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Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences

Benjamin L. Berger*

In this piece, the author attacks the notion of "moral involuntariness" in the Supreme Court of Canada's judgment in *R. v. Ruzic*. He asserts that the voluntarist account of criminal liability is purely descriptive. Through the embrace of a mechanistic understanding of human agency, it forestalls judgment and veils the normative foundation of criminal law. The author asserts the need for a more normative approach, one which seeks to evaluate the moral blameworthiness of an act.

In the case of duress, the author suggests that it is not enough to simply state that a person's will is constrained because he or she is acting under the influence of emotion. An evaluative account of emotions would suggest that emotions involve thought on the part of the actor, and that emotions can be mistaken. Therefore, the moral bases of emotions can and should be evaluated. The law could have considerable conservative inertia under a legal regime that allowed certain attitudes to go unexamined. For instance, the sources of a particular "emotional" reaction might be rooted in a subordinating, retrograde vision of society that placed a low value on certain classes of persons. Hence, the voluntarist account may allow morally suspect social norms and their regressive effects to persist in the criminal law. Through these and other lines of inquiry, the author leads us to question some of the underpinnings of criminal law thinking, and calls for the reintroduction of meaningful and open judgment into the law of criminal defences.

Dans cet article, l'auteur questionne la notion de «involonté morale» dans la décision de la Cour suprême du Canada dans l'affaire *R. v. Ruzic*. Il affirme que la perspective volontariste de la responsabilité criminelle est purement descriptive. En analysant l'action humaine de façon mécanique, elle empêche le jugement et tire un voile sur les fondements normatifs du droit criminel. L'auteur affirme le besoin d'une approche plus normative, une approche qui chercherait à évaluer le caractère répréhensible au niveau moral d'une action.

Dans le cas de contrainte, l'auteur suggère qu'il n'est pas suffisant d'établir simplement que la volonté d'une personne est contrainte parce qu'elle agit sous l'influence d'une émotion. Une évaluation des émotions suggérerait que les émotions impliquent une réflexion de la part de la personne, et que les émotions peuvent être erronées. Les fondements moraux des émotions peuvent donc être évalués et devraient l'être. Le droit pourrait avoir une inertie conservatrice considérable dans un système juridique qui permettrait que l'on n'examine pas certaines attitudes. Par exemple, la source d'une réaction «émotive» particulière pourrait être une vision rétrograde de la société qui placerait une valeur moindre sur certains groupes de personnes. La perspective volontariste pourrait donc permettre la persistance de normes sociales moralement suspectes et de leurs effets régressifs dans le droit criminel. Cette analyse de l'auteur nous mène à questionner certains des fondements du droit criminel, et propose le retour du jugement ouvert et significatif dans le droit des défenses criminelles.

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Introduction

Marijana Ruzic had no choice—so the story goes.¹ One late winter day, while walking her dog on the streets of Belgrade, where she lived with her mother, she was approached by a man named Mirko Mirkovic. Mr. Mirkovic began a process of intimidation that would last for two months, subjecting Ms. Ruzic to threats of violence against her and her mother, placing menacing phone calls to her home, and physically and sexually harassing her. Although she gave him no information about herself, each time Mr. Mirkovic approached Ms. Ruzic, he knew more and more about her life and claimed that he knew her every move. Ms. Ruzic believed that Mr. Mirkovic had been a paid assassin during the war, and she was deeply afraid. However, like many citizens of Belgrade at the time, she felt that the police could do nothing to help her.

One day, Mr. Mirkovic called Ms. Ruzic and instructed her to pack a bag and meet him at a hotel. When she arrived, he strapped three packages of heroin to her body, gave her a fake passport and airline tickets, and told her to fly to Toronto and to deliver the drugs to a restaurant. At first she refused, but she finally acquiesced when Mr. Mirkovic threatened to harm her mother if she didn't cooperate. She landed in Toronto on 29 April 1994 and was arrested and charged with possession and use of a false passport and unlawful importation of narcotics.

At trial, Ms. Ruzic's defence was duress. She claimed that she should not be blamed for her offences because they were committed under the compulsion of another. The problem was that the *Criminal Code* definition of duress required that the risk of harm be imminent and that the person threatening harm be present during the commission of the offence.² Ms. Ruzic could claim neither. The issue that wound its way to the Supreme Court of Canada was whether the statutory defence of duress³ was constitutional in its imminence and presence requirements.

¹ *R. v. Ruzic*, [2001] 1 S.C.R. 687, 197 D.L.R. (4th) 577 [*Ruzic* cited to S.C.R.].

² *Criminal Code*, R.S.C. 1985, c. C-46, s. 17:

17. 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 and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

³ The statutory definition of duress has been held to apply only to principals, whereas other parties to an offence avail themselves of the common law doctrine of duress, which does not include presence or imminence requirements.

