [expert] testimony, I am

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<sup>170</sup> *R. v. Lavallee supra* note 120.



skeptical that the average fact-finder would be capable of appreciating *why her subjective fear may have been reasonable* in the context of the relationship". Elsewhere she states, "... the law does not require *her fear to be correct, only reasonable*".(352) [Emphases added.] These passages demonstrate that extreme fear is integrally connected to the accused's beliefs. The reasonableness of her fear is inseparable from the reasonableness of her belief. In this way, extreme emotion is integral to the availability of the defences.

However, other aspects of the defence suggest emotion does not have such a central, normative role. If, despite the history of abuse, the defendant in *Lavallee* had been calm on the night in question, and in calmly rationalizing her options she believed she had no means of escaping death at the hands of her partner except by killing him, the defence would still be available on the same grounds as before. The reasonableness of the defendant's belief would not be affected by her calm demeanour. Conversely, if, in spite of the expert testimony, the jury deemed the accused's belief to be unreasonable, there is no defence regardless of the level of fear the accused might have experienced as a result of the threats she faced. If the deceased had threatened to kill the accused after he returned from a three month holiday instead of on the night in question, or if the accused's best friend was a police officer waiting downstairs for the accused and deceased to return to the party, the contextual circumstances might be changed such that it would be considered unreasonable for the accused to defend herself by shooting the deceased in the back of the head.

Clearly then, the role of emotion in the defence is limited if it is understood as a particular entity of excuse. Although the environment which invokes the extreme emotional state can be

accommodated as a contextual circumstance, the resulting extreme response to that environment, although a potentially 'understandable' response, cannot always be accommodated in a generous test of reasonableness.<sup>171</sup> A reasonableness test can only be extended so far before it is excusing patently unreasonable conduct. The defence is given its widest scope possible through the use of expert testimony. Such testimony explains how conduct which seems patently unreasonable in the experience of the judges of fact, can be reasonable in contexts they have never encountered. Expert evidence broadens the understanding of what *can be* reasonable, and therefore, broadens the concept of emotion under the defence.

If emotions can be judged in terms of their reasonableness, they must not only be capable of reason, but also of socially acceptable reason. To determine what is socially acceptable, it is necessary to get out of the head of actors, and look to the social context in which they chose their emotional reactions. The normative focus in this approach to emotion in criminal defences is appealing. It avoids the difficult question, which is the very basis of the defence of provocation, of whether there could be circumstances in which the emotional stress is so extreme that actors have no control over their reactions, and whether in such circumstances, there ought to be an excuse available to actors.

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<sup>171</sup> Such circumstances might arise in self-defence cases in which the actor has an honest but unreasonable belief in the necessity of lethal force in self-defence. There is no such defence to even reduce murder to manslaughter. The High Court of Australia recognised the defence in *R. v. Viro* (1978) 141 C.L.R. 88 (H.C.), but subsequently rejected it in *R. v. Zecevic* (1987) 162 C.L.R. 645 (H.C.).

At times the Court in *Lavallee* came close to suggesting that the emotion of the accused was consonant with a peculiar, internally arising mental state of the accused resulting from her escalating terror.

Given the relational context in which the violence occurred, *the mental state of the accused at the critical moment she pulled the trigger cannot be understood except in terms of the cumulative effect of the months and years of brutality . . .* The issue is . . . what the accused reasonably perceived given her situation and experience. [Emphasis added.]<sup>172</sup>

Once the focus shifts to the 'mental state' of the accused as the source of emotion, the law is again focusing on the mechanism of emotion, which can obscure the normative values to be upheld in the particular context. I discuss this danger in relation to the use of expert testimony in Chapter Four.

### Duress

The defence of duress is contained in Section 17 of the *Criminal Code*:

A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person *believes that the threats will be carried out . . .* but this section does not apply where the offence that is committed is . . . murder, . . . [or] attempted murder. [Emphasis added]

As with self-defence, under the statutory defence of duress, the discussion of emotion is in the context of the actor's beliefs. This seems to exclude an understanding of emotion in terms of affect. The defence is also available under the common law in Canada.<sup>173</sup> The most recent

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<sup>172</sup> *Lavallee supra* note 120 at 880.

<sup>173</sup> In *R. v. Paquette* [1976] 2 S.C.R. 189 the Supreme Court of Canada held that the defence of duress under s.17 of the *Criminal Code* applied only to principals, leaving the common law defence open to parties. The Court also held that the common law defence was open to parties to murder. In this, it was strongly influenced

formulation of the defence under the common law is *R. v. Hibbert*.<sup>174</sup> The availability of the defence and the extent to which extreme fear is an explicit consideration in the defence depends on the interpretation of normative involuntariness which the Supreme Court accepted as the rationale for the defence of necessity in *Perka* and, in turn, adopted as the rationale for the defence of duress in *Hibbert*.<sup>175</sup>

In interpreting normative involuntariness for the defence of necessity in *Perka*, Dickson J. for the majority of the Court engages in two distinct discourses. The first is the language of rational choice: compliance with the law must be “demonstrably impossible”. (399) This suggests that in the cold light of day, the defendant must be able to point to his or her limited available options and to demonstrate that he or she effectively had no choice. Dickson C.J. accepts the position of H.L.A. Hart that it is “ideologically desirable for the government to treat its citizens as self-actuating, choosing agents”. (399) If Hart’s approach is applied to the defence of duress, it would seem that it is not the circumstances of fear which ground the defence, but the absence of a rational alternative choice to complying with the threats. In this discourse, there is no separate consideration of emotion. However, this is not because the Court understands the

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by the UK decision of *Lynch v. R.* [1975] A.C. 653; 1 All E.R. 913 (H.L.) (hereinafter cited to C.A.) endorsed by *Paquette*, at 195-197. Since *Paquette* there has been a divergence in Canadian and UK jurisprudence. In the UK, *Lynch* has been overturned. The common law defence is no longer available for parties to murder (*R. v. Howe* [1987] 2 W.L.R. 568 (H.L.)) or for principals to attempted murder. (*R. v. Gotts* [1992] 1 All E.R. 832 (H.L.)) There is no direct authority holding that the defence is not available for parties to attempted murder other than principals but this is clearly the implication of *Howe* and *Gotts*. In Canada, it is unclear whether the *Charter* may require that duress be available as a defence to murder. In *R. v. Langlois* (1992) 19 C.R. (4th) 87, the Quebec Court of Appeal suggested that s. 17 of the *Criminal Code* might contravene s. 7 of the *Charter* because it allows for the conviction of actors for “normatively involuntary” acts.

<sup>174</sup> *R. v. Hibbert* [1995] 2 S.C.R. 973. In *Hibbert*, the Court simply accepts that the common law defence is available to parties to attempted murder. Given the Court’s reliance on UK jurisprudence in *Paquette*, it would have been helpful for the Court to have indicated the scope of the defence at common law in Canada.

<sup>175</sup> *R. v. Perka*, *supra* note 27.

relationship between reason and emotion to be integral. On the contrary, the Court accepts the division of reason and emotion and looks only to reason as a relevant consideration in the judgment of responsibility.

Intermittently, Dickson C.J. engages in another discourse which emphasizes that the person must have been “compelled” to act by “normal human instincts. . . . The situation must be so emergent and the peril must be so pressing that *normal human instincts cry out for action* and make a counsel of patience unreasonable”. (400) [Emphasis added.] This discourse would suggest that it is not only reason which dictates whether a course of action should be adopted but also *instinct*, which is often discussed as the basis of affective reactions. It is unclear whether Dickson J. intends to distinguish the cries of instinct from the choice of reason. There are a number of possible interpretations. First, instinct may simply be a reason to act. When the instinct cries out (such as an instinct of self-preservation) it indicates that there is a good reason to act which ought not to be ignored. In this case, instinct is understood cognitively - instinct cries out; the cry is appraised in the particular circumstances; and appropriate action is chosen. Alternatively, instinct might be understood to compel action as a bio-physical affect much like a reflex.<sup>176</sup> On this reading of instinct, Dickson C.J. could be interpreted as supporting an interpretation of normative involuntariness which includes uncontrollable reactions in states of emotional stress. Human instinct might include the incidence of emotion and the epithet “normal” might confine the relevant emotions to those that arise ordinarily, having the same

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<sup>176</sup> Cognitivists and affectivists agree that instincts are uncontrollable spontaneous reactions. Cognitivists distinguish instincts from emotions because they lack the complex interplay between appraisals and judgments which characterise emotion. For affectivists, instinct *is* emotion. It is simply a question of emphasis. See debate between Zajonc and Lazarus on the primacy of cognition and affect, *supra* note 53. So at one level, the debate might simply be a question of semantics.

limiting effect as the concept of the 'ordinary person' in the defence of provocation. If this interpretation were accepted, there would seem to be no barrier to arguing that the circumstances were so stressful (perhaps because the choices were so narrow) that the person "was not for the moment master of his own mind", and acted while in this temporary condition. As such they should be wholly or partially excused.

If defendants could argue that compliance with the law was "demonstrably impossible" because the actor was so struck with fear that he or she was incapable of seeing any option other than to comply with the threat, the theoretical foundation for the defence of duress would be similar to that for the defence of provocation. To allow such an argument to succeed in a defence to homicide would be to give explicit excusatory power to the emotion of fear. Furthermore, since, as presently formulated, the defence leads to acquittal (and not merely to a conviction for manslaughter) fear would have greater excusatory power in the law than anger.

Given the restrictive scope Dickson C.J. leaves for the defence of necessity in *Perka*, it seems clear that his interpretation of normative involuntariness was intended to be limited to constrained rational choices, and not to excuse conduct because it was uncontrollable. In *R. v. Hibbert*, the Supreme Court endorses a restrictive reading of Dickson C.J.'s interpretation of normative involuntariness in *Perka*. Lamer C.J. in the judgment of the Court in *Hibbert* states that the test for "involuntariness" is whether "the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could be called a choice. If he was making a choice, then the wrongful act could not have been involuntary in the

relevant sense.”<sup>177</sup> Having accepted a narrow interpretation of normative involuntariness, the Court is left with a defence which would not excuse people beyond circumstances in which their conduct was reasonable in the circumstances. Perhaps cognizant of the narrow scope of the defence, the Court held that the objective test should explicitly consider the ‘human frailties’ of the accused which once again suggests an affectivist understanding of emotion.(1017)

It is not clear what is considered a relevant human frailty for the purposes of the defence. The Court relied on the discussion of human frailty in *R. v. Creighton* which held that relevant human frailties are those which “render the accused incapable of perceiving the correct set of facts” but do not include a “sudden and temporary incapacity to appreciate risk due to exigent circumstances.”<sup>178</sup> In the same case in dissent, Lamer C.J. discussed illiteracy as an example of a relevant human frailty in certain circumstances.

By raising the concept of human frailty in *Hibbert*, the Court does not intend a synthesis of the law’s approach to anger in provocation and fear in duress. In the defence of provocation, a loss of self-control operates as an internal mechanism, triggered by external circumstances. It is a sudden and temporary incapacity. As such, it would seem to be excluded from the concept of ‘human frailty’ as defined above. A synthesis of approach might be possible if emotion is understood cognitively. If emotion were considered an integral part of reason, retarded emotional development might be considered a relevant human frailty in the same way as illiteracy.

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<sup>177</sup> *Hibbert v. R* [1995] 2 S.C.R. 973 at 1017.

<sup>178</sup> *R. v. Creighton*, *supra* note 102.

The defence of duress is available to excuse actors who face threats to their life, and succumb to those threats and commit illegal acts. However, as with the defence of self-defence, although fear is a central element to the availability of the defence of duress, it is not explicitly considered. Instead, extreme fear is a factor that actors are expected to overcome despite the circumstances. The law assumes that actors have the ability to choose available lawful options regardless of their emotional condition. Furthermore, in section 17 of the *Criminal Code*, the law removes the defence in some circumstances such as homicide and robbery in which the actor is expected to choose self-sacrifice rather than to commit a serious criminal offence. Thus, even in circumstances in which the ordinary person could succumb to their great fear and commit a serious criminal act, the defence is not available.

In *R. v. Howe*, Lord Hailsham addressed a submission that duress should be treated like provocation. He held that the defences of provocation and duress are both based on a “concession to human frailty” but that one involves a “loss of self-control” and the other involves a conscious decision, “coolly undertaken”, to choose the lesser of two evils.<sup>179</sup> Lord Hailsham draws a sharp distinction between anger (under provocation) as affective and fear (under duress) as cognitive, and he expects a high standard of actors cognitive ability to refrain from committing homicidal acts under duress. The judgment of Lord Hailsham represents a common approach to defining the limits of the defence of duress. His approach illuminates once again the disparity in the level of self-control expected of actors under extreme anger and under extreme fear.

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<sup>179</sup> *R. v. Howe*, *supra* note 173 at 582.



*R. v. Howe* demonstrates a tendency of courts when engaging in a mechanistic discourse to resolve questions of personal responsibility by making definitive statements about what is an ordinary level of control and what can fairly be demanded of actors. Such discourse often demands high and uncompromising standards. In Chapter Four, I analyze more closely the judgment of Lord Hailsham in *R. v. Howe* as an example of this approach to determining personal responsibility.

### Conclusion

The different approaches to considering emotion in the objective tests means that different emotions are granted different excusatory power. In the defence of provocation, the law has made a normative choice to emphasize affective processes connected with anger, and therefore to understand anger as arising spontaneously and uncontrollably within the individual. With this understanding of emotion, the law confronts many difficult questions about human behaviour under extreme emotional stress which it is not equipped to answer. There is psychological literature which both supports and rejects the law's concept of a loss of self-control. However, it is questionable whether the law ought to be contributing to this literature. In Chapter Four, I discuss some disturbing normative implications entrenched in the law's understanding of emotion in the defence.

The understanding of emotion in the defences of self-defence and duress is quite different. In the defence of self-defence, the inquiry is unequivocally normative. There is an attempt to

understand the emotion of the accused in the specific context in which it arises, and then to judge the accused's response to the environment in terms of its reasonableness. Fear in duress is understood in a confusion of approaches, sometimes in the language of cognition and sometimes the language of affect. The law does not attempt to understand the actors emotional condition in its specific context, but instead makes unequivocal statements of what degree of psychological fortitude can be expected of actors.<sup>180</sup>

It is clear both within the defence of provocation, and across the defences of provocation, self-defence and duress, that anger is the privileged emotion with the greatest intrinsic excusatory power. When faced with a choice under coercion of losing his or her life or of taking the life of another, the actor is understood to be capable of choosing to die and is expected to make this choice. In the defence of provocation, it is understood that the ordinary person is not always capable of choosing from a myriad of options which do not involve the commission of an offence, and when incapable can be partially excused. This disparity in the level of control expected of the actor in fear and in anger is made even more significant by the circumstances in which the homicidal acts are committed in each case. The action required to commit homicide in the defence of provocation is self-motivated, skilled behaviour. In the most common scenarios giving rise to the defence, it would be simpler for the actor not to engage in the homicidal act and to walk away. The option of walking away is not available to the actor under duress. For the coerced actor, the option of least resistance is to submit to the threat. The actor is held responsible for submitting to the threat, and failing to display a high standard of self-motivated resistance.

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<sup>180</sup> See discussion of Lord Hailsham judgment in *R. v. Howe*, *infra* note 256, and accompanying text.