The Supreme Court of Canada held that these requirements were unconstitutional, severed them from the section, and allowed Ms. Ruzic to rely upon the more generous common law defence.⁴ The result came as no surprise to most commentators. Yet the reasoning of the unanimous Court fundamentally changed the theory of criminal law defences in Canada. The Court held that Marijana Ruzic was entitled to avail herself of the common law defence not because she was morally blameless, as the court below had held, but because she was acting in a morally involuntary manner. The Court reasoned that it was a principle of fundamental justice protected by section 7 of the *Charter of Rights and Freedoms*⁵ that only morally voluntary acts could be criminally punished. As a new principle of fundamental justice, this holding was not confined to the law of duress, but installed a new general foundation for the law of criminal defences.⁶

The decision provoked a range of responses from commentators. One argued that the new principle of moral involuntariness was persuasive, if somewhat confusing.⁷ Others were more critical. Stephen Coughlan argued that although the Court's stated motivation for adopting the moral involuntariness standard over that of moral blameworthiness was to avoid potentially far-reaching consequences, the moral involuntariness standard is actually the more expansive and disruptive principle.⁸ Stanley Yeo criticized the decision for placing principles of fundamental justice relevant to criminal defences on the same footing as those that animate or limit the

⁴ *Ruzic*, *supra* note 1.

⁵ *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁶ Indeed, the Court did not even seem to limit the scope of moral involuntariness to excuses (as opposed to justifications). The Court went further than others, including George Fletcher who discusses moral involuntariness in *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978). See Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2005) at 109.

⁷ Stuart writes: "This analysis is persuasive but there is a concern. Given that defences so often involve pragmatic determinations that someone in a situation of agonizing choice should not be punished, even if the act was morally blameworthy, it seems confusing to speak of a principle of moral involuntariness" (*ibid.* at 101 [emphasis in original]).

⁸ Stephen G. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?" (2002) 7 *Can. Crim. L. Rev.* 147. According to Coughlan: "In their haste to keep the cap on the toothpaste, the Supreme Court may have cut the bottom off the tube" (*ibid.* at 149). Coughlan is particularly concerned that the moral involuntariness principle has the potential to sap criminal law defences of their proportionality elements. Any requirement beyond moral involuntariness that limits access to a defence would appear to be unconstitutional.

definition of criminal offences.⁹ To Yeo, the Court's treatment of duress in *Ruzic* failed to take account of the "secondary role"¹⁰ that defences play in the criminal law.

Although these critiques are all doctrinally interesting, in my view the true import of the decision in *Ruzic* lies elsewhere. The case's primary importance lies in how it orients the law's understanding of criminality and, concomitantly, how it affects the criminal law's sphere of concern. By installing the notion of moral involuntariness at the core of affirmative defences, the Court has suffused the law with a mechanistic understanding of human agency that veils the normative foundation of criminal law. The effect of this veiling, I will argue, is to withdraw judgment, understood as critical reflection on these norms, from its rightful place at the heart of thinking about crime. This is bad. It is bad because it facilitates the persistence of inequitable or regressive social arrangements and values; it is bad because it separates the practice of law from its inevitable communicative impact.

This article will proceed in the following way: first, I will consider what the human state of "moral involuntariness" as described in *Ruzic* means, and why it is that this account of human agency is unsatisfactory in the criminal law; then I will suggest an alternative approach to emotions and agency that would better address the normative component of criminal law (though it would have produced similar results in *Ruzic*); and finally, I will examine why it is that the law has adopted the idiom of voluntariness, arguing that it ought not to be attributed to error or silliness, but stems from genuine philosophic concerns about the nature of the interaction between criminal law and society. Nevertheless, I will suggest that these concerns are overcome by competing considerations that militate in favour of a more normative approach to criminal liability.

⁹ Stanley Yeo, "Challenging Moral Involuntariness as a Principle of Fundamental Justice" (2002) 28 Queen's L.J. 335. Yeo also argues that "moral involuntariness" is too imprecise a concept to qualify as a principle of fundamental justice.

¹⁰ *Ibid.* at 338. Yeo explains:

However, while the question posed for offences is whether the accused is at fault, the question posed for a defence such as duress is whether he or she should be excused or justified even where fault has been established. Seen in this way, considerations of defences and their elements are always subordinate to the offences they seek to excuse. Further, the exculpatory nature of defences makes legislative judgments about defence elements more sacrosanct than legislative judgments about the adequacy of fault expressed in offence elements (*ibid.*).

I find this line of argument perplexing. An accused is not criminally liable until the constituent elements of the offence have been proven (which may include a consideration of certain *mens rea* and *actus reus* vitiating defences) and the finder of fact is satisfied that there are no applicable affirmative defences. Accordingly, in my opinion, the better view is that offences and defences are equal partners in criminal liability. In a case of self-defence, for example, it would be strange to assert that the defence is somehow "subordinate" to the offence. Rather, the sphere of criminal culpability—the ultimate question—is defined in the interaction between the defence and the offence.