The disparities in the understanding of emotion between the defences of provocation, self-defence and duress have occurred because the law attempts to explain normative distinctions between the scenarios in which the defences arise in terms of a psychology of emotion that emphasizes the mechanisms of cognition and affect. It has no coherent theory of these mechanisms, altering its understanding of emotion according to the excusatory power it wishes each defence to possess. This approach to understanding emotion has unacceptable normative implications. The rules of criminal liability need to be reconceived to remove these implications.

The analysis in Chapter Three has used a positive psychology of emotion to explain and challenge the understanding of emotion in the rules of criminal liability. In Chapter Four, I question the use of such a psychology of emotion in the criminal law, drawing on a new approach to understanding emotion which claims no definitive or universal knowledge of emotion, and challenges those who make claim to any such knowledge. The analysis may raise more questions than answers. It is not my intention to reveal the right approach to structuring the rules of criminal liability, but to suggest that an alternative understanding of emotion might be more responsive to unacceptable normative implications in the rules of criminal liability as exposed in Chapter Three.

## CHAPTER FOUR

The inconsistencies and uncertainties in understanding emotion and its influence on personal responsibility and the unacceptable normative implications of the disparate excusatory power of emotional conditions in the defences of provocation, self-defence and duress make it imperative to reconceptualize emotion in the process of judgment. In this chapter, I embrace a broad sociological approach to emotion. I discuss and apply to criminal defences the theory of social constructionism. Constructionism asserts that the meaning of action can only be understood in its context. It offers a vehicle for a fresh understanding of emotion and its influence on personal responsibility, and for a new approach to judgment. It challenges the primacy of self-control, the polarization of emotion as either cognition or affect, and the separation of emotion from reason. The criminal liability of the jealous man cannot be determined exclusively in terms of the degree of his anger. He is not simply out of control. The criminal liability of the battered woman cannot be determined solely in terms of the reasonableness of her beliefs. She is not simply a cold-blooded murderer or a helpless victim of abuse. Each is a complex emotional being whose motivation for action is a combination of affect and cognitive appraisal which occurs in a particular spatial, cultural and historical context.

Social constructionism arose predominantly as a response to the modernist epistemological foundations (positivism) of psychology which assumes the possibility of absolute knowledge and affirms scientific observation as the sure route to attaining that knowledge. To begin this Chapter, I look more closely at the origins of this epistemology and suggest that it has resulted in a narrow understanding of emotion in the criminal law. I argue that the modernist

epistemology needs to be replaced and offer a suggestion for the foundation of a new epistemology which would support a social constructionist understanding of emotion in the rules of criminal liability. The remainder of the chapter is devoted to examining the implications of a social constructionist approach to the organization of criminal defences. Initially I concentrate on the emotion of the criminal actor, presenting examples under each defence of how the actor's emotion can be understood as a social construction. I then argue that the process of judgment must be recognized as an emotional process. Judges are emotional beings, their assessments of the actor are part of an emotional process, and the whole context in which legal judgment takes place represents a particular emotional dynamic.

Under the mechanistic approaches discussed in Chapter Three, emotion was often described using metaphor: "the heat of passion", "icy detachment", "time for the passions to cool". Under a social constructionist approach, emotion becomes the metaphor; a metaphor for the expression of values in social contexts, and more deeply, a metaphor for an epistemological crisis in the rules of criminal liability, and the process of judgment. Metaphor helps to escape the confines of language and, in particular, the entrenchment of particular concepts of normativity. It offers the potential for enriching perspective by establishing an identity between dissimilar concepts. It is unscientific, conforming to no rules of dimension, space, time or value. The challenge in using metaphor is to exercise creativity to make the metaphor as rich and colourful as possible.<sup>181</sup> It is hoped that the following analysis will provide the framework for imaginatively reconceiving the rules of criminal liability and the process of judgment.

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<sup>181</sup> Michel Foucault often used spatial metaphors. "Once knowledge can be analysed in terms of region, domain, implantation, displacement, transposition, one is able to capture the process by which knowledge functions as a form of power and disseminates the effects of power." *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Brighton: Harvester Press, 1977) at 68.

## Modernist Epistemology and Its Application to the Criminal Law

The era of Copernicus is often cited as a point of epistemological revolution; a point at which empiricism replaced intuition and "common sense".<sup>182</sup> 'Man' was humbled. With the earth no longer central, man's control of the universe was not assured. Rather than accept a less prominent place in the universe, man's response was to strive 'positively' for more knowledge of the natural world in order to dominate and control it.

The increase in empirical data this century and the concomitant capacity to manipulate and control the natural world is unprecedented.<sup>183</sup> This capacity has not been matched by a synchronous capacity to understand and predict the effects of this manipulation.<sup>184</sup> The collection of information in the natural sciences and psychology has continued regardless. This has left the physical and emotional world in a perilous position. The problem is not in the process of scientific investigation itself but in the willingness to draw conclusions and to act upon them before there is any credible ability to predict the implications of such action.<sup>185</sup>

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<sup>182</sup> See the discussion in Boaventura deSousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 13. Nietzsche makes the same point in talking of the positive advances in science. "Science ... takes as little consideration of final purposes as does nature; just as nature sometimes brings about the most useful things without having wanted to, so too true science ... will ... often further man's benefit and welfare and achieve what is useful - but likewise *without having wanted too*." *Human, All too Human*, *supra* note 24 at 42.

<sup>183</sup> Tim Murphy argues that the modern emphasis on empiricism in the social sciences can be traced to the economists Smith and Keynes. Empiricism took precedence over experience. Experience came to be treated as antithetical to reason. Murphy, "The Oldest Social Science? The Epistemic Properties of the Common Law Tradition" (1991) 54 *Modern Law Review* 182.

<sup>184</sup> Santos, *A New Common Sense*, *supra* note 182 at 9.

<sup>185</sup> There are numerous examples of this phenomenon. In psychology, a recent example is the preponderance of race theories which assert a hierarchy of intelligence among racial groups based both on empirical studies, such as IQ tests and surveys, comparing the success of different racial groups in particular intellectual endeavours. These theories are strongly criticised for drawing strong conclusions with dramatic social implications from data which is open to many interpretations. A graphic example of the same phenomenon in the natural sciences is the

Results of a scientific inquiry are reached by a two stage process. The first stage is the factual investigation which occurs within a particular paradigm or theory. The theory is required to focus the investigation. This stage of the process can be a rich and creative process. Phenomena can be pondered from many angles, and the boundaries of their reality pushed to new points of discovery. Alternatively, the process can occur within a narrow paradigm which stifles imagination and rejects alternative perspectives. The second stage is the manipulation of the phenomena to form hypotheses. In this second stage, science is concerned with what can be observed and understood. This requires categorizing objects and reducing their complexity to quantities which can be understood.<sup>186</sup>

Although the criminal law has evolved over the centuries to accommodate changing social norms, like science it has retained an epistemological foundation based on the belief that truth and knowledge can be gained through the rational manipulation of facts. As science conquers the natural world, so the criminal law judges the actor. The current structure of the criminal law

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production of the atom bomb. Oppenheimer realised only well into the process of production the possible implications of creating the atom bomb. "The [atomic bomb] we made . . . really arrived in the world with such a shattering reality and suddenness that there was no opportunity for the edges to be worn off." However, Oppenheimer was resigned to the fact that the quest for knowledge would continue regardless of gaps in the predictive capabilities and the understanding of the consequences of what had been invented. "[W]hen you come right down to it the reason we did this job is because it was an organic necessity. If you are a scientist you cannot stop such a thing. If you are a scientist you believe that it is good to find out how the world works; that it is good to find out what the realities are; that it is good to turn over to mankind at large the greatest possible power to control the world and to deal with it according to its lights and values." Robert Oppenheimer, *Letters and Recollections*, eds. Smith and Weiner (Cambridge, Mass.: Harvard University Press, 1980) A concern at the accumulation of knowledge prompted Rousseau to ask the Academy "the extent to which all this accumulated knowledge has enriched or, rather, impoverished our lives." Santos, *Toward a New Common Sense*, *supra* note 182 at 11.

<sup>186</sup> For example, in logic and mathematics, the intrinsic qualities of the things quantified, be they algebraic figures or abstract concepts, are altogether irrelevant. That which needs qualification cannot yield an unequivocal, positive result.

and its model of responsibility is supported by a necessity to engage in the difficult process of judging and punishing despite a deficit in the understanding of the behaviour of an actor who has committed a wrongful act. The analysis of the criminal actor and his or her emotion in this chapter takes place within a space bounded by the inevitability of judgment and seeks strategies to reduce the perils inherent in the process.<sup>187</sup>

The mechanistic understanding of emotion in the criminal law fits neatly into the modernist epistemology. A mechanistic understanding of emotion assumes that a certain level of scientific sophistication, accuracy and explanatory power can be brought to the process of judgment. It requires a belief in the possibility of understanding human behaviour. There is the same division of investigation and manipulation as in the natural sciences. The investigation can be open textured and imaginative, or it can take place within a narrow framework. The second stage, the manipulation of the phenomena investigated, is the application of the appropriate normative rule. This stage in the process of judgment is restricted by the need for a certain outcome so that normative rules can be applied with certainty and expediency.

The division of the factual investigation and the application of the normative rule reveals an important limitation in the mechanistic understanding of emotion in the process of judgment -

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<sup>187</sup> The right to judge can be challenged in a variety of ways. By what right do we judge? David Luban sets out four responses to this question. First, the avant-garde would argue that there is no right to judge. Luban links the nihilist wing of the Critical Legal Studies movement to this response. Second, traditionalists regard the asking of the question to be unnecessary. They retreat to a position which glories in the previous practice and successes of judgment. Third, there is a post-modern response which suggests that the question assumes the existence of some right. They would dismiss the question since the question, as well as the right to judge, are nothing more than a contingent cultural construction. Luban favours none of these approaches. He endorses instead a "neo-Kantian" answer to the question. He argues that modernism must respond creatively to its own history. Each time there is an advance, the question (by what right?) must be asked again and should lead to a "rigorous dialectic self-evaluation". *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994) at 19.



the inability to 'view' the objective and subjective positions simultaneously.<sup>188</sup> Ideally, what the actor did and how he did it, and what the actor ought to have been capable of doing must be viewed together in the process of judgment. The law would have a view that understands the actor from every perspective; a view that knows each individual and their internal reasons for action while judging that action from an external perspective which perfectly understands the influences on the actor in the particular context. With these perfect internal and external views, the law would be able to judge the actor against appropriate community standards and to apply the perfectly proportional and just punishment. The endeavour to approximate such a view has driven the process of judgment as it has driven psychological and scientific research.

Of course, it is not possible for the law to perfectly understand the effect of external influences on the actor. The law is a product of those influences. Only if the law could step outside of itself could it be perfectly objective. Equally, it is not possible for the law to be perfectly subjective, understanding fully the effect of internal and interpersonal influences on the actor. The law views relationships between people, but not being one of those people, it cannot fully know the motivations for action which the interpersonal dynamic creates.

Even if the perfectly internal and external views were possible individually, the law could not hold them simultaneously. As with Heisenberg's uncertainty principle<sup>189</sup>, as knowledge of the

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<sup>188</sup> The term "view" is taken from Thomas Nagel, *View from Nowhere* (Oxford: Oxford University Press, 1986). In this context I take it to mean a perspective or way of understanding the world. A view incorporates a system of belief and knowledge.

<sup>189</sup> Heisenberg's Uncertainty Principle is to the effect that the more accurately the position of a point is measured, the more variable (inaccurate) is the measurement of the object's velocity at that point, and vice versa.

subjective (seemingly) increases, the objective understanding of what the ordinary person could have done decreases, and vice versa. The closer the judge is to understanding what the actor did and why, the further the judge will be from understanding of what the actor was capable. In other words, the more that is known of an actor's personal motivation for action, the less it seems possible or right to judge the individual against a general standard. Conversely, if the law has a strong sense of what is objectively acceptable, it will find it difficult to give much consideration to an actor's personal circumstances.<sup>190</sup>

As a result of the inability to view both the subjective and objective simultaneously, there are circumstances in which the concept of the preconceived actor as defined in the normative rule is incompatible with the actor which the factual investigation reveals, and this is especially the case when the actor is under extreme emotional stress. Clearly, the law cannot hope to encompass all factors relevant to explaining the effect of the actor's emotion on their conduct.

There are pressures on the law to assume a positive understanding of the actor. Huge case loads call for expedient judgment. The community demands authoritative and decisive pronouncements of principle. To meet these demands, the actor is transformed into a 'thing easily quantified', a 'concept' which can be judged. The possibility of transformation requires the synthesis of normative rule and fact. Since it is fact that is heterogeneous and inadequately known, there is pressure on the law to reduce the facts deemed relevant to the inquiry into

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<sup>190</sup> A corollary to Heisenberg's principle is that objects actually have no velocity or position until scientists measure them. Similarly, in law, there are only important subjective and objective considerations when they have been given expression in legal rules. Before that time, there is simply the act.

criminal liability. Elements such as emotion which are not understood or which render the normative rule too difficult to apply are omitted, marginalized or reduced in complexity.

A mechanistic understanding of emotion meets these demands well. It allows for the possibility of 'reducing' actors to their component parts of reason and emotion or of cognition and affect, and to explain the etiology of their conduct with authority in terms of these phenomena.<sup>191</sup>

Under a mechanistic understanding of emotion, the law chooses one of a myriad of possible modes of explaining the actor's emotion, and within this mode of explanation, a few of the many factors potentially relevant to its expression. For example, in the defence of provocation, there is an inevitable simplification and distortion of circumstances which might be highly relevant to an inquiry into the physiological or psychological condition of a loss of self-control. The following factors, each of which would find a place in a psychological theory of emotion, have little or no place in the determination of the availability of the defence of provocation: culture, sexual orientation, gender, socio-economic background, class, personality traits, the air temperature, level of pollution, nature of past and present relationships, attitudes, dispositions, family history.<sup>192</sup> If these and other factors, personal to each individual, are relevant to explaining why a person might become extremely emotional in a particular circumstance, the adoption of an applicable standard of "normality" in extreme anger, having considered only some of the factors, is highly suspect. The identification of anger as the relevant emotion in the

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<sup>191</sup> Foucault explains that psychiatry attained such prominence in the law because it was needed to render understandable acts with no motive. Once the law could categorize actors, it was able to judge them appropriately. With the increased ability to diagnose illness and, therefore, to categorise actors, the focus of responsibility shifted from the act to the actor. Foucault, "About the Concept of the Dangerous Individual in 19th Century Legal Psychiatry" (1978) 1 *International Journal of Law and Psychiatry* 1.

<sup>192</sup> See the discussion of such factors in understanding aggression in Robert Baron and Deborah Richardson, *Human Aggression* (New York: Plenum Press; 1994), c. 5 and 6.

circumstances of provocation is itself a simplification. Every scenario giving rise to the offence involves a complex spectrum of emotions including jealousy, fear and sorrow.

Once the facts are ascertained, all rests on the application of the normative rule. Under the modernist epistemology, the law (like science) assumes the possibility of absolute natural and moral tenets. The control of the world assumes the ability to make unqualified judgments which in turn assumes an ability and a right to determine what is best for the community. This is clearly evident in the law of homicide. Courts often express normative rules in absolute and inflexible terms.<sup>193</sup> There are incentives for so framing judgments so that they resonate with authority; to counter any suggestion that they are not based on fact or do not represent the truth; for judicial peace of mind - it is easier to pass judgment if there is no doubt as to the correct outcome; and finally, to reach an expedient resolution without a painstaking search for the truth.

The mechanistic understanding of emotion has many ideological implications. The understanding is based on the theories of a small number of men prior to the 20th century with their particular class, race and gender perspectives. The normality of uncontrollable emotional conditions bolsters the validity of judgments which are unacceptable on purely normative grounds such as the potential gender bias ingrained in the rhetoric of self-control.<sup>194</sup> The mode of analyzing emotion has implications for the power of the legal system to shape ideas, values

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<sup>193</sup> See discussion of the judgment of Lord Hailsham in *R. v. Howe* *infra* note 256, and accompanying text, and the judgment of Lord Coleridge in *R. v. Dudley and Stephens*, *infra* note 196.

<sup>194</sup> See discussion in relation to the defence of provocation, *supra* note 165, *infra* note 209, and accompanying text.

and facts. If a mechanistic analysis is employed, the law asserts that it has the central role in making difficult psychological assessments of human behaviour; a role which is removed from other institutions or community groups. Whereas from a social psychological perspective, the law is one of many vehicles for determining community standards of conduct. Finally, the willingness of the law to engage in mechanistic assessments means it relies heavily on the knowledge of other, predominantly scientific, disciplines. There are ideological implications in the shift of power from the law to these disciplines to determine, among other things, what is 'normal' or 'reasonable' conduct in society. Having said this, under a constructionist perspective, other non-legal voices are more prominent and must be taken seriously. The modernist epistemology of the natural sciences can then enter the legal inquiry, though indirectly.<sup>195</sup>

The mechanistic approach to emotion has allowed for startling results - sailors being convicted of murder for taking the life of another in circumstances in which the judge acknowledges that he, and possibly any man, may have engaged in the same conduct,<sup>196</sup> judges demanding of

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<sup>195</sup> See discussion of expert testimony in the defence of self-defence, *infra* note 225, and accompanying text.

<sup>196</sup> *R. v. Dudley and Stephens* (1884) 14 Q.B.D. 273 (H.L.). In a critique of *R. v. Dudley and Stephens*, Wesley Pue criticizes the judgment for being 'anti-geographical'. "Wrestling with Law: (Geographical) Specificity vs. (legal) Abstraction" (1990) 11 Urban Geography 566. "The situation of men starving to death on a small dinghy on the high seas is legally tantamount to premeditated murder in a private club in London. By legal fiction English state territory encompasses the smallest raft which might put off from an English ship at the opposite corner of the earth. The social relations among survivors of a shipwreck are presumed to mirror in all essential respects the social relations among citizens living in a highly developed industrial city. The "community" of four dying humans is regarded as indistinguishable from the English political "community". The age, health, status, social class, family relations, religions, skills, and life expectancy of the men are deliberately treated as entirely irrelevant in law." (568) Likewise, the actor's emotional state is generalised. The fear and desperation of the sailors is treated no differently from the emotional condition of persons acting in necessity in entirely different contexts. In *R. v. Dudley and Stephens*, Lord Coleridge acknowledges the case is "hard" because of the extremely difficult circumstances but is unwilling to acknowledge that the unusually extreme psychological and physical stress can affect the normative rule.

civilians under duress the same standard of 'heroics' as people during the war,<sup>197</sup> and compassionate killings being indistinguishable from murder.<sup>198</sup> At the same time, we have the one exception to the rule that intentional homicide is murder (outside legitimate self-defence claims) offering a partial defence to actors who have lost their self-control which, I suggest, is based on a rigid and contestable theory of emotion.

### A New Epistemology

The closer science is to knowing the truth, the more elusive truth becomes. "The deepening of knowledge reveals the fragility of the pillars on which it rests".<sup>199</sup> Knowledge of human emotion is particularly fragile. Psychiatrists occasionally recognize this in relation to diagnosis of human illness. "Psychiatry seeks to achieve predictive power in a situation where certainty is low. This phenomena is common to positivist approaches to the social world - uncertainty is viewed as an interloper to be overcome rather than as a basic feature which may provide problems that cannot be surmounted".<sup>200</sup>

If the law recognizes its own ignorance in relation to the etiology of emotion it cannot rely on definitive interpretations of fact or on immutable normative rules. To move from a world with a

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<sup>197</sup> *R. v. Howe*, discussed, *infra* note 256.

<sup>198</sup> See for example, *R. v. Latimer* (1995) 99 C.C.C. (3d) 481.

<sup>199</sup> Santos, *Towards a New Common Sense*, *supra* note 182 at 17.

<sup>200</sup> Phil Brown "The Name Game: Toward a Sociology of Diagnosis" (1990) 11 *Journal of Mind and Behaviour* 385 at 393.

belief in the possibility of a positive knowledge, to a world in which knowledge is acknowledged to be limited, and 'ignorance'<sup>201</sup> is the norm, is a radical transition. It might be argued that there can be no meaningful morality in such a world and therefore no possibility of articulating and enforcing normative values. The denial of positive knowledge, it might be argued, is a denial that some acts are harmful, that there are victims, or that there is discrimination based on race, gender or sexual orientation. There is also a question of how existing knowledge bases are to be challenged. Should the current understanding of the actor simply be abandoned, or is it possible to test the limits of knowledge gradually? In the criminal law, people have expectations of particular official responses to crime. If these expectations ought to be modified, how is this to be done with any degree of acceptance?<sup>202</sup>

It is important to acknowledge these implications of displacing the modernist epistemology. In the criminal law, problems are real and ontological. Citizens have legitimate expectations of moral boundaries which define the space in which conflict can be engaged. A challenge to the law's current epistemology, and in particular its understanding of emotion in the criminal law, must be mindful of these facts.

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<sup>201</sup> For an eloquent discussion of the relationship between 'ignorance' and 'knowledge', see Santos, *Towards a New Common Sense*, *supra* note 182.

<sup>202</sup> There must be some means of expressing what we demand of each person in the community. Instruments such as the *Charter*, *supra* note 89, express general values to which all citizens can have recourse. The statement of general values may or may not be controversial, and it is beyond the scope of this inquiry to challenge or endorse them. In addition to the expression of community standards, there is the question of how to conduct an honest and satisfying inquiry into the criminal liability of the actor in their unique personal circumstances in a particular social environment.

### **A Social Understanding of Emotion and the Implications for Criminal Defences**

For social constructionists, emotion is synonymous with context. Contexts are manufactured; the product of social interactions in particular historical, cultural and physical spaces. No two contexts are identical. Any attempt to understand conduct outside its context is necessarily deontological. There is no objective 'criminal act' to be understood. We construct models of what is a criminal act and then agree through social discourse (legislation and custom among other things) that a particular model of action is the norm. A social constructionist perspective argues that patterns of mechanical processes involved in our reactions to events are "elaborated and transformed as they are absorbed into the symbolic universe of actual human associations".<sup>203</sup> This is not to deny that there is personal autonomy, or that there is some point to holding actors responsible for their conduct. However, if the constructionist thesis is right, the social context is the most important influence in shaping human emotions. It follows that in determining criminal liability, the context in which emotion arises ought to be the focus of the inquiry, as it will reveal most usefully how emotion affects an actor's conduct, and what it suggests about their personal responsibility for that conduct.

The rules of criminal liability display a resistance to such a non-mechanistic approach to applying rules of criminal liability. There are no defences which suggest that an actor's social

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<sup>203</sup> Harre, *Social Being*, *supra* note 30 at 11.



context can offer an excuse to the actor in itself.<sup>204</sup> The implications of understanding criminal conduct as a social phenomenon reflects on the whole of society. "It raises the possibility of laying, in whole or in part, the 'responsibility' for crime at the door of the government, state or social structure".<sup>205</sup>

The need to understand conduct in the social context in which it arises is no great revelation. The law has long been cognizant of the need to judge conduct in its social context. The very existence of criminal defences to homicide is a recognition that criminal liability varies in different contexts. However, in its understanding of emotion, the law tends to focus on attributes of the actor, and attempts to define these attributes in terms of general psychological functions common to all human beings rather than to examine how the actor is located in a particular social setting. This understanding runs the risk of being deontological. In the defence of duress, the actor's conduct is always considered to have been coolly undertaken, regardless of the context. In the defence of provocation, all circumstances in which a person has responded violently to a serious provocation are treated as issues of a 'loss of self-control' when there may in fact be much better (social) explanations for the homicidal violence. Furthermore, the law's understanding of emotion risks being anti-contextual. The defence of

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<sup>204</sup> The defence of necessity is most often discussed as an example of this fact. Blackstone considered that a defence of necessity on the grounds of 'personal impoverishment' could be a valid defence to crime. Blackstone only rejects such a defence on the grounds that the factual conditions could never exist in England for such a defence to be raised. Sir William Blackstone, *Commentaries on the Laws of England*, Bk. 4. (Philadelphia: Rees Welsh and Company, 1897), c. II at 32. See also the discussion in Grant, Chunn and Boyle, *The Law of Homicide* (Toronto: Carswell, 1994) at 6-71.

<sup>205</sup> Nicola Lacey, Celia Wells and Dirk Meure, *Reconstructing Criminal Law: Critical Perspectives of Crime and the Criminal Process* (London: Weidenfeld & Nicolson, 1990) at 499.

provocation is available to the actor because his or her extreme emotion is deserving of excuse despite the fact that the context suggests that the conduct is unreasonable.

In the following section, I review the defences of provocation, self-defence and duress with particular emphasis on the historical, cultural and spatial contexts in which claims for the defences arise. The issues raised are isolated, intended only to present an example of a context specific approach to understanding emotion in the determination of criminal liability.

### Provocation: The Emotion of the Jealous Man.

Social constructionists would reject the concept of a loss of self-control. Anger, as with all emotions, is an expression of an actor's values as 'located' in their particular social environment.<sup>206</sup> C. Terry Warner argues that the perception of anger as uncontrollable is a self-deception. People look for outside, or uncontrollable inside, causes for their anger which do not exist. This deception prevents them taking responsibility for their anger.<sup>207</sup> Solomon provides a similar analysis of anger:

The anger is my own as well as the control; the "suppression" is but part of the structure which I am imposing upon the world through my anger. To think otherwise is to view my anger as not mine, not my responsibility, allowing me to abuse other people and self-righteously condemn them ... without ever taking responsibility for my own judgment.<sup>208</sup>

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<sup>206</sup> Harre, *Social Being*, *supra* note 30 at 4. "The self is a location, not a substance or an attribute. The sense of self is the sense of being located at a point in space, of having a perspective in time and of having an awareness of some kind of being."

<sup>207</sup> Warner, "Anger and Similar Delusions" in *The Social Construction of Emotions*, ed. Harre (Oxford: Blackwell, 1986).

<sup>208</sup> Solomon, *Passions* *supra* note 2 at 169.

The defence of provocation feeds this lack of responsibility by providing a physiological cause (a loss of self-control) as the basis for the defence.

In the 18th century the jealous man was viewed as a man with rights, including a property right over his wife. In the defence of provocation, there were paradigmatic scenarios in which it was understood that a man might act with homicidal violence in outrage. One such scenario was that an unfaithful wife in an act of adultery with a lover.<sup>209</sup> The availability of the defence was indicative of a particular understanding of the marriage relationship, and of the comparative social positions of women and men within that relationship.

Over this century, the status of women in relationships, employment and citizenship has changed significantly and what is a socially acceptable emotional response by a man to a woman's infidelity has also changed. The response of the law has not been to withdraw the defence of provocation but to reformulate the defence so that it avoids consideration of the negative social implications of anger as it arises in the defence. It does this by understanding anger not as outrage, in which the resulting conduct might be viewed as the correcting of the wrong which led to the outrage<sup>210</sup>, but as loss of self-control, which is grounded in affect.<sup>211</sup> Thus, instead of being reformed to reflect contemporary social values, the focus of the defence was changed so that it represented an exception to these values.

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<sup>209</sup> *Regina v. Mawgridge* (1707) 84 Eng. Rep. 1107 (Q.B.).

<sup>210</sup> See Averill, *Anger and Aggression*, *supra* note 162 at 317ff.

<sup>211</sup> For a discussion of the transition from anger as outrage to anger as loss of self-control in the defence of provocation, see Jeremy Horder, *Provocation and Responsibility*, *supra* note 167, c.4 and 5.

The law has attempted to keep the defence within socially acceptable limits by demanding an objective standard of self-control of the actor. The extent to which particular characteristics of the accused can be considered in the objective ordinary person test has proved controversial.<sup>212</sup> However, with an affectivist understanding of anger in the defence, the controversy has a limited scope. Personal characteristics are considered in the objective test to the extent that they would affect either the gravity of a particular provocation to the actor or the ordinariness of the emotional reaction, both of which are concerned with the issue of loss of self-control. In other words, the characteristics are only relevant to the extent that they help explain the increase in the affective pressure in the pump (the provocation) leading to a final release (the loss of self-control). The possibility that concepts such as gender, sexual orientation and culture are themselves socially constructed is not considered. With the focus of the defence so squarely on a loss of self-control, judges risk losing sight of the context in which the anger is expressed through aggression and the normative values to be upheld through the defence. Some of the most common claims for the defence of provocation incorporate scenarios in which the actor's

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<sup>212</sup> Since *Camplin v. D.P.P.* [1978] A.C. 705, 67 Cr. Ap. Rep. 14 (H.L.) various features have been attributed to the ordinary person for the purposes of the defence. In *Camplin*, sexual orientation and age were considered relevant to understanding the ordinary person's anger. More recently, leading cases reveal a division in the approach to considering what is an ordinary level of self-control. In *R. v. Hill* [1986] 1 S.C.R. 313 the majority of the Supreme Court of Canada held that it should be left to the finders of fact to determine what are the relevant characteristics of the ordinary person in the particular circumstances surrounding the offence. In a dissenting judgment, Wilson J. argued that a universal standard of self-control must be attributed to the ordinary person in the interests of equality. Particular characteristics of the accused could be considered in determining the gravity of provocation. This approach was expressly adopted by High Court of Australia in *R. v. Stingel* (1990) 171 C.L.R. 312 (H.C.), and more recently in *R. v. Masciantonio* (1995) 129 A.L.R. 575 (H.C.). In this latter case, McHugh J. in dissent stated that the ordinary person must be considered to be of the same ethnic and cultural background as the accused.

claim for a defence is of dubious normative value such as cases of homicidal rage in response to homosexual advances<sup>213</sup> or to the discovery of marital infidelity.<sup>214</sup>

The interpretation of the origins and incidence of aggression is particularly important in relationships between men and women. The concept of a loss of self-control in anger which explodes violently immediately subsequent to a provocative act, and before the passions have had time to cool may represent well the most prevalent violent incidents of men, but perhaps not of women.<sup>215</sup> Anne Campbell develops an interesting thesis explaining how men and women understand aggression differently. For men, aggression is an instrumental force, used to serve particular goals, such as controlling others. For women, aggression is expressive, used to communicate their emotional state. Under this theory, when men encounter women's aggression, they view it as a threat and meet it with their own aggression. When women encounter men's aggression they try to identify what men are trying to communicate through their aggression.<sup>216</sup> Women's experience of aggression might not be in sudden outbursts, but something that develops after reflecting on the provocative act and contemplating the most

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<sup>213</sup> The common usage of the defence of provocation in circumstances giving rise to homicidal violence in response to a homosexual advance prompted a review of the defence in New South Wales. "The defence has been used in 13 criminal trials in the state since 1993. Of the 12 cases resulting in death, five accused pleaded guilty to murder or manslaughter. Juries acquitted the two others, found two guilty of murder and three guilty of the lesser charge of manslaughter. A government discussion paper on the defence . . . said it regarded the number of cases using the defence as "sufficiently high to warrant concern." See also Robert Mison, "Homophobia in Manslaughter: Homosexual Advance as Insufficient Provocation" (1992) 80 *California Law Review* 133.