Before turning to the analysis, I want to pause to make clear my approach to two issues of criminal law theory. First, throughout this piece, I refer generally to “defences”, or to “affirmative defences”, rather than drawing the conventional distinction between excuses and justifications. I do so advisedly. In part, I do so because the Supreme Court of Canada does not confine its theory of moral involuntariness, the object of criticism in this paper, to either justifications or excuses. More fundamentally, however, the aspect of defences that I am addressing does not depend upon—and perhaps even challenges the salience of—the distinction between excuses and justifications.¹¹ Irrespective of whether the act is ultimately viewed as justified or simply excused, what is at stake in both the Court’s theory of moral involuntariness and in this piece are those situations in which the law refuses to punish conduct owing to the presence of powerful emotional motivations. This analysis is concerned with the precise way in which we should understand the role of such emotions in criminal liability.

Second, I wish to be clear that my focus upon emotion in this article is not meant to suggest that all criminal law defences, or even all instances of any given defence, turn on the question of emotion. Rather, this piece is an attempt to grapple with those particular situations in which the influence of powerful emotions forms the basis for a claimed defence. More specifically, my purpose is to challenge the adequacy of the Supreme Court of Canada’s current approach to such situations: the concept of moral involuntariness.

I. What Does “Moral Involuntariness” Mean?

The Court was exceedingly clear in its conception of moral involuntariness and its rejection of the notion of moral blameworthiness as the principle underlying criminal law defences. The Court drew the dividing line between these two principles at the point between the constituent elements of the offence and the affirmative defences. The Court asserted that it had “never taken the concept of blamelessness any further than [the] initial finding of guilt” and that “[t]he undefinable and potentially far-reaching nature of the concept of moral blamelessness”¹² precludes it

¹¹ This is not to say that the distinction between justifications and excuses is not theoretically interesting and, in some instances, practically significant. See *e.g.* Benjamin L. Berger, “A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity” (2002) 39 *Alta. L. Rev.* 848. For a simple formulation of the distinction between justifications and excuses, see J.L. Austin, “A Plea for Excuses” in *Philosophical Papers*, 3d ed. by J.O. Urmson & G.J. Warnock (New York: Oxford University Press, 1979) 175. Austin writes: “In the one defence, briefly, we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don’t accept full, or even any, responsibility” (*ibid.* at 176).

¹² *Ruzic*, *supra* note 1 at para. 41. It is unclear to me what is, precisely, this “initial finding of guilt.” A verdict of guilt is only entered once the constituent elements have been proven *and* the finder of fact rejects any affirmative defences. The Court seems to be asserting that there is a kind of *prima facie* case of guilt established once the constituent elements of the offence have been made out, even though the Crown may not have disproved, for example, a claim of self-defence.

from being extended as the animating principle behind the affirmative defences. “Morally involuntary conduct,” the Court stated, “is not always inherently blameless.”¹³

Instead, the Court fastened upon the notion of moral involuntariness. This concept had been introduced into Canadian criminal law in *R. v. Perka*,¹⁴ a case involving a claim of necessity. What does moral involuntariness mean? Does it mean that a person is actually incapable of controlling his behaviour in some way? This is the sense of physical involuntariness: a person who is holding a knife is not liable for homicide if another actor pushes his hand into the victim. In such a case, the person is not culpable because he was not in control of his actions. The act was not voluntary, so it could not be attributed to him. But this is not how the Court defined moral involuntariness. Rather, “[a] person acts in a morally involuntary fashion when, faced with perilous circumstances, she is deprived of a realistic choice whether to break the law.”¹⁵ Justice LeBel, writing for the Court, invoked the scenario that Justice Dickson (as he then was) used in *Perka* to explain the concept:

By way of illustration in *Perka*, Dickson J. evoked the situation of a lost alpinist who, on the point of freezing to death, breaks into a remote mountain cabin. The alpinist confronts a painful dilemma: freeze to death or commit a criminal offence. Yet as Dickson J. pointed out at p. 249, the alpinist’s choice to break the law “is no true choice at all; it is remorselessly compelled by normal human instincts”, here of self-preservation.¹⁶

Justice LeBel recognized that this notion of involuntariness, though drawn by analogy from the “more familiar notion of physical voluntariness,” differs in the sense that the accused “does not act in a literally involuntary fashion.”¹⁷ The act cannot be attributed to the accused, not because he or she is actually incapable of control, but because “her will is overborne” and, therefore, “[h]er conduct is not, in a realistic way, freely chosen.”¹⁸ Nevertheless, a common thread runs through both the physical and moral varieties of involuntariness: the importance of autonomy and choice.¹⁹ In the Court’s view, “[t]he treatment of criminal offenders as rational, autonomous and

¹³ *Ibid.*

¹⁴ [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1 [*Perka* cited to S.C.R.]. The concept of “normative involuntariness” found its way into the law of duress in *R. v. Mack*, [1988] 2 S.C.R. 903 at 946, [1989] 1 W.W.R. 557, and *R. v. Hibbert*, [1995] 2 S.C.R. 973 at para. 54, 184 N.R. 165 [*Hibbert* cited to S.C.R.].