<sup>214</sup> Horder, *Provocation and Responsibility*, c. 9. *supra* note 167.

<sup>215</sup> See for example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); Anne Coughlin, "Excusing Women" (1994) 82 *California Law Review* 1; Laurie Taylor, "Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence" (1986) 33 *UCLA Law Review* 1679.

<sup>216</sup> Anne Campbell, *Men, Women and Aggression*, *supra* note 67.

appropriate response. Women's aggression might be linked to emotions other than anger, such as fear and despair.<sup>217</sup> Despair is not as temporary as anger and action in despair may appear calm and deliberate. The defence of provocation might be, as Jeremy Horder suggests, "poorly equipped to deal with those who are driven to act as they do out of despair."<sup>218</sup>

Norms do not exist in isolation from legal rules. Legal rules not only reflect norms, but have an influence in developing what is the norm. Thus, if the legal rule espouses a norm that the ordinary man could lose his self-control when his wife is unfaithful, men might feel less constrained to control their behaviour in such a situation. As deSousa puts it, "in cultures where murderous jealousy is considered rational and inevitable, jealous husbands are surely less given to effective self-control."<sup>219</sup> One response to the disparity in the values held in the community and the values expressed through the defence, is to reject the defence in relation to particular scenarios such as cases of a non-violent homosexual advance or sexual infidelity.<sup>220</sup> In *R. v. Thibert*, the dissenting judgment of Major and Iacobucci J.J. adopted this approach, dismissing the defence on purely normative grounds, pointing to the danger of supporting values through the defence which are unacceptable in the community.<sup>221</sup> The judgment avoided the language of self-control altogether. The majority began by expressing the same normative values as the minority, but went on to decide the case in the language of self-control.<sup>222</sup> Though the whole

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<sup>217</sup> See discussion on the application of the concept of a loss of self-control to emotions other than anger, *supra* note 165, and accompanying text.

<sup>218</sup> Jeremy Horder, *Provocation and Responsibility*, *supra* note 167 at 191.

<sup>219</sup> deSousa, *Rationality of Emotion*, *supra* note 2 at 23.

<sup>220</sup> See the argument of Robert Mison to this effect in "Homophobia in Manslaughter", *supra* note 213.

<sup>221</sup> *R. v. Thibert* [1995] 1 S.C.R. 37 at 65.

<sup>222</sup> *Ibid.* at 44-55, Cory J.

court agreed on the normative values at issue, they reached opposite conclusions on the facts because of the different emphasis each placed on the excusatory power of anger in the context. Even though the majority of the Court in *R. v. Thibert* had in mind the relevant normative values, an affectivist understanding of emotion obscured those values in the particular context. I believe this result is inevitable because the very notion of a loss of self-control is an unacceptable normative construction.

The extent to which ethnicity is a relevant factor in the defence of provocation is controversial.<sup>223</sup> On occasions, Courts have considered whether anger is culturally specific. For example, Justice Pincus of the New York Supreme Court (trial court) said the following in reducing a sentence from murder to manslaughter: "[The accused] was the product of his culture . . . The culture was never the excuse, but it is something that made him crack more easily. That was the factor, the cracking factor."<sup>224</sup> In such an analysis, the law avoids the difficult normative questions involved in recognizing cultural specificity. Under a mechanistic concept of anger, the question becomes what is 'ordinary' anger for a given culture. The law is not equipped to answer this question, and any answer it does give must be culturally

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<sup>223</sup> Those in favour of explicit consideration of culture emphasize the importance of individualized justice, cultural pluralism and the importance of understanding culture in an historical and spatial context. Those against argue in the language of community standards, principles of harm and the rights to safety of victims. There is a large body of literature discussing these issues in the US in relation to whether or not to codify a "cultural defence". See for example, John Lyman, "Cultural Defense: Viable Doctrine or Wishful Thinking" (1986) 9 *Criminal Justice Journal* 87; Sharon Tamao, "Cultural Defense: Traditional or Formal" (1996) 10 *Georgetown Immigration Law Journal* 241; Malek-Mithra Sheybani, "One Person's Culture is Another Person's Crime" (1987) 9 *Loyola Los Angeles International and Comparative Law Journal* 751.

<sup>224</sup> Daina Chiu, "The Cultural Defence: Beyond Exclusion, Assimilation and Guilty Liberalism" (1994) 82 *California Law Review* 1053, citing Rorie Sherman, "'Cultural' Defenses Draw Fire" *National Law Journal*, Apr. 17 (1989) at 3; and Nina Schuyler, "Cultural Defense: Equality or Anarchy" *S.F. Weekly*, Sept. 25, 1991, 1. See also McHugh J. of the High Court of Australia in *R. v. Masciantonio*, *supra* note 125. See also *R. v. Dincer* [1987] 1 V.R. 460 (S.C.). Cf. *R. v. Ly* (1987) 33 C.C.C. (3d) 31 (B.C.C.A.) in which the jury was held to have been properly instructed not to have regard to the attitude of Vietnamese males toward the relevant act of infidelity.

essentialist. Social constructionists would have no trouble accepting the proposition that when faced with a particular normative scenario (such as infidelity), the reaction of people from one culture will be different from the reaction of people from another culture - the cultural environment provides a unique context in which emotional reactions are learned and expressed. However, this constructionist conclusion does not rely on a particular psychological reality. It has no concern with internal 'cracking factors', but only with environmental factors which encompass concerns of space, language, social and ideological power relations, personal and cultural history, gender, and race.

#### Self-Defence: The Emotion of the Battered Woman.

Throughout this century, there has been a transformation in the place of women in society. Women have claimed equal rights to citizenship, employment opportunity and status in relationships. These claims have impacted on the law. For example, prior to the 20th century, chastisement of one's wife was an accepted social practice in western culture. Up to that time, there was no legal recourse for a woman in response to her husband's legitimate chastisement. Around the turn of the century, chastisement was outlawed in British and American common law.<sup>225</sup> A significant step in the transformation of women's status in relationships was the public focus on domestic violence in the 1960s. Throughout these social transformations, the generic construction of the defence of self-defence has not changed.<sup>226</sup> One of the elements of the

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<sup>225</sup> Joan Meier, "Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice" (1993) 21 *Hofstra Law Review* 1295.

<sup>226</sup> Symposium, (1993) *Harvard Law Review* 1499 at 1501 ff.



defence in Canada is that the actor must face the threat of a lethal assault.<sup>227</sup> This requirement has been criticized for assuming all actors to possess an equivalence of physical strength and defensive resources, and therefore, an equal ability to act in self-defence.<sup>228</sup> Battered women only have a defence of self-defence if they satisfy the traditional elements of the defence. It is difficult to satisfy the requirement of imminence in a scenario typically faced by battered women.<sup>229</sup> Recently, through the use of expert testimony, the generic elements have been considered in the particular psychological and social context in which they arise. When put in context, a whole variety of questions about the social appropriateness of a battered woman's action attain greater significance:

Why should a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself?<sup>230</sup>

Expert testimony has been of fundamental importance to aiding judges and juries to place the events surrounding self-defence claims in social contexts.<sup>231</sup> However, some theorists argue

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<sup>227</sup> See ss 34(1) and 34(2) of the *Criminal Code* which refer to the requirement of an "unlawful assault"; *Reilly v. The Queen* [1984] 2 S.C.R. 396; *R. v. Baxter* (1975) 33 C.R.N.S. 22 (Ont. C.A.); *R. v. Bogue* (1976) 30 C.C.C.(2d) 403 (Ont. C.A.); *R. v. Whynot* (Stafford) (1983) 9 C.C.C. (3d) 449; 37 C.R. (3d) 198 (N.S.C.A.). For a general discussion, see Grant, Chunn and Boyle, *The Law of Homicide*, *supra* note 204 at 6-39. Note, however, that *Lavallee*, *supra* note 120, and *McConnell*, *infra* note 237, have challenged the imminence of such an assault.

<sup>228</sup> Laurie Taylor, "Provoked Reason in Men and Women", *supra* note 215; Willoughby, "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer" (1989) 38 *Kansas Law Review* 169.

<sup>229</sup> See for example, Loraine Eber, "Battered Woman's Dilemma: To Kill or be Killed" (1981) 32 *Hastings Law Journal* 895.

<sup>230</sup> Wilson J. provides this list of questions in *Lavallee*, *supra* note 120 at 871.

<sup>231</sup> It is important to note that research on the Battered Woman's Syndrome was conducted to add women's voices to the literature on domestic violence. It presents a social perspective which is of particular importance because of the negative stereotypes which have surrounded battered women.

that experts are used not to give a new voice to women, but to translate women's experience into the entrenched male model of responsibility by making their claims the exception to the rule. Anne Coughlin suggests that the language of Battered Women's Syndrome "testifies to women's passivity, incompetence and timidity, without attributing to her any positive qualities or traits."<sup>232</sup>

Evidence of the battered woman syndrome is very specific and well defined. It points to particular symbols for 'learned helplessness' and a 'battering cycle'.<sup>233</sup> These symbols will not always be appropriate to women's experience of abuse. In fact, there may be a danger in adopting the language of psychiatry at all. Feminist psychologists have been critical of the research method of modern psychology. "An extensive literature identifies the scope of psychology's marginalization of women, including ... psychology's (mis)representation of the experience of women as deviant from the male norm."<sup>234</sup>

Isabel Grant argues that to render an abused woman's conduct reasonable, expert testimony shifts the focus of the inquiry away from the fact of abuse. Furthermore, with the testimony being presented in the language of psychiatry, helplessness is easily translated into a syndrome.<sup>235</sup> With a syndrome established, the danger is that battered women are excused

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<sup>232</sup> Anne Coughlin, "Excusing Women" *supra* note 215 at 88.

<sup>233</sup> Lenore Walker, *Battered Woman Syndrome* (New York: Springer Company, 1984); Angela Browne, *When Battered Women Kill* (New York: Free Press, 1987).

<sup>234</sup> Janis Bohan (ed.) *supra* note 30 at 2.

<sup>235</sup> Isabel Grant, "The 'Syndromization' of Women's Experience" in Martinson *et al.*, "A Forum on *Lavallee v. R: Women and Self-Defence*" (1991) 25 *UBC Law Review* 23.

because they satisfy a label and not because their conduct is a reasonable response to their situation.<sup>236</sup> The law must learn to be open to more flexible evidence of women's experience of abuse. A similar danger is evident in the case of *R. v. McConnell*.<sup>237</sup>

The law must be careful not to impose expert evidence of the syndrome in cases where it would not be appropriate. If evidence of the syndrome is accepted too readily as the ultimate truth of abusive relationships, it can be put to surprising and controversial uses. For example, the defence team for O.J. Simpson named Lenore Walker, one of the most important researchers and advocates for women in abusive relationships, as a defence witness; presumably to testify that Simpson did not fit the stereotype of a batterer. There were cries that this took the use of research on the battered woman syndrome too far. Melanie Griffith argues that courts should reject the use of the battered woman syndrome where the victim's state of mind is not at issue.<sup>238</sup> However, this seems to create an artificial distinction to explain away an uncomfortable implication of the use of expert testimony. If the 'Syndrome' is presented as objective truth, the possibility must be allowed for such a use.

The law must also be careful not to accept expert evidence of the Syndrome to the exclusion of other important contextual considerations. Julie Stubbs and Julia Tolmie argue that race is too

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<sup>236</sup> Wilson J was cognizant of this danger in *Lavallee* [1990] 1 S.C.R. 852 at 890, "The focus is not on who the woman is, but on what she did". Wilson J. goes on to quote a passage to this effect from Phyllis Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence" (1985) 8 *Harvard Women's Law Journal* 121.

<sup>237</sup> *R. v. McConnell* [1996] 1 S.C.R. 1075, rev'g (1995) 169 A.R. 321; 97 W.A.C. 321.(C.A.), discussed *infra* note 246.

<sup>238</sup> Melanie Griffith, "Battered Women Syndrome: A Tool for Batterers" (1995) 64 *Fordham Law Review* 141.

often ignored within the framework of evidence of abuse. They point out that in leading Canadian and Australian cases in which evidence of Battered Woman Syndrome was introduced (*Lavallee* in Canada and *R. v. Hickey*<sup>239</sup> in Australia), at least one of the parties to the relationship was aboriginal, and yet, no mention was made of this in either of the judgments.<sup>240</sup>

Despite these reservations about the use of expert testimony of the Battered Woman Syndrome, it presents an important challenge to traditional concepts of reasonableness. MacCrimmon argues that the current reasonableness requirement is based on a model of rationality in which the rational choice is that which best promotes the individual's personal interests.<sup>241</sup> For example, in a factual scenario like that of *R. v. Lavallee*, a male rationality might concentrate on whether or not the accused had any possibility of leaving the relationship. A different, perhaps female, rationality might emphasize the value of the relationship despite its flaws. With a focus on the value of the relationship, there are other relevant considerations beyond the question of the possibility of leaving the relationship such as a belief in the potential for the batterer to reform and the hope that the relationship might continue.<sup>242</sup> Such a model of rationality is possible if emotion is understood to be an integral part of the reasoning process. Emotion might reflect a range of phenomena which escape the clinical assessment of what has traditionally been understood as pure reason.

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<sup>239</sup> *R. v. Hickey* (14 April 1992), (Supreme Court of New South Wales) [unreported].

<sup>240</sup> Julie Stubbs and Julia Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 *Canadian Journal of Women and the Law* 122.

<sup>241</sup> Marilyn MacCrimmon, "The Social Construction of Reality and the Rules of Evidence" in Martinson *et al.*, "A Forum on *Lavallee v. R.* Women and Self-Defence" (1991) 25 *UBC Law Review* 23.

<sup>242</sup> *Ibid.*

Empirical research by Carol Gilligan on the different rational and emotional responses of young men and women to different scenarios suggested that there are detectable differences in their modes of thinking, particularly with respect to relationships. One such general distinction is that men place greater value on autonomy, while women value caring and place greater emphasis on their personal relationships.<sup>243</sup> There is a danger, of which Gilligan was well aware, in over-emphasizing stereotypical differences between men and women, and reflecting these differences in a framework of criminal defences. However, Gilligan's, and other, studies are important for exposing the current model of responsibility, and the construction of defences under this model as gendered, and not representative of a universal rationality.<sup>244</sup>

The challenge is to develop a new understanding of emotion which has a place for the experience of both men and women; an understanding which empowers a woman in a battering relationship to tell the story of her fear and despair in such a way that the story is in itself a compelling defence. Developing such an understanding will take time. It may be that expert testimony is required to expound alternative experiences to fact-finders who, Wilson J. in *Lavallee* suggested, might not otherwise be able to appreciate the seriousness of the circumstances facing the accused person. Such testimony will be required until a new approach to judging criminal liability is sufficiently widespread to be a part of a more general community

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<sup>243</sup> Carol Gilligan, *In a Different Voice* *supra* note 215. See also, Unger and Crawford, *Women and Gender*, *supra* note 67; Bohan, *Seldom Seen, Rarely Heard* *supra* note 30, Campbell, *Men, Women and Aggression*, *supra* note 216.