¹⁵ *Ruzic*, *supra* note 1 at para. 29.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at para. 44. William Wilson calls this “metaphorical involuntariness”, noting that “[i]t is involuntary only in the sense that under different circumstances the choice would not have been made” (William Wilson, *Central Issues in Criminal Theory* (Oxford: Hart Publishing, 2002) at 114 [Wilson, *Central Issues*]).

¹⁸ *Ruzic*, *ibid.*

¹⁹ *Ibid.* at para. 45.

choosing agents is a fundamental organizing principle of our criminal law."²⁰ If there is no real choice, the accused's acts cannot fairly be treated as a product of his agency.²¹

This account of the conceptual foundations for human agency ties the Court very closely to a tradition in criminal law theory that places free choice at the centre of criminal culpability. The *Perka* decision drew consciously from the thinking of George Fletcher, who argues that excuses should be founded on such a conception of moral involuntariness.²² Fletcher's explanation of excuses in criminal law makes free choice the central test for criminal liability.²³ Fletcher is himself building upon a theoretical tradition that Dan Kahan and Martha Nussbaum have called "voluntarism".²⁴ H.L.A. Hart is the central figure in this approach to criminal liability, arguing that what is essential in the criminal law is that "each individual is given a fair opportunity to choose between keeping the law required for society's protection

²⁰ *Ibid.* The Court found support for this proposition in the requirement for *mens rea* and the existence of an insanity defence, and stated that free will and autonomy are of critical importance to a free and democratic society. LeBel J. continues:

Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a wrongful act must be intentional to ground a conviction. *Sault Ste. Marie, Re B.C. Motor Vehicle Act*, and *Vaillancourt* all stand for the proposition that a guilty verdict requires intentional conduct or conduct equated to it like recklessness or gross negligence. Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society ... Criminal liability also depends on the capacity to choose—the ability to reason right from wrong (*ibid.* at para. 45 [references omitted]).

²¹ LeBel J. writes:

Punishing a person whose actions are involuntary in the physical sense is unjust because it conflicts with the assumption in criminal law that individuals are autonomous and freely choosing agents ... It is similarly unjust to penalize an individual who acted in a morally involuntary fashion. This is so because his acts cannot realistically be attributed to him, as his will was constrained by some external force (*ibid.* at para. 46 [references omitted]).

²² Fletcher, *supra* note 6.

²³ Fletcher writes:

Excuses arise in cases in which the actor's freedom of choice is constricted. His conduct is not strictly involuntary as if he suffered a seizure or if someone pushed his knife-holding hand down on the victim's throat. In these cases there is no act at all, no wrongdoing and therefore no need for an excuse. The notion of involuntariness at play is what we should call moral or normative involuntariness. Were it not for the external pressure, the actor would not have performed the deed. In Aristotle's words, he "would not choose any such act in itself" (*ibid.* at 802-803 [footnotes omitted]).

²⁴ Dan M. Kahan & Martha C. Nussbaum, "Two Conceptions of Emotion in Criminal Law" (1996) 96 Colum. L. Rev. 269 at 302.

or paying the penalty.”²⁵ Hart thinks of the human as fundamentally a “*choosing being*”²⁶ who is to be accorded respect as such. When an individual had no fair or real choice, it would be fundamentally unjust to punish her.²⁷

Duress is a defence concerned with the effect of emotions on an individual’s acts.²⁸ In particular, the kind of compulsion or threat that can found a claim of duress will evoke profound feelings of fear or love for oneself or another. When one places the voluntarist account of moral involuntariness into this context, the result is a profoundly mechanistic²⁹ understanding of human agency. Circumstances (threats, in this case) produce emotions that exert themselves on the human agent. If the emotions are strong enough, they may restrict the scope of a person’s realistic choices. As the Court in *Ruzic* described the way that moral involuntariness operates, “there [is] *indeed* an alternative to breaking the law, although in the case of duress that choice may be even more unpalatable—to be killed or physically harmed.”³⁰

²⁵ H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) at 22-23 [emphasis in original].

²⁶ *Ibid.* at 49 [emphasis in original].

²⁷ Hart writes: “Thus a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him” (*ibid.* at 181). See also Dennis Klimchuk, “Moral Innocence, Normative Involuntariness, and Fundamental Justice” (1998) 18 C.R. (5th) 96:

We do not punish those who act involuntarily because their actions resist imputation to them. Their agency, so to speak, is not implicated in their doings. ... Normatively involuntary actions, I suggest, similarly resist imputation to those who perform them. In this case, attribution points not to a medical condition, but, rather the perilous circumstances in which an accused find himself or herself, or to the threats of another (*ibid.* at 102).