<sup>244</sup> For discussion of other studies, see generally, Bohan, *Seldom Seen, Rarely Heard*, *supra* note 30, Unger and Crawford, *Women and Gender*, *supra* note 67; Thomas ed., *Women and Anger*, *supra* note 67.

experience, or until legal structures exist which more clearly acknowledge the importance of context.

The advent of self-defence claims by battered women is an important development in the law of self-defence. It is the most extensive attempt by the law to take account of historical and spatial context in understanding the conduct of actors. It is significant that the law has been willing to confront new perspectives of the actor without altering the text of the law. Instead of creating a special defence for the battered women's self-defence claims, the law has applied a new and particular understanding of battered women plotted by psychologists and applied it within the parameters of the general self-defence claim. In doing so, new perspectives on the necessity of self-defence and the very concept of reasonableness have been discovered.<sup>245</sup> The approach has the potential to influence claims for self-defence which arise in a variety of different contexts, challenging the traditional understanding of what is a reasonable response to fear by placing the fear in context.<sup>246</sup>

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<sup>245</sup> See for example, Aileen McColgan, "In Defence of Battered Women Who Kill" (1993) 13 *Oxford Journal of Legal Studies* 508 at 527. "The application of self-defence to many battered women who kill does not involve any alteration or extension of the defence, rather a rethinking of the way in which the requirement that the defendant's use of force be reasonable is applied." For a contrary perspective, see David Hanson, "Battered Women: Society's Obligation to the Abused" (1993) 27 *Akron Law Review* 19 at 24, "As battered women are often not faced with immediate danger to their life, self-defence is a tenuous theory upon which to rely. The Battered Woman Syndrome should be granted its own chapter within the book of defences to a charge of homicide. The Syndrome should be uniformly applied and standards should be defined in order to properly inform battered women when they may act, and when they may not".

<sup>246</sup> For example, in *R. v. McConnell*, supra note 237, the Supreme Court accepted a comparison between expert evidence of Battered Woman Syndrome which puts the beliefs of the battered woman in context and expert evidence on the affect of the prison environment on the reasonable beliefs of an inmate.

Duress: The Rise of Terrorism.

The most recent high court pronouncements on the availability of the defence of duress for murder have been in Great Britain and Northern Ireland. The scope of the defence in these places can be explained in terms of the social and political environments in which the leading cases arose. In *R. v. Lynch*<sup>247</sup> and *R. v. Howe*<sup>248</sup>, the House of Lords was clearly concerned about the rise of terrorism in relation to the political situation in Northern Ireland. Restrictions on the defence can therefore be attributed to the anger of society at organized terrorism, to the fear of judges making the law (being potential political targets) and to the utilitarian concern that people will be encouraged to submit to terrorist threats if the defence of duress is available to them.<sup>249</sup>

A concern about the rise of terrorism pervades the judgments of the Court in each case. In a dissenting judgment in *Lynch*, Lord Simon suggested that allowing the defence might be “inscribing a charter for terrorists, gang leaders and kidnappers.”<sup>250</sup> The facts of *R. v. Howe*

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<sup>247</sup> *Lynch v. R.*, *supra* note 173. Lynch was charged as an accomplice to murder for driving the getaway car to the site of an IRA bombing. He claimed that he was coerced and raised the defence of duress. The issue before the House of Lords was whether the defence of duress was available to an accomplice to murder. The Court decided by majority that it was.

<sup>248</sup> *R. v. Howe*, *supra* note 173.

<sup>249</sup> For example, in *Lynch*, Lord Simon was concerned that if ordinary citizens did not show courage in the face of terrorism, society would be submitting to a rule of terror and the legitimate coercion of the criminal law would be undermined by a “countervailing system of threats”(688). Note however that there is a compelling retort to the utilitarian position which argues that when faced with a threat to his or her life, the last thing on an actor’s mind is his or her legal liability.

<sup>250</sup> *Lynch*, *supra* note 247 at 688.

were not related to organized terrorism at all.<sup>251</sup> However, in the Court of Appeal, Lord Lane stated that the availability of a defence of duress took on particular practical importance in a world in which "acts of terrorism are commonplace and opportunities for mass murder have never been more readily to hand".<sup>252</sup> In the House of Lords, Lord Griffith suggested, "We are facing a tide of violence and terrorism against which the law must stand firm recognizing that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight."<sup>253</sup>

There is a contrast between this strong language condemning terrorism, and the language used in rejecting the defence of provocation which rarely makes specific reference to the dangers of supporting domestic violence and homophobic rage which result in homicidal violence in anger.<sup>254</sup> And yet, the case law would suggest that the prevalence of such violence is a more immediate and pressing problem than the threat of terrorism, certainly in Canada and Australia, and almost certainly in Britain and Northern Ireland. Submitting to anger and losing self-control is a significant factor in the occurrence of homicidal violence.<sup>255</sup> In fact, such violence might be

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<sup>251</sup> The four accused involved in a series of murders became connected in an English penitentiary. Three of the accused, Howe, Bannister and Bailey were 19 or 20 yrs. of age and had records of petty offences, one, Murray, was 35 yrs. of age and had committed a series of serious offences. Murray led the others in the commission of a series of murders. Howe *et al.* claimed the defence of duress. The defence was denied at trial, and their appeals to the Court of Appeal and the House of Lords failed.

<sup>252</sup> *R. v. Howe* [1986] Q.B. 626 at 641 (C.A.).

<sup>253</sup> *R. v. Howe* [1987] 2 W.L.R. 568 at 590 (H.L.).

<sup>254</sup> A recent exception is the statement of Freeman J.A. in *R. v. Young* (1993) 78 C.C.C. (3d) 538 (N.S.C.A.) at 542 where he states, "It would set a dangerous precedent to characterize terminating a relationship as an insult or wrong act capable of constituting provocation to kill". This was cited with approval and extended in the dissenting judgment of Iacobucci and Major in *R. v. Thibert* (1995) 1 S.C.R. 37 at 65: "Similarly, it would be a dangerous precedent to characterize involvement in an extramarital affair as conduct capable of grounding provocation. . . . At law, no one has either an emotional or proprietary interest in a spouse that would justify the loss of self-control that the appellant exhibited."

<sup>255</sup> See Horder, *Provocation and Responsibility*, *supra* note 167.



considered a form of terrorism - anger is the weapon of the terrorist; fear is instilled by such anger. Comparing the social contexts which give rise to the defences of duress and provocation, there is a more compelling argument for removing provocation as a defence to murder. Despite this, the law displays a much greater concern about homicidal violence arising in relation to the defence of duress than in relation to the defence of provocation. From the language of the reported cases, it would seem that judges feel more angry about terrorism than about domestic violence.

### The Ordinary Hero

In *R. v. Howe*, Lord Hailsham was prepared to demand heroism of actors faced with life threatening situations.<sup>256</sup>

I have known ... too many acts of heroism by ordinary people of no more than ordinary fortitude to regard a law as "just or humane" which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and poltroon in the name of a 'concession to human frailty'. (579)

In this passage, which was central to his judgment, Lord Hailsham makes a psychological assessment of those who submit to threats under duress: They are 'cowards and poltroons' who have failed to display a degree of heroism which can be expected of 'people of ordinary fortitude'. If emotion is a social construction, the context in which people experience emotion is vitally important to understanding how emotion reflects on their character, and their choice and capacity to act. In analyzing Lord Hailsham's judgment, it is necessary to assess the social,

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<sup>256</sup> *Howe*, *supra* note 173.

historical and spatial context in which the accused in *R. v. Howe* might experience fear in 1985, and the context of the 'ordinary person' to whom Lord Hailsham refers.

It is very likely that Lord Hailsham's experience of the heroism of "ordinary people of no more than ordinary fortitude" refers to his personal experience of heroism during the Second World War (the War). In two separate autobiographical volumes, Lord Hailsham acknowledges the influence of the army in his life and in particular the influence of his active service during the War.<sup>257</sup> When Britain entered the War in 1939, Lord Hailsham was 32 years old. Although he could have avoided military service<sup>258</sup>, he enlisted at the earliest opportunity<sup>259</sup> and speaks with pride of his involvement in active duty.<sup>260</sup> Lord Hailsham experienced firsthand the dangers of war. He was dining in a restaurant in London with his father when it was bombed during a German Blitz; and while on active duty in the Middle East as a junior officer with the Second Battalion of the Rifle Brigade received a minor injury from Messerschmitt fire. He was also affected by the tragedy of loss of life during the war. He describes one occasion in which he had the unpleasant task of convincing the father of one of his comrades that his son had died and

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<sup>257</sup> Lord Hailsham, *The Door Wherein I Went* (London: Collins, 1975); *A Sparrow's Flight: The Memoirs of Lord Hailsham of St. Marylebone* (London: Collins, 1990). See for example, *A Sparrow's Flight* at 132, "During the war and since, I have had to comfort many victims of bereavement - husbands, wives, mothers, fathers, girlfriends, brothers, sisters. All these experiences are desperately poignant."

<sup>258</sup> "I might . . . have made arrangements in the event of war to offer my service to the Judge Advocate General's department, for which my legal qualification and experience would, I suppose, have amply qualified me." *Sparrow's Flight* at 129. Lord Hailsham was offered a job in the Ministry of Economic Affairs but "turned it down on the ground that at my age my only honourable duty was to risk my life with my other contemporaries in the armed forces." *Sparrow's Flight* at 145.

<sup>259</sup> "After war had broken out, my main occupation was to join the Army. I could, of course, have waited until I was called up, or placed myself in a reserved occupation. But this seemed to me an ignominious course." *Sparrow's Flight* at 129.

<sup>260</sup> "I showed my willingness from the first to expose myself in an infantry battalion, ... and, in the event, I did, in fact, have the honour to lead an infantry platoon in a minor battle and numerous night patrols in the desert in 1941". *The Door Wherein I Went* at 117.

was not just 'missing in action'.<sup>261</sup> His active military service ended when he suffered an attack of infective jaundice in 1942.

Lord Hailsham's personal experience of the war influences what he understands can be expected of the emotions of others. He suggests in his concept of 'the ordinary hero' that the capacity to show courage in the face of fear that was displayed by soldiers and civilians during the Second World War can be attributed to a person facing a threat to their life during (relative) peacetime.

Psychological studies have been carried out on the incidence and effect of fear on soldiers and civilians during the numerous wars of the 20th century.<sup>262</sup> The studies suggest that both soldiers and civilians display an extraordinary ability to cope with the fear of death during the adversity of war. A number of factors were identified as contributing to this ability. Soldiers are trained to deal with fear. Combat training includes exposure to fearful situations. Soldiers are encouraged to acknowledge their fear, so that it becomes a normal phenomenon. They are taught to deal with their fear by keeping their mind on their tasks. Those perceived to be psychologically prone to fear are excluded from front-line combat. In addition, soldiers are paid; they have the possibility of promotion if they showed courage; they hate the enemy; they have an ideological

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<sup>261</sup> *Sparrow's Flight* at 131-132.

<sup>262</sup> See for example, Stanley Rachman, *Fear and Courage* (New York: Freeman and Company, 1990); Richard Gabriel, *No More Heroes: Madness and Psychiatry in War* (New York: Hill and Wang, 1987) c. 4; Elmar Dinter, *Hero or Coward: Pressures Facing the Soldier in Battle* (London: Frank Cass and Co. Ltd., 1985); Lord Moran, *The Anatomy of Courage* (London: Constable and Company, 1966); National Research Council, *Psychology for the Fighting Man* (Washington: Penguin Books and the Infantry Journal, 1943); George H. Quester, "The Psychological Effects of Bombing on Civilian Populations: Wars of the Past" in *Psychological Dimensions of War*, ed. Betty Gould (Newbury Park, Cal.: Sage, 1990).

commitment to their role; they can legitimately transfer their fear into aggression; they are not isolated but in the company of other soldiers facing the same fear; and they have the incentive of not showing fear in front of their comrades.<sup>263</sup> Psychologists found that fear was reduced in civilians during air raid attacks as they became more used to dealing with the attacks, and more confident of the protection offered by shelters. Also, having time to consider the prospect of death, they were better prepared to live in the face of it.

The conditions in which actors face the threat of death or bodily harm usually have none of the above factors to help them cope with their fear. They are often isolated and have not faced the type of threat in the past. They are in no way psychologically prepared to deal with the fear especially when the situation confronting the actor is sudden and unexpected; and they cannot legitimately transfer their fear into aggression against the innocent victim.

Given the disparity in the social circumstances of soldiers and civilians during times of war and actors facing an isolated threat to their life, Lord Hailsham's psychological assessment of the cowardice of actors is dubious. Criminal actors are at a considerable psychological disadvantage to Lord Hailsham's "ordinary people of no more than ordinary courage" if the people to whom he refers were in circumstances of war when they displayed their 'acts of heroism'. The standard of their conduct can not legitimately be compared.<sup>264</sup> Furthermore, Lord

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<sup>263</sup> See generally, Rachman, *Fear and Courage*, *ibid.*.

<sup>264</sup> It is interesting that the rhetoric of the majority of the House of Lords in *Lynch* (*supra* note 247) was very different. See for example Lord Morris, "For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the court-room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and well disposed." (670)

Hailsham's willingness to engage in such a comparison demonstrates his belief in the possibility and legitimacy of making universal statements about an actor's character, choice and capabilities. He fails to recognize that his application of the law is shaped by his own experience of war, and the cultural expectation of courage placed upon him in that context.

The above examples under the defences of provocation, self-defence and duress demonstrate that under a social construction of emotion, the law fails to account for important social, cultural and spatial contexts in the application of the rules of criminal liability. They broaden the understanding of how emotion is relevant within the criminal law, not simply emerging from within criminal actors, but pervading the whole social context.

### **Emotion in the Process of Judgment**

In the current process of judgment each person comes before the court with an isolated perspective - victims, often full of hate, wanting maximum punishment to satisfy a desire for vengeance or even full of compassion, wanting there to be a resolution outside the criminal justice system; accused persons seeking the most lenient sentences possible without considering the nature or consequences of their action; judges hoping for a resolution that is within the strict letter of the law so that they can avoid the prospect of an appeal; and communities deeply divided by the results of the whole process. There is no empathy, and therefore no emotional connection, between the people involved. Victim, accused and the wider community are inevitably dissatisfied with the result: Victims angry at the leniency of the sentence and hating the accused even more; the accused feeling that he is himself a victim of injustice. Neither is

able to transcend his or her solipsistic perspective. Perhaps the separation of all these participants in the process of judgment is inevitable. After all, homicidal violence in itself usually demonstrates a profound disconnection of the actor from the victim and the whole community.

Under the 'modernist' epistemology, the separation is exacerbated. Judges assume the role of impartial arbiters, administering justice from an objective distance; disconnected from the criminal actors and victims whose lives their judgments affect. The law fails to recognize the emotions present in the process of judgment. Connolly suggests that recognizing the different desires at work in the process of attributing blame and punishment might, "introduce circumspection and generosity into social judgments drawn ... from particular interpretations of desire and responsibility. An ethic of generosity and forbearance might be cultivated through attentiveness to the uncertainties and vicissitudes of desire."<sup>265</sup> When judgment is recognized as emotional, it becomes a social process which exists below hierarchies, under wigs and gowns, within the formal rhetoric of the law and between judge, actor and victim.

Judgment will only begin to be emotional when the actor is viewed as equal subject.

Intersubjectivity requires a difficult transcendence which is captured in Santos' concept of solidarity. Understanding and knowledge is gained through a reflexive, inter-personal discourse. The other is known in relation to knowledge of oneself.<sup>266</sup> Santos' notion of solidarity

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<sup>265</sup> Connolly, *Ethos of Pluralization*, *supra* note 3 at 50.

<sup>266</sup> Santos, *Towards a New Common Sense*, *supra* note 182 at 25ff..

corresponds closely to Michael Detmold's concept of love.<sup>267</sup> For Detmold, lawful relations require people to love others as they love themselves. This requires an acknowledgment of the equality of the other in relation to the self. Equality does not literally mean equal qualities, nor does it mean equal 'moral standing'.<sup>268</sup> It means recognition of a common humanity. Lawful relations only exist when the other is loved as equal subject.

Madan Sarup describes a similar approach to judgment. Instead of focusing on the opposition between object and subject in analyzing the process of judgment, Sarup focuses on the opposition of the normative rule to the individual. The interplay between normative rule and the individual should be a constant struggle, in a contingent discourse. The individual will at once be subject and object, universal and particular. In this struggle the wisdom for right judgment is momentary, occurring at the point when, in a moment of enlightenment, subject and object are one.

The above approaches call for an imaginative process of representing the actor which is beyond a simple relationship of subject and object.<sup>269</sup> For intersubjectivity, solidarity or love, the judge cannot place victim, accused and normative rule into neat boxes. The accused must be

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<sup>267</sup> Michael Detmold, *The Law of Love: Natural Law in Human Practice*. (Faculty of Law, University of Adelaide, 1991)[unpublished].

<sup>268</sup> For Detmold such concepts have no reality.

<sup>269</sup> In *The Order of Things: an Archaeology of the Human Sciences* (New York: Pantheon Books, 1971) at 4-5, Foucault describes such a complex relationship between a painter and a model. The model is both subject, object and spectator. As the eyes of the painter and the model meet in a conditional exchange, the model is continually transformed. Foucault argues that in the transition from the classical to the modern age, representation disappeared as the foundation of order because "discourse [between the subject and object] ceased to function within representation." It may be that what is required for an emotional process of judgment is a return to Foucault's account of classical representation.

understood as victim, victim as accused, normative rule not as absolute prescription but as a perspective from which to enter discourse. All must look into the eyes of the other and recognize the self, the reflection of which is our common humanity. Although difficult, this level of understanding may be what is demanded of a process of judgment seeking to reflect the actor's personal responsibility in the particular context. The problem with 'reasonable person' tests is that they tend to objectify the actor, thus disabling the possibility of achieving intersubjectivity.<sup>270</sup>

To have an emotional connection with the actor, those in the position to judge may be required to embrace politically unpopular perspectives of victim, accused and normative rule. The factors which will have particular importance to the judge will inevitably be those the judge has previously encountered on her or his life journey but also, viewing the actor as equal subject, the judge will take seriously the possibility of other factors having importance to the actor which he or she has never encountered. The judge will therefore take seriously the stories of the criminal actor, victims and the interpretations of these stories by experts. Important factors might include familial support, the history of the relationship of accused and victim, history of other personal relationships, employment status, the significance of particular types of insult, age, sex, ethnic background, religious beliefs and so on. The emotional energy of judges will be stirred intermittently by the injustice to the victim, by the plight of the accused, and by the importance of community safety. At different times, the significance of each of these relevant emotions will expand and contract, and different feelings will brighten and fade, as the

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<sup>270</sup> Madan Sarup, *Post-Structuralism and Post-Modernism* (New York: Harvester, 1992) at 49.



prominence of different social considerations take precedence and then recede. The process of judgment is a compassionate process of aiding the actor to judge him or her self.

In the criminal law, the ideal of intersubjectivity is particularly difficult to attain because of the hierarchical structure of the law. The text of the law is set up as superior to the actor and the actor is reduced to fit the text.<sup>271</sup> When there is a clear division between the subject and the object, each is self-enclosed and there is no possibility of communication between them. The ideal of intersubjectivity is also difficult to achieve because to become emotionally involved in the lives of actor and victim - which are lives of extreme emotion - is exhausting. Under the current structure of the law, judges are daily confronted with multiple actors and victims. It is not possible to empathize with them all, which is why the law simplifies emotion, dealing with it at a mechanical, intellectual level. For emotion to play a serious role in the process of judgment, there may need to be a transformation in current legal structures.

Judging emotion requires judging actors' capacity, choice, character, motivation, reason, background and the relationship of these concepts within complex historical, cultural and spatial contexts in which the prohibited conduct took place. Judgment requires engaging in a difficult but vital relationship with the person being judged, and with the people for whom judgment is being performed, and striving in these relationships to balance the internal and external and the objective and subjective perspectives. Contemporary legal methods make the process deceptively simple. Emotion is reduced to a quantifiable phenomenon or omitted altogether

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<sup>271</sup> James Duncan and David Ley, "Representing the Place of Culture" in *Place/Culture/Representation*, eds. Duncan and Ley (London: Routledge, 1993) at 2.

from the process of judging criminal liability. Judgment is conducted from a superior position, the actor judged as object, and the circumstances of the conduct to be judged are compartmentalized and reduced to fit a relevant legal equation.

Under a constructionist understanding of emotion, the judge is constantly reminded that the interpretation of context cannot be pre-determined by set definitions, but is his or her responsibility in each individual case. The judge cannot assert a definitive knowledge of human conduct through the application of the rules of criminal liability grounded on a rigid psychological reality, or an antiquated 'human experience'. In the application of those rules, and in the process of judgment, there must be a place for a new understanding of emotion; not as subordinate to knowledge or on the periphery of knowledge or even alongside knowledge, but as the very heart of knowledge.

## CONCLUSION

There have been many interpretations of emotion throughout history; at one time it was the bed fellow of the deadly sins, at another time the master of reason. Its interpretation and acceptance by the law is also diverse. In the law of homicide, emotion is understood as a cognitive phenomenon in the defence of duress and rejected as the ground of excuse. It is understood as an affective phenomenon in the defence of provocation and is the central focus of the defence.

Such inconsistencies in the role of emotion in the criminal law is due to a limited understanding of what emotion can be. While it continues to be understood only in terms of its definable affective and cognitive properties, it is an entity which the law can choose to omit from the determination of criminal liability, or choose to interpret in a way which expedites the desired result. But emotion is no such entity. It undoubtedly has affective and cognitive characteristics, but these do not capture its complexity. It is within and around all other entities, and thus, can never be excluded from the rules of criminal liability, or the process of judgment.

To understand the potential role of emotion in the criminal law, this paper has ranged far and wide, moving from a broad theoretical inquiry into the nature of emotion and responsibility, to a narrow analytical inquiry of the role of emotion in the rules of criminal liability, and ending with a critique of the grounds of legal knowledge on which the traditional concept of emotion is based. Emotion has been conceived of theoretically and analytically, physiologically and philosophically, abstractly and contextually. Each concept of emotion that emerges has different

implications for the degree of personal responsibility of actors, and the availability to them of the criminal defences of provocation, self-defence and duress.

I believe, perhaps optimistically, that the law's understanding of emotion is maturing. My optimism is based predominantly on recent developments in the defence of self-defence. There is a new concern for context in the application of the defence to the claims by battered women which is influencing more generally the way self-defence claims are framed. My optimism is in spite of the continued existence of the defence of provocation which is based on an unsustainable understanding of emotion. The defence inhibits the law's attempt to properly evaluate context by pouring contextual considerations into the obscure concept of a loss of self-control.

To conclude that the law must take context seriously is inane. Legal realists and others have been making this plea for a good part of this century. What is new in this thesis is a call for a deeper level of contextuality. Emotion has been the one entity in law which belies context. It operates as a ground of excuse despite what the context suggests ought to be the personal responsibility of the actor. Thus, though the context might suggest that the accused ought not to have killed the victim in extreme violence, his or her anger may yet partially excuse the conduct. Conversely, emotion has been used as a ground of excuse to the exclusion of context, when the context itself might have excused the conduct. In this way, theorists fear that the Battered Woman Syndrome may be a means for pouring important contextual considerations into the language of emotional pathology. The power of emotion to excuse despite, or instead

of, context, is possible because emotion is understood as a mechanistic phenomenon which resists the influence of socialization, and on occasions is even opposed to reason.

The social constructionist approach to understanding emotion removes the 'entity' from emotion and replaces it with a space in which emotion arises as essential to the context. Not only the accused and the victim, but also the rules of criminal liability and the process of judgment occupy that space. The law is exposed; no longer able to hide behind set definitions which categorize and polarize the actor's capabilities and choices.

For too long the law has separated the head and the heart. The head, in horse-hair wig, examining the scales of justice is the epitome of the law. All the elements relevant to the legal inquiry, including emotion, are in the balance. This symbol must be replaced. The law must understand emotion, not only as an entity that can be rationally weighed, but as pervading every aspect of the criminal law - the symbols weighed, the hand holding the scales, and the scales themselves. The social constructionist approach to understanding emotion encourages the law to throw away the scales, and judges to take off their wigs and to open their hearts, thus facilitating a new application of the rules of criminal liability, and a more contextual process of judgment.

## BIBLIOGRAPHY

## Books and Articles

Alexander, Laurence. "Justification and Innocent Aggressors" [1987] 33 *Wayne Law Review* 1177.

Aquinas, Thomas. *Truth*, Volume II. Translated by James McGlynn. Chicago: Henry Regnary, 1953.

\_\_\_\_\_. *A Summa of the Summa: Essential Theological Passages of St. Thomas Aquinas Summa Theologica*. Edited by Peter Kreeft. San Francisco: Ignatius Press, 1990.

Archibald, Todd. "Interrelationship between Provocation and Mens Rea: A Defence of Loss of Self-Control" (1985-1986) 28 *Criminal Law Quarterly* 454.

Arrigo, Bruce. "Deconstructing Jurisprudence: An Experiential Feminist Critique" (1992) 4 *Journal of Human Justice* 13.

Aristotle. *Nichomachean Ethics*. Translated by J.E.C. Weldon. London: Macmillan, 1912.

Armon-Jones, Claire. "The Thesis of Constructionism" in *The Social Construction of Emotions*. Edited by Rom Harre. Oxford: Blackwell, 1986.

Armour, Jody. "Race ipsa Loquitor: Of Reasonable Racists, Intelligent Bayesians and Involuntary Negrophiles" (1994) 46 *Stanford Law Review* 781.

Ashworth, A.J. "Doctrine of Provocation" (1976) 35 *Cambridge Law Review* 292.

Augustine. *Confessions* Translated by Vernon Bourke. Washington: Catholic University of America Press, 1966.

Averill, James. *Anger and Aggression: An Essay on Emotion*. New York: Springer-Verlag, 1982.

Baron, Robert, and Deborah Richardson. *Human Aggression*. New York: Plenum Press, 1994.

Bayles, Michael. "Reconceptualizing Necessity and Duress" (1987) 33 *Wayne Law Review* 1191.

Bayne, Donald. "Automatism and Provocation in Canadian Case Law" (1975) 31 C.R.N.S. 257.

Bazelon, David. "Morality of the Criminal Law" (1976) 49 *Southern California Law Review* 385.

Becker, Christine. "Clemency for Killers? Pardoning Battered Women who Strike Back" (1995) 29 *Loyola of Los Angeles Law Review* 297.

Bedford, Errol. "Statements about Emotions" in *The Social Construction of Emotions*. Edited by Rom Harre. Oxford: Blackwell, 1986.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Edited by J.H. Burns and H.L.A. Hart. London: Menthuen, 1982.

Berkowitz, Leonard. *Aggression: Its Causes, Consequences and Control*. Philadelphia: Temple University Press, 1993.

Berofsky, Bernard. *Freedom from Necessity* New York: Routledge and Kegan Paul, 1987.

Bhabha, Homi. *The Location of Culture* London: Routledge, 1994.

Blackstone, William. *Commentaries on the Laws of England*. Book 4. Philadelphia: Rees, Welsh and Company, 1897.

Blankstein, Kirk, and Janet Polivy. "Emotions, Self-Control and Self-Modification" in *Self-Control and Self-Motivation of Emotional Behaviour*. Edited by Blankstein and Polivy. New York: Plenum Press, 1982.

Blue, Jon. "Defining Extreme Emotional Disturbance" (1990) 64 *Connecticut Bar Journal* 473.

Bohan, Janis. (ed.) *Seldom Seen, Rarely Heard: Women's Place in Psychology*. Boulder: Westview Press, 1992.

Boyle, Christine. "Role of Equality in Criminal Law" (1994) 58 *Saskatchewan Law Review* 203.

Brett, Peter. *An Inquiry into Criminal Guilt*. Sydney: Law Book Company, 1963.

\_\_\_\_\_. "The Physiology of Provocation" [1970] *Criminal Law Review* 634.

Brown, Phil. "Name Game: Towards a Sociology of Diagnosis" (1990) 11 *Journal of Mind and Behavior* 385.

Brudner, Alan. "A Theory of Necessity" (1987) 7 *Oxford Journal of Legal Studies* 339.

Byrd, Sharon. "Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction" (1987) 33 *Wayne Law Review* 1289.

Campbell, Anne. *Men, Women and Aggression*. New York: Basic Books, 1993.

Campos, Joseph, *et al.* "A Fundamentalist Perspective on the Nature of Emotion" in *The Development of Emotion Regulation*. Edited by Nathan Fox. Chicago, Ill.: Society for Research in Child Development, 1994.

Candeub, Adam. "Motive Crimes and Other Minds" (1994) 142 *University of Pennsylvania Law Review* 2071.

Carty, Anthony, and Jane Mair. "Some Post-Modern Perspectives on Law and Society" (1990) 17 *Journal of Law and Society* 395.

Chiu, Daina. "The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism" (1994) 82 *California Law Reports* 1053.

Colvin, Eric. "Exculpatory Defences in Criminal Law" (1990) 10 *Oxford Journal of Legal Studies* 381.

Connolly, William. *Ethos of Pluralization*. Minneapolis, University of Minnesota Press, 1995.

Corrado, Michael. "Notes on the Structure of a Theory of Excuses" (1991) 82 *Journal of Criminal Law and Criminology* 465.

Cotteral, Leonard. "Interrelationships of Law and Social Science" in *Law and the Social Role of Science*. Edited by Harry James. New York: Rockefeller University Press, 1966.

Coughlin, Anne. "Excusing Women" (1994) 82 *California Law Review* 1.