To anticipate an argument made later in this article, Hart’s focus on choice, voluntarism, and agency is steeped in liberal premises. The privileging of choice as the most valued aspect of the human is a mainstay of liberal political theory and culture. See Paul W. Kahn, *Putting Liberalism in its Place* (Princeton: Oxford University Press, 2005) at 14. The liberal underpinnings of the voluntarist account are particularly clear when contrasted with a perfectionist approach to criminal liability such as the character theory of liability, which holds that entitlement to mitigation turns on whether the given “bad act” is expressive of the quality of the individual’s character. See e.g. Victor Tadros, “The Characters of Excuse” (2001) 21 Oxford J. Legal Stud. 495; Kyron Huigens, “Virtue and Inculcation” (1995) 108 Harv. L. Rev. 1423; Michael D. Bayles, “Character, Purpose, and Criminal Responsibility” (1982) 1 Law & Phil. 5. For character theorists, liability is based on an “evaluation of an agent as a person, taken as a whole, where we are not particularly interested in whether his behavior conforms to a norm, but in whether he is a good or bad person, considered in a more general sort of way” (Claire Finkelstein, “Excuses and Dispositions in Criminal Law” (2002) 6 Buff. Crim. L. Rev. 317 at 326). Such a position would be anathema to a liberal theorist. For a thoughtful analysis of the character theory of liability, see Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997) c. 13.

²⁸ For a helpful survey of understandings of emotion in the psychological literature, see Alexander Reilly, “The Heart of the Matter: Emotion in Criminal Defences” (1997) 29 Ottawa L. Rev. 117 125ff.

²⁹ Here again, I am drawing from the schema set up by Kahn & Nussbaum, *supra* note 24.

³⁰ *Ruzic*, *supra* note 1 at para. 39 [emphasis in original].

In terms of criminal liability, the idiom of moral involuntariness is, accordingly, a descriptive one. It explains why someone acted the way that he did by reference to an account of free choice. As Kahan and Nussbaum explain:

Conceptually, criminal law voluntarists tend to view strong emotions as diminishing an offender's culpability on the ground that they detract from "the accused's capacity for self-control" or constrain her opportunity to exercise it. A person whose "psychological control mechanisms" are overwhelmed by fear or rage cannot justly "be held accountable" for criminal acts. Consistent with the mechanistic conception, emotions enter into such an account only as forces that either do or do not limit an offender's choices; the strength of a person's emotions is thus of far more interest than any valuations internal to them.³¹

In the case of duress, if emotions are strong enough, the choice was not free, and the person cannot be held criminally liable. A focus on moral involuntariness, the Court's chosen approach in *Ruzic*, can pierce no further into the narrative of criminality; all it is capable of saying is that the individual was overwhelmed by emotion such that she had no real choice but to break the law.

II. What is Wrong with Moral Involuntariness?

The first problem with this account of duress is that it fails on its own terms. On its own, the idiom of moral involuntariness simply requires that the person be subject to circumstances that produce emotions strong enough to constrain her will. However, this emotional requirement does not accord with the legal requirements for duress. The Court has held that, in a case of duress, there must be no reasonable alternative to breaking the law³² and that the harm produced must be proportionate to the threatened harm.³³ In *Ruzic*, the Court explained that the nature of the threat and the potential for an alternative course of action must be assessed on a subjective-objective basis, as against "the reasonable person similarly situated."³⁴ These requirements belie the voluntarist account.³⁵

The condition that there be no reasonable alternative to breaking the law imposes an objective test on what is supposed to concern the effect of emotion on an individual's choice. Even more obviously, an act is no less voluntary simply because, viewed from a (substantially) objective point of view, the harms associated with

³¹ Kahan & Nussbaum, *supra* note 24 at 302 [footnotes omitted].

³² *Hibbert*, *supra* note 14 at para. 62. See also Stephen J. Morse, who writes: "The coercion problem is not lack of any choice. It is yielding to an unjustifiable choice in the absence of acceptable alternatives" ("Diminished Capacity" in Stephen Shute, John Gardner & Jeremy Horder eds., *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993) 239 at 257).

³³ *Ruzic*, *supra* note 1 at para. 62.

³⁴ *Ibid.*

³⁵ For similar critiques made with respect to the relationship between moral involuntariness and the requirements of the defence of necessity, see Diana Young, "Excuses and Intelligibility in Criminal Law" (2004) 53 U.N.B.L.J. 79.

committing the crime would be greater than those threatened. Imagine that Mary is threatened with a trivial harm—like repeated pinching—if she refuses to steal a car. If fear overwhelms Mary’s will, no matter how unreasonably, on the voluntarist account it ought not to matter that the result is disproportionate. The requirements of reasonable alternatives and proportionality both sound in the register of legal accountability despite moral involuntariness. There is some moral foundation driving the requirement for proportionality and the absence of a reasonable alternative, but “[a]n account that stresses volitional impairment cannot explain this normative limitation.”³⁶

Yet the critical defect in the voluntarist approach to duress lies not in its descriptive deficiencies, but in its descriptive nature. This descriptive or, in the term used by Kahan and Nussbaum, “mechanistic” account explains emotions and their impact on agency but does not evaluate them. The voluntarist idiom forestalls judgment.

Moral involuntariness is predicated on the absence of a real choice. But what counts as a real choice? The answer is that the assessment of reasonable choice is one that is deeply inflected with value judgments about what is appropriate behaviour for given individuals in a given situation. In a fundamental way, the defence of duress is about the quality or legitimacy of the emotions that one feels, not just their magnitude. A trite example reflects this truth: although a person might not be excused for a robbery on account of duress if he was threatened with harm to his goldfish, a mother would surely be excused for a theft if the alternative was harm to her daughter. A different example exposes the depth of this evaluative vein: we might excuse this mother for her legitimate concern for her daughter, but would condemn her if she acted in a way harmful to her daughter when threatened with harm to herself.

The evaluation taking place is not just of the state of the accused’s will, but of the emotions that informed her action and whether these emotions are emotions that are legitimate in the eyes of the community. Ultimately, this is about agent-appropriate behaviour³⁷—what the law regards as the range of legitimate responses to particular emotional states. Yet on the voluntarist account embraced by the Supreme Court of Canada, the question is simply whether the will was overborne by emotion; the normative value of the emotions goes unevaluated. Duress is, at its core, concerned with the question of agent-appropriate behaviour, but the voluntarist account—the free-will description of duress—does not speak to this question at all.³⁸

³⁶ Kahan & Nussbaum, *supra* note 24 at 335 [footnotes omitted].

³⁷ See John Gardner, “The Gist of Excuses” (1998) 1 *Buff. Crim. L. Rev.* 575: “Different people are subject to different normative expectations when their excuses are assessed” (*ibid.* at 579).

³⁸ See Dan M. Kahan, “The Progressive Appropriation of Disgust” in Susan Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999) 63. Kahan addresses the impact of voluntarism on the critical normative barometer of “disgust” and concludes that the voluntarist account disguises, but does not banish, notions of disgust from the law (*ibid.* at 71-73).

This problem can be posed another way, using the criteria of reasonable perceptions of threat and reasonable legal alternatives. What informs the law's view of whether, in a given situation, a threat is sufficient and the alternatives are not realistic? Again, the voluntarist account has no answer. This is not to say that the problem has not been identified by voluntarist theorists. George Fletcher addresses this question in his discussion of "expectations of appropriate and normal resistance to pressure,"³⁹ and concedes that "[d]etermining this threshold is patently a matter of moral judgment about what we expect people to be able to resist in trying situations."⁴⁰ Yet in spite of this subtending moral element—an evaluative core—the autonomy-based account taken up by the Supreme Court fails to speak to these central normative issues. Kahan and Nussbaum offer an incisive account of the interplay between norms and emotion at the core of duress:

Although necessarily diverse, the emotional evaluations that inform duress doctrine share a theme: the legitimate love of one's own. Typically, a defendant asserts the defense of duress when the social losses associated with her act exceed (in some sense) the threatened loss to her or her family members. Such behaviour is tolerated by the law not just because it is inevitable that an individual will prefer herself and her loved ones to the public at large, but also because it is at least sometimes morally appropriate to have such a preference. ... But clearly one's love of one's own faces moral limits; complex social norms define when such a preference is legitimate and when it is not. "Duress" captures the interplay of at least some of these norms and helps to regulate the interaction between the privilege to love one's own and the duty to treat all persons with concern and respect.⁴¹

My argument is that at the very centre of duress, and indeed of all criminal defences, is a set of normative evaluations about the way in which it is appropriate for people to act.⁴² Put this way, it is hardly a startling assertion. What is startling, rather, is that the free-will account with its descriptive core—that emotions exerted themselves on the individual and the individual therefore had no real choice—fails to touch this essential aspect of criminal exculpation. On this view, emotions are external forces, divorced from individual evaluation and decision making. The voluntarist account of criminal defences acts as a normative veil, hiding the underlying assumptions about what emotions are legitimate or illegitimate, what

³⁹ Fletcher, *supra* note 6 at 804.

⁴⁰ *Ibid.*

⁴¹ Kahan & Nussbaum, *supra* note 24 at 336 [footnotes omitted].

⁴² At points, the Court has been amenable to this description of the conceptual foundation for criminal law defences. Dickson C.J.C. stated:

The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided ... it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met (*R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 70, 44 D.L.R. (4th) 385).

actions are good or bad, and, accordingly, who should be raised or lowered in society's estimation.

Consider the theory of criminal excuses offered by William Wilson.⁴³ Finding both the reasons theory and capacity theory of excuses inadequate, Wilson offers an alternative theory of excuses that uses the concept of crisis as the crucial consideration. Though more subtle and morally demanding of the offender than most, Wilson's is still, fundamentally, a voluntarist theory of criminal law defences. Wilson argues that we are normally expected to resist feelings such as aggression and jealousy. However, under conditions of extreme crisis, we can no longer properly hold individuals accountable for their reactions and, therefore, we allow excuses. "[T]he natural order of things," Wilson writes, "is upset" so we cannot properly be punished.⁴⁴ Why? Because such crises "deprive individuals of their susceptibility to conform their behaviour to rules."⁴⁵ Accordingly, "our actions are not authentically ours."⁴⁶ The problem with this view is the same problem that afflicts all voluntarist approaches: what counts as a crisis to an individual—certainly what counts as the "natural order of things"—is always informed by prior assessments and judgments about the world. These assessments can either be consistent with our highest ideals, or can be regressive, discriminatory, and subordinating. Any theory of defences that revolves around the impairment of volition obscures the value judgments that condition emotion and action alike.

My claim is that there are very real dangers associated with this normative veiling. When the legally approved idiom is one of descriptive voluntarism, the normative assumptions that underlie our assessments of agent-appropriate behaviour go unexamined. The formal legal response to a case of duress is that the actor had no real choice because her will was constrained. Therefore, to respect her autonomy and individual agency, we must not punish her. This account explains or describes, but does not evaluate. This is so even though, as Fletcher concedes, the ship of voluntarism floats on a sea of social norms and moral commitments. The danger is that, left unexposed in the reasoning of our courts, morally-suspect social norms and their regressive effects will persist in the criminal law, hidden in the shadow of the rhetoric of "constraint on will". In this mechanistic/descriptive account, circumstances produce emotions that bear down on the person, resulting in particular actions. But are these emotional responses that we want the law to recognize as legitimate or even tolerable? Are the emotions conditioned by a set of social norms

⁴³ William Wilson, "The Filtering Role of Crisis in the Constitution of Criminal Excuses" (2004) 17 Can. J.L. & Jur. 387 [Wilson, "Filtering Role"].

⁴⁴ *Ibid.* at 389.

⁴⁵ *Ibid.* at 390. Wilson describes the unifying feature of the defences of automatism, involuntary intoxication, duress, and provocation as "the recognition that the most balanced amongst us can, in extreme conditions such as trauma, terror, anger or intoxication, lose touch with that basic core of reasonableness which invites conformity with legal rules" (*ibid.* at 397). This is quintessentially mechanistic/voluntarist language, focusing as it does on emotions interfering with choice and/or will.

⁴⁶ *Ibid.* at 389.

that we find unacceptable? In the voluntarist account that the Court has now installed at the base of criminal defences, these questions do not figure into the analysis. The result is a criminal law with considerable conservative inertia because the prevailing norms and social arrangements are taken as given, like cogs in the machine of human agency, rather than as contestable subjects that both the individual and society have a moral obligation to inquire into and to judge.

The extent of this normative veiling is particularly apparent in the case law concerning the contested defence of provocation. In shifting attention to the law of provocation, I am not departing from the argument concerning duress. From the perspective of modern criminal law doctrine, the conceptual core of the provocation defence is the same: constraint on free will.⁴⁷ Section 232 of the *Criminal Code* requires a wrongful act or insult that is “sufficient to deprive an ordinary person of the power of self-control.”⁴⁸ In *R. v. Thibert*,⁴⁹ the Court asserted that there are both subjective and objective elements to the application of this test.⁵⁰ Justice Cory, speaking for the majority, explained the need for both objective and subjective elements “as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence.”⁵¹ But what have passed for legally cognizable constraints on free will under this voluntarist regime?

⁴⁷ For the ubiquity of voluntarist accounts in the area of criminal defences, see Wilson, *Central Issues*, *supra* note 17. Wilson writes: “If we examine the full range of defences we see that each in its own way represents a claim of involuntariness of action” (*ibid.* at 113). See also Paul H. Robinson, “Should the Criminal Law Abandon the *Actus Reus-Mens Rea* Distinction?” in Shute, Gardner & Horder, *supra* note 32, 187. Robinson says:

[T]he voluntariness requirement is analogous to, indeed it is part of, the criminal law’s system of excuses. Both the voluntariness requirement and the excuse defences, such as insanity, involuntary intoxication, and duress, hold a defendant blameless despite criminal conduct, because that conduct is judged to be too much the product of forces other than the defendant’s exercise of will. These exculpatory doctrines work upon a continuum of volition, with the voluntariness requirement exculpating the most extreme cases (*ibid.* at 197).

Compare K.J.M. Smith, “Duress and Steadfastness: In Pursuit of the Unintelligible” (1999) *Crim. L. Rev.* 363. Smith writes: “[D]uress’s modern conceptualisation has been one predominantly based on the incoherent notion of an ‘overborne will’” (*ibid.* at 374).

⁴⁸ *Criminal Code*, *supra* note 2, s. 232(2).

⁴⁹ [1996] 1 S.C.R. 37, 131 D.L.R. (4th) 675 [*Thibert* cited to S.C.R.]. For an analysis of the role of emotion in *Thibert*, see Reilly, *supra* note 28 at 140.

⁵⁰ In *Thibert*, Cory J. writes:

[T]he wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control (*ibid.* at para. 19).

⁵¹ *Ibid.* at para. 4.

Consider the case of *R. v. Fraser*.⁵² In *Fraser*, the Alberta Court of Appeal reviewed the adequacy of a trial judge's self-instruction with respect to the law of provocation. The court ordered a new trial, holding:

Had the learned trial Judge correctly directed himself on the law of provocation, he may have found that the acts and words of the deceased were sufficient to deprive the ordinary person of his self-control. Further, had he properly directed himself, he would then have gone on to determine whether or not the respondent had lost his self-control because of provocation.⁵³

What were the underlying facts of the case? What was the basis for the accused's claim that his will was overborne by emotion and he should therefore be partially excused? The accused was a young taxi driver who had driven the deceased to a casino, gambled with this man, and then drove him home to the deceased's apartment. The deceased invited the accused up for a drink and, while in the apartment, allegedly grabbed the accused's crotch and made other sexual advances. The accused bludgeoned the victim to death, then stole \$140, and left the scene. The theory of the defence was that the accused was subject to "homosexual panic" at the time and, therefore, was deprived of his self-control.

By focusing narrowly on the question of self-control and the exercise of unconstrained free will, the law directs the court's attention away from the underlying normative question of whether we wish to accept this kind of emotional response to homosexuality. Even if the accused was subject to homosexual panic, this emotional response is conditioned by a homophobic social hierarchy whereby homosexuality is base, dirty, or despicable. The structure of legal reasoning at worst affirms and at best perpetuates a discriminatory and oppressive social hierarchy.⁵⁴ Similar arguments have been made with respect to the claims of overborne will that courts have accepted with respect to male reactions to marital infidelity; claims that tend to perpetuate or legitimate violence against women.⁵⁵ The overarching point for the purposes of my argument is that when any criminal defence is wedded to the descriptive idiom of voluntariness, the law is condemned to be unresponsive to the need to interrogate social norms and hierarchies for their fairness or legitimacy. "Voluntariness" treats the human as acted upon by emotion, rather than an agent responsible for her emotional reactions. In so doing, it pre-empts any normative evaluation of the emotional basis

⁵² (1980), 55 C.C.C. (2d) 503, 15 Alta. L.R. (2d) 25 (C.A.) [*Fraser* cited to C.C.C.].

⁵³ *Ibid.* at 519.

⁵⁴ See Kathleen Banks, "The 'Homosexual Panic' Defence in Canadian Criminal Law" (1997) 1 C.R. (5th) 371. Banks writes:

A legally recognized defence theory based on the sexual orientation of the victim wrongly re-directs the focus of the crime to the victim instead of the defendant, suggesting that the victim is the author of his own misfortune. It also legitimates and perpetuates paranoia of and violence against gay men and lesbians by implying that extreme violence may be a justifiable response to a homosexual advance (*ibid.* at 378).

⁵⁵ See Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 193-94.

for action. This is the shadow cast by the new structure of criminal responsibility announced in *Ruzic*.

III. What is the Alternative?

If these dangers are inherent in the moral involuntariness approach to criminal defences, what is the alternative? The very difficulty of imagining another idiom attests to the deep-seated legal disposition to excise considerations of social norms and hierarchies from the criminal law. I have argued that the voluntarist account of duress is thick on description but thin on judgment. It tells us that an individual has been overcome by circumstantially evoked emotions and, therefore, that his set of choices was constrained. It does not, however, pass judgment upon the legitimacy or desirability of either those emotional reactions or the social structures and norms that conditioned them. The linchpin of this theoretical orientation is a particular view of emotions as forces that act upon the individual, with a resulting reaction. Ironically, though the rhetoric of moral involuntariness places respect for the individual as an autonomous and choosing being in the foreground,⁵⁶ this view of agency is terribly impoverished. A more satisfying account of human agency in the criminal law—one that could bring judgment, in addition to explanation, to bear on individual acts—would have to question this descriptive approach to the role of emotion and make emotion itself a participant in the choosing life of the autonomous actor.

The alternative lies in what Kahan and Nussbaum have called an “evaluative” conception of emotion.⁵⁷ An evaluative understanding of emotion treats emotions as themselves sites for thought and reflection, rather than simply forces levelled upon the individual. The mechanistic view of emotions “sees emotions as forces that do not contain or respond to thought”⁵⁸ and is, therefore, “skeptical about both the coherence of morally assessing emotions and the possibility of shaping and reshaping persons’ emotional lives.”⁵⁹ In contrast, the evaluative conception “holds that emotions express cognitive appraisals, that these appraisals can themselves be morally evaluated, and that persons (individually and collectively) can and should shape their emotions through moral education.”⁶⁰ This is to say more than simply that emotions have a role in decision making (though this insight is also significant). To view emotions in this evaluative way involves recognizing that emotions are themselves always already

⁵⁶ See Hart, *supra* note