Crocker, Phyllis. "The Meaning of Equality for Battered Women who Kill Men in Self-Defense" (1985) 8 *Harvard Women's Law Journal* 121.

Dahl, Tove Stang. *Women's Law: an Introduction to Feminist Jurisprudence*. Translated by Ronald Craig. Oslo: Norwegian University Press, 1987.

Damasio, Antonio R. *Descartes' Error :Emotion, Reason and the Human Brain*. New York, Grosset/Putnam; 1994.

Darwin, Charles. *Expression of Emotions in Man and in Animals*. London: John Murray, 1892.

Davis, Wayne. "Two Senses of Desire" in *The Way of Desire*. Edited by Joel Marks. Chicago: Precedent Publishing, 1986.

Delgado, Richard. "Rotten Social Background: Should the Criminal Law Recognise a Defence of Severe Environmental Deprivation" (1985) 3 *Law and Inequality* 9.

Denning, Lord Alfred. *The Changing Law*. London: Stevens, 1953.

Denzin, Norman. *On Understanding Emotion*. San Francisco: Jossey-Bass Publishers, 1984.

Descartes, Rene. "Passions of the Soul" in *Philisophical Writing of Descartes*, Volume 1. Translated by J. Cottingham, R.Stoothoff and D. Murdoch. Cambridge: Cambridge University Press, 1985.



deSousa, Ronald. *The Rationality of Emotion*. Cambridge Massachusetts: The MIT Press, 1987.

Dewey, John. *Lectures on Psychology and Political Ethics*. Edited by Donald Koch. New York: Hafner Press, 1976.

Dinter, Elmar. *Hero or Coward: Pressures Facing the Soldier in Battle*. London: Frank Cass and Co., 1985.

Donagan, Alan. *Choice: The Essential Element of Human Action*. London: Routledge and Kegan Paul, 1987.

Donovan, Dolores, and Stephanie Wildman, "Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defence and Provocation" (1981) 14 *Loyola Los Angeles Law Review* 435.

Douzinas, Costas, Peter Goodrich and Yifat Hachamovitch. *Politics, Post-Modernity and Critical Legal Studies*. London: Routledge, 1994.

Dressler, Joshua. "Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits" (1989) 62 *Southern California Law Review* 1331.

\_\_\_\_\_. "Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code" (1988) 19 *Rutgers Law Journal* 671.

\_\_\_\_\_. "Justifications and Excuses: A Brief Review of the Concepts and the Literature" (1987) 33 *Wayne Law Review* 1155.

\_\_\_\_\_. "Rethinking Heat of Passion" (1982) 13 *Journal of Criminal Law & Criminology* 421.

Duff, R.A. "Choice, Character and Criminal Liability" (1993) 12 *Law and Philosophy* 345.

Duncan, James, and David Ley. "Representing the Place of Culture" in *Place/ Culture/ Representation*. Edited by James Duncan and David Ley. London: Routledge, 1993.

Durkin, Kevin. *Developmental Social Psychology*. Cambridge, Mass; Oxford: Blackwell, 1995.

Dutton, Mary Ann. "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome" (1993) 21 *Hofstra Law Review* 1193.

East, Sir Edward. *A Treatise of the Pleas of the Crown*, Volume I. London: Butterworth, 1803.

Eastman, Nigel. "Psychiatric, Psychological and Legal Models of Man" (1992) 15 *International Journal of Law and Psychiatry* 157.

Eber, Loraine. "The Battered Woman's Dilemma: To Kill or be Killed?" (1981) 32 *Hastings Law Journal* 895.

Edwards, J.L.I.J.. "Compulsion, Coercion and Criminal Responsibility" (1951) 14 *Modern Law Review* 297.

Eisenberg, John. *The Limits of Reason*. New Brunswick: Transaction Publishers, 1992.

Elster, John. "When Rationality Fails" in *The Limits of Rationality*. Edited by Cook and Levi. Chicago: University of Chicago Press.

Finkelstein, Claire. "Duress: A Philosophical Account of the Defense in Law" (1995) 37 *Arizona Law Review* 251.

Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980.

Fletcher, George. "Unmet Challenge of Criminal Theory" (1987) 33 *Wayne Law Review* 1439.

\_\_\_\_\_ "The Right and the Reasonable" (1985) 98 *Harvard Law Review* 949.

\_\_\_\_\_ *Rethinking Criminal Law*. Boston: Little, Brown and Company, 1978.

\_\_\_\_\_ "Individualization of Excusing Conditions" (1974) 47 *Southern California Law Review* 1264.

Foucault, Michel. *Discipline and Punish: the Birth of the Prison*. New York: Pantheon, 1978.

\_\_\_\_\_ "About the Concept of the 'Dangerous Individual' in 19th Century Legal Psychiatry" (1978) 1 *International Law and Psychiatry* 1.

\_\_\_\_\_ *The Order of Things: an Archeaology of the Human Sciences*. New York: Pantheon, 1971.

\_\_\_\_\_ *Madness and Civilisation: a History of Insanity in the Age of Reason*. Translated by Richard Howard. New York: Vintage, 1988.

Foulks, Edward. "Transcultural Psychiatry and Normal Behaviour" in *The Diversity of Normal Behaviour: Further Contributions in Normatology*. Edited by Offer and Sabshin. New York: Basic Books, 1991.

Freeman, Walter. *Societies of Brains: A study of the Neuroscience of Love and Hate*. Hillsdale, N.J.: L. Erlbaum, 1995.

Freud, Sigmund. *Civilization and Its Discontent*. Translated by Joan Riviere. London: Hogarth Press and the Institute of Psycho-Analysis, 1957.

Frijda, Nico H. "Lazarus, Labour of Love" (1994) 8(5) *Cognition and Emotion* 473.

\_\_\_\_\_ "Appraisal and Beyond" (1993) 7 *Cognition and Emotion* 225.

\_\_\_\_\_ "Laws of Emotion" (1988) 43 *American Psychologist* 349.

Gabriel, Richard. *No More Heroes: Madness and Psychiatry in War*. New York: Hill and Wang, 1987.

Gardner, Martin R. "Mens Rea Enigma" (1993) *Utah Law Review* 635.

Geertz, Clifford. *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books, 1983.

Gilligan, Carol. *In a Different Voice: Psychological Theory and Women's Development*. Cambridge: Harvard University Press, 1982.

Globus, Gordon. *The Postmodern Brain*. Amsterdam: John Benjamin, 1995.

Goldberg, Steven. *Culture Clash: Law and Science in America*. New York: New York University Press, 1994.

\_\_\_\_\_ "Central Dogmas of Law and Science" (1986) 36 *Journal of Legal Education* 371.

Goreta, Miroslav. "Psychoanalytic Approach as a Contribution to the Assessment of Criminal Responsibility" (1990) 18 *Journal of Psychiatry and Law* 329.

Grant, Isabel, Dorothy Chunn, and Christine Boyle. *Law of Homicide*. Toronto: Carswell, 1994.

Green, O.H. "Actions, Emotions and Desires" in *The Way of Desire*. Edited by Joel Marks. Chicago: Precedent Publishing, 1986.

Greenspan, Patricia. *Emotions and Reasons: an Inquiry into Emotional Justification*. New York: Routledge, 1988.

Greenwood, John. *Realism, Identity and Emotion: Reclaiming Social Psychology*. London: Sage, 1994.

Griffith, Melanie. "Battered Woman Syndrome: A Tool for Batterers" (1995) 64 *Fordham Law Review* 141.

Hailsham, Lord Quinton. *A Sparrow's Flight: The Memoirs of Lord Hailsham of St. Marylebone*. London: Collins, 1990.

\_\_\_\_\_ *The Door Wherein I Went*. London: Collins, 1975.

- Hakeem, Michael. "A Critique of the Psychiatric Approach to Crime and Correction" (1958) 23 *Law and Contemporary Problems* 650.
- Hall, Harold. "Extreme Emotion" (1990) 12 *University of Hawaii Law Review* 39.
- Hall, Jerome. *Law, Social Science and Criminal Theory*. Colorado: Littleton; 1982.
- Hanson, David. "Battered Women: Society's Obligation to the Accused" (1993) 27 *Akron Law Review* 19.
- Harre, Rom. *Social Being*. Oxford: Blackwell, 1993.
- \_\_\_\_\_. "An Outline of the Social Constructionist Viewpoint" in *The Social Construction of Emotions*. Edited by Rom Harre. Oxford: Blackwell, 1986.
- Hart, H.L.A. *Punishment and Responsibility*. Oxford: Clarendon Press; 1968.
- Healy, Patrick, "Innocence and Defences" (1993) 19 *Criminal Reports* (4th) 121.
- Hegel, G.W.F. *Philosophy of Right*. Translated by T.M. Knox. Oxford: Clarendon Press, 1952.
- Holland, Winifred. "Automatism and Criminal Responsibility" (1982) 25 *Criminal Law Quarterly* 95.
- Holmes, Oliver Wendell. *The Common Law*. Boston: Little, Brown and Company, 1945.
- \_\_\_\_\_. "Law in Science and Science in Law" (1899) 12 *Harvard Law Review* 443.
- \_\_\_\_\_. "The Path of the Law" (1897) 10 *Harvard Law Review* 457.
- Horder, Jeremy. "Criminal Culpability: The Possibility of a General Theory" (1993) 12 *Law and Philosophy* 193.
- \_\_\_\_\_. "Autonomy, Provocation and Duress" [1992] *Criminal Law Review* 706.
- \_\_\_\_\_. *Provocation and Responsibility*. Oxford: Clarendon Press; 1992.
- \_\_\_\_\_. "Cognition, Emotion and Criminal Culpability" (1990) 106 *Law Quarterly Review* 469.
- Huigens, Kyron. "Virtue and Inculcation" (1995) 108 *Harvard Law Review* 1423.
- Hume, David. *A Treatise on Human Nature*. Edited by Green and Grose. Scientia Verlag Aalen; 1964.
- Izard, Carroll. *Psychology of Emotions*. New York: Plenum Press; 1991.

- James, William. *Principles of Psychology*. New York: H.Holt and Company, 1905.
- \_\_\_\_\_ and Carl Lange, *The Emotions*. New York: Hafner Publishing Company, 1967.
- Jauregui, Jose Antonio. *The Emotional Computer*. Oxford: Blackwell, 1995.
- Kadish, Sanford. "Excusing Crime" (1987) 75 *California Law Review* 257.
- Kahan, Dan, and Martha Nussbaum. "Two Concepts of Emotion in the Criminal Law" (1986) 96 *Columbia Law Review* 269.
- Kalat, James. *Biological Psychology*. Pacific Grove, Cal.: Brooks/Cole, 1995.
- Kant, Immanuel. *Metaphysical Elements of Justice*. Translated by John Ladd. Indianapolis: Bobbs-Merrill, 1965.
- Kaye, J.M. "The Early History of Murder and Manslaughter" (1967) 83 *Law Quarterly Review* 365.
- Kennedy and Kemp. "Fear and Anger in Delusional (Paranoid) Disorder: The Association with Violence" (1992) 160 *British Journal of Psychiatry* 488.
- Kenny, Anthony. *Action, Emotion and Will*. London: Routledge and Kegan Paul, 1963.
- Kinsport, Kit. "Defending Battered Women's Self-Defence Claims" 67 *Oregon Law Review* 393.
- Klimchuk. "Outrage, Self-Control and Culpability" (1994) 44 *University of Toronto Law Journal* 441.
- Lacey, Nicola, Celia Wells and Dirk Meure. *Reconstructing Criminal Law*. London: Wiedenfeld and Nicholson, 1990.
- Lazarus, Richard and Smith. "Appraisal Components, Core Relational Themes and the Emotions" (1993) 7 *Cognition and Emotion* 233.
- \_\_\_\_\_, James Coyne and Susan Folkman. "Cognition, Emotion and Motivation: Doctoring Humpty-Dumpty" in *Approaches to Emotion*. Edited by Klaus Scherer and Paul Ekman. Hillsdale, N.J.: L. Erlbaum, 1984.
- \_\_\_\_\_ "On the Primacy of Cognition" (1984) 39 *American Psychologist* 124.
- \_\_\_\_\_ "Thoughts on the Relations between Emotion and Cognition" (1982) 37 *American Psychologist* 1019.
- Leventhal, Howard, and Andrew Tomarken, "Emotion: Today's Problems." (1986) *Annual Review of Psychology* 565.

Lloyd, Genevieve. *The Man of Reason*. London: Routledge, 1993.

Logue. "Research on Self-Control: An Integrating Framework" (1988) 11 *Behavioural Brain Sciences* 665.

Lorenz, Konrad. *On Aggression*. Translated by Marjorie Wilson. New York: Harcourt, Bruce & World, 1966.

Luban, David. *Legal Modernism*. Ann Arbor: University of Michigan Press, 1994.

Lyman, John. "Cultural Defense: Viable Doctrine or Wishful Thinking" (1986) 9 *Criminal Justice Journal* 87.

McColgan, Aileen. "In Defence of Battered Women Who Kill" (1993) 13 *Oxford Journal of Legal Studies* 508.

Mandler, George. "Emotions and the Psychology of Freedom" in *Emotions: Essays on Emotion Theory*. Edited by Stephanie Van Goozen, Nanne Van de Poll and Joseph Sergeant. Hillsdale, NJ.: L.Erlbaum, 1994.

\_\_\_\_\_. *Mind and Body: Psychology of Emotion and Stress*. New York: W.W. Norton, 1984.

Meier, Joan. "Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice" (1993) 21 *Hofstra Law Review* 1295.

Mele, Alfred. *Springs of Action: Understanding Intentional Behaviour*. New York: Oxford University Press, 1992.

Mewett, Alan. "Murder and Intent: Self-Defence and Provocation" (1984-5) 27 *Criminal Law Quarterly* 433.

Mison, Robert. "Homophobia in Manslaughter: Homosexual Advance as Insufficient Provocation" (1992) 80 *California Law Review* 133.

Monahan, John, and Laurens Walker. *Social Science in the Law: Cases and Materials*. 3rd edition. New York: Foundation Press, 1994.

Moore, Michael. "Choice, Character and Excuse" (1990) 7 *Social Philosophy and Policy* 29.

\_\_\_\_\_. "Causation and the Excuses" (1985) 73 *California Law Review* 1091.

Moran, *The Anatomy of Courage*. London: Constable and Co. Ltd., 1966.

Morse, Stephen. "Causation, Compulsion and Involuntariness" (1994) 22 *Bulletin of American Academy of Psychiatry and Law* 159.

\_\_\_\_\_, Loren Roth and Robert Wettstein. "Concept of Normality in the Law" in *Diversity of Normal Behaviour: Further Contributions to Normatology*. Edited by Daniel Offer and Melvin Sabshin. New York: Basic Books, 1991.

\_\_\_\_\_. "Psychology, Determinism and Legal Responsibility" in *Law as a Behavioural Instrument*. Edited by Gary Melton. Lincoln: University of Nebraska Press, 1986.

Murphy, Tim. "The Oldest Social Science? The Epistemic Properties of the Common Law Tradition" (1991) 54 *Modern Law Review* 182.

Nagel, Thomas. *View From Nowhere*. Oxford: Oxford University Press, 1986.

National Research Council. *Psychology for the Fighting Man*. Washington: Penguin Books and the Infantry Journal, 1943.

Nietzsche, Friedrich. *Human, All Too Human: a Book for Free Spirits*. Translated by Marion Faber. Lincoln: University of Nebraska Press, 1984.

Norris, Christopher. "Law, Deconstruction and the Resistance to Theory" (1988) 15 *Journal of Law and Society* 166.

Nozick, Robert. *Nature of Rationality*. Princeton: New Jersey: Princeton University Press, 1993.

Oakley, Justin. *Morality and the Emotions*. London: Routledge, 1991.

Oatley, Keith. *Best Laid Schemes: The Psychology of Emotions*. Cambridge University Press, 1992.

\_\_\_\_\_ and Jennifer Jenkins. "Human Emotions: Function and Dysfunction" (1992) 43 *Annual Review of Psychology* 55.

Offer, Daniel, and Melvin Sabshin. ed. *The Diversity of Normal Behaviour: Further Contributions to Normatology*. New York, N.Y.: Basic Books, 1991.

Oppenheimer, Robert. *Letters and Recollections*. Edited by Smith and Weiner. Cambridge: Harvard University Press, 1980.

Ortony, Andrew, Gerald Clore and Allan Collins. *Cognitive Structure of Emotions*. Cambridge, Cambridge University Press, 1988.

Ottowski, Margaret. "Mercy Killing Cases in the Australian Criminal Justice System" (1993) 17 *Criminal Law Journal* 10.

Papanicolaou, Andrew. *Emotion: A Reconsideration of the Somatic Theory*. New York: Gordon and Breach Science Publishers, 1989.

Plutchik, Robert. *The Psychology and Biology of Emotion*. New York: Harper Collins, 1994.

Pue, W. Wesley. "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 *Urban Geography* 566.

Quester, George. "The Psychological Effects of Bombing on Civilian Populations: Wars of the Past" in *Psychological Dimensions of War*. Edited by Betty Gould. Newbury Park, Cal.: Sage, 1990.

Rachman, Stanley. *Fear and Courage*. New York: Freeman and Company, 1990.

Reschler, Nicholas. *Rationality: A Philosophical Inquiry into the Nature and the Rationale of Reason*. Oxford: Clarendon Press, 1988.

Roseman, Ira. "Cultural Differences and Cross-Cultural Similarities in Appraisals and Emotional Responses" (1995) 26 *Journal of Cross-Cultural Psychology* 23.

\_\_\_\_\_. "Appraisal Determinants of Discrete Emotions" (1991) 5 *Cognition and Emotion* 161.

Rosenthal, Peter. "Duress in the Criminal Law" (1989-90) 32 *Criminal Law Quarterly* 199.

Rubin, Edward. "Practice and Discourse of Legal Scholarship" (1986) *Michigan Law Review* 1835.

Ryle, Gilbert. *Concept of Mind*. London: Hutchinson, 1949.

Sabini, John, and Mary Silver. "Emotions, Responsibility and Character" in *Responsibility, Character and the Emotions* Edited by Schoeman. Cambridge: Cambridge University Press, 1987.

Santos, Boaventura deSousa. *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York: Routledge, 1995.

Sarbin, Theodore, "Emotion and Act" in *The Social Construction of Emotions*. Edited by Rom Harre. Oxford: Blackwell, 1986.

Sartre, Jean-Paul. *The Emotions: Outline of a Theory*. Translated by Bernard Frenchman. New York: Philosophical Library, 1948.

Sarup, Madan. *Post-structuralism and Post-Modernism*. New York: Harvester, 1992.

Schachter and Singer "Cognitive, Social and Physiological Determinants of Emotion" (1962) 69 *Psychological Review* 379.

Schweiker, William. *Responsibility and Christian Ethics*. Cambridge: Cambridge University Press, 1995.



Segrest, Dale . *Conscience and Command: a Motive Theory of Law*. Atlanta: Scholars Press, 1994.

Semin, G.R. and A.S.R. Manstead, *Accountability of Conduct*. London: Academic Press, 1983.

Sheybani, Malek-Mithra. "One Person's Culture is another Person's Crime." (1987) 9 *Loyola Los Angeles International and Comparative Law Journal* 751.

Silbey, Susan. "Ideals and Practices in the Study of Law" (1985) 9 *Legal Studies Forum* 7.

Sistare, C.T. *Responsibility and Criminal Liability*. Dordrecht: Kluwer Academic, 1989.

\_\_\_\_\_. "Models of Responsibility in Criminal Theory: Comment on Baker" (1989) 7 *Law and Philosophy* 295.

Smart, Carol. *Feminism and the Power of Law*. London: Routledge, 1989.

Smith, et .al. "In Search of the 'Hot' Cognitions: Attributions, Appraisals and Their Relation to Emotion" (1993) 65 *Journal of Personality and Social Psychology* 916.

Solomon, Robert. "Sympathy and Vengeance: the Role of Emotions in Justice" in *Emotions: Essays on Emotion Theory*. Edited by Stephanie Van Goozen, Nanne Van de Poll and Joseph Sergeant. Hillsdale, NJ.: L.Erlbaum, 1994.

\_\_\_\_\_. "Philosophy of Emotions" in *Handbook of Emotions*. Edited by Michael Lewis and Jeannette Haviland. New York: Guildford Press, 1993.

\_\_\_\_\_. *A Passion for Justice*. Reading, Mass.: Addison-Wesley, 1990.

\_\_\_\_\_. "On Emotions as Judgments" (1988) 25 *American Philosophical Quarterly* 183.

\_\_\_\_\_. *The Passions*. Notre Dame: University of Notre Dame Press, 1976.

Stanish, Garth. "Whither Provocation?" (1993) 7 *Auckland University Law Review* 381.

Strasser, Mark. *Agency, Free-Will and Moral Responsibility*. Wakefield N.H.: Hollowbrook, 1992.

Stubbs, Julie and Julia Tolmie. "Race, Gender and the Battered Woman Syndrome: An Australian Case Study." (1995) 8 *Canadian Journal of Women and the Law* 122.

Sullivan, G.R. "Anger and Excuse: Reassessing Provocation" (1993) 13 *Oxford Journal of Legal Studies* 421.

Taft, "The Ability to Judge People" (1955) 52 *Psychological Bulletin* 1.

Tamao, Sharon. "The Cultural Defense: Traditional or Formal" (1996) 10 *Georgetown Immigration Law Journal* 241.

Tancredi, Laurence and Nora Volkow "Neural Substrates of Violent Behaviour: Implications for Law and Public Policy" (1988) 11 *International Journal of Law and Psychiatry* 1.

Tanford, J. Alexander. "Limits of a Scientific Jurisprudence: the Supreme Court and Psychology" (1990) 66 *Indiana Law Journal* 137.

Tavris, Carol. *Anger, the Misunderstood Emotion*. New York: Touchstone Books, 1982.

Taylor, Laurie J. "Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence" (1986) 33 *UCLA Law Review* 1679

Taylor, Paul. "Provocation and Mercy Killings" (1991) *Criminal Law Review* 111.

Thomas, Sandra "Emotions and How They Develop" in *Women and Anger*. Edited by Sandra Thomas. New York: Springer Publishing Company, 1993.

Uchiyama, "Differentiation of Fear, Anger and Joy" (1992) 74 *Perceptual and Motor Skills* 663.

Unger, Rhoda, and Mary Crawford. *Women and Gender: a Feminist Psychology*. Philadelphia, Temple University Press, 1992.

Unger, Roberto. *Passion: An Essay of Personality*. New York: Free Press, 1984.

Von Hirsch, Andrew, and Nils Jareborg, "Provocation and Culpability" in *Responsibility, Character and the Emotions* Edited by Ferdinand Schoeman. Cambridge: Cambridge University Press, 1987.

Walker, Lenore. *Battered Woman Syndrome*. New York: Spring, 1984.

\_\_\_\_\_. *The Battered Woman*. New York: Harper and Row, 1980.

Wallace, R. Jay. *Responsibility and Moral Sentiments*. Cambridge: Harvard University Press, 1994.

Warner, C. Terry. "Anger and Similar Delusions" in *The Social Construction of Emotions*. Edited by Rom Harre. Oxford: Blackwell, 1986.

Weiner, Bernard. *Judgments of Responsibility*. New York: Guildford Press, 1995.

Weinreb, Lloyd. "Desert, Punishment and Criminal Responsibility" (1986) 49 *Law and Contemporary Problems* 47.

Williams, Glanville. "Provocation and the Reasonable Man" [1954] *Criminal Law Review* 740.

Willoughby. "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" (1989) 38 *Kansas Law Review* 169.

Wyer, Robert, and Thomas Srull. *Perspectives on Anger and Emotion*. Hillsdale, N.J.: L. Erlbaum Associates, 1993.

Yeo, Stanley. "Power of Self-Control in Provocation and Automatism" (1992) 14 *Sydney Law Review* 3.

\_\_\_\_\_. "Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism" (1991) 33 *Criminal Law Quarterly* 280.

Zajonc, R.B., Sheila Murphy and Daniel McIntosh, "Brain Temperature and Subjective Emotional Experience" in *Handbook of Emotions*. Edited by Michael Lewis and Jeannette Haviland. New York: Guildford Press, 1993.

\_\_\_\_\_. "On the Primacy of Affect" (1984) 39 *American Psychologist* 117.

\_\_\_\_\_. "Feeling and Thinking: Preferences Need No Inferences" (1980) 35 *American Psychologist* 151.

## Cases

*Ackland, People v.* (1929) 128 P. 728 (Cal. Ct. App.).

*Baxter, R. v.* (1975) 33 C.R.N.S. 22 (Ont.C.A.).

*Blackmore, R. v.* (1967) 1 C.R.N.S. 286 (N.S.S.C.).

*Bogue, R. v.* (1976) 30 C.C.C. (2d) 403 (Ont. C.A.).

*Bratty v. A-G Northern Ireland* (1961) 46 Cr. App. Rep. 1 (H.L.).

*Brisson, R. v.* [1982] 2 S.C.R. 227; 69 C.C.C. (2d) 97; 29 C.R. (3d) 289.

*Brown, R. v.* (1986) 43 S.A.S.R. 33.(S.C.)

*Campbell, R. v.* (1977) 38 C.C.C. (2d) 6 (Ont.C.A.).

*Camplin v. R.* [1978] A.C. 705, 67 Cr. App. Rep. 14 (H.L.)

*Chamberlain, R. v.* (1983) 153 C.L.R. 514 (H.C.).

*Creighton, R. v.* [1993] 3 S.C.R. 3; 83 CCC (3d) 346.

*Dincer, R. v.* [1987] 1 V.R. 460 (S.C.).

*Dudley and Stephens, R. v.* (1884) 14 Q.B.D. 273 (H.L.).

*Duffy, R. v.* [1949] 1 All E.R. 932 (C.C.A.).

*Gotts, R. v.* [1992] 1 All E.R. 832 (H.L.).

*Graham, R v* [1982]1 All E.R. 801 (C.A.).

*Hayward, R. v.* (1833) 6 C.&P. 157.

*Hibbert v. R* [1995] 2 S.C.R. 973.

*Hickey, R. v.* (14 April 1992) S.C. of N.S.W. [unreported].

*Hill, R v* [1986] 1 S.C.R. 313; 25 C.C.C. (3d) 222.

*Howe, R v* (1958) 100 CLR 448 (H.C.).

*Howe, R. v.* [1987] A.C. 417; [1987] 1 All E.R. 771; [1987] 2 WLR 568 (H.L.).

- Johnson, R. v.* (1976) 136 C.L.R. 619 (H.C.).
- K, R. v.* [1971] 2 Ont. Rep. 401 (C.A.).
- Langlois v. R.* (1993) 80 C.C.C.(3d) 28; 19 C.R. (4th) 87 (Que.C.A.).
- Latimer, R. v.* (1995) 99 C.C.C. (3d) 481 (Sask.C.A.).
- Lavallee, R. v.* [1990] 1 S.C.R. 852; 55 C.C.C. (3d) 97; 76 C.R. (3d) 329.
- Ly, R. v.* (1987) 33 C.C.C. (3d) 31 (B.C.C.A.)
- Lynch v. R.* [1975] A.C. 653; [1975] 1 All E.R. 933; [1975] 2 W.L.R. 641 (H.L.).
- MacConnell, R. v.* [1996] 1 S.C.R. 1075.
- MacConnell, R. v.* (1995) 169 A.R. 321; 97 W.A.C. 321 (C.A.).
- McPherson, R. v.* (1957) 41 Cr. App. Rep. 213 (C.C.A.).
- Manchuk, R v* [1938] S.C.R. 18; 69 C.C.C. 172 .
- Mancini v. R.* [1942] A.C. 1 (H.L.).
- Masciantonio v. R* (1995) 183 C.L.R. 58; 129 A.L.R. 575 (H.C.).
- Mawgridge, R v* (1707) 84 Eng. Rep. 1107 (Q.B.).
- Morgentaler, R. v.* (1975) 20 C.C.C. (3d) 449 (S.C.C.).
- Noble, People v.* (1969) 170 N.W. 2d 916 (Mich. App.).
- Palmer, Rex v.* [1913] 2 K.B. 29 (C.C.A.).
- Paquette v. R* [1976] 2 S.C.R. 189.
- Perka v. R* [1984] 2 S.C.R. 233; 14 C.C.C. (3d) 385; 42 C.R. (3d) 113.
- Phillips v. R* [1969] 2 A.C. 130 (H.L.).
- Rabey, R v.* [1980] 2 S.C.R. 513; 54 C.C.C.(2d) 1; 15 C.R. (3d) 225.
- Rabey, R. v.* (1977) 17 O.R. (2d) 1; 37 C.C.C. (2d) 461 (C.A.).
- Radford, R. v.* (1985) 42 S.A.S.R. 266 (S.C.).
- Reilly v. R* [1984] 2 S.C.R. 396.

*Stingel, R. v.* (1990) 171 C.L.R. 312; 65 A.L.J.R. 141 (H.C.).

*Thibert v. R* [1996] 1 S.C.R. 37; 104 C.C.C. (3d) 1; 45 C.R. (4th) 1.

*Ubhi, R. v.* (1994) 27 C.R. (4th) 333. (B.C.C.A.)

*Van Den Hoek, R v* (1986) 161 C.L.R. 158 (H.C.).

*Viro v. R* (1978) 141 C.L.R. 88; 18 A.L.R. 257 (H.C.).

*Wade v. R* [1995] 2 S.C.R. 737.

*Wade, R v.* (1994) 18 O.R. (3d) 33; 89 C.C.C. (3d) 39; 29 C.R. (4th) 327 (C.A.).

*Whipple, People v.* (1929) 27 P. 1008 (Cal.).

*Whitfield, R v.* (1976) 63 Cr. App. Rep. 39 (C.A.).

*Whynot, R. v.* (1983) 9 C.C.C. (3d) 449; 37 C.R. (3d) 198 (N.S.C.A.).

*Zecevic v. R* (1987) 162 C.L.R. 645 (H.C.).

## **Legislation**

*Canadian Criminal Code*, R.S.C. 1985, c. C-46.

*Charter of Rights and Freedoms*, Constitution Act, 1867: Pt. 1, as enacted by the Canada Act, 1982 (U.K.), c.11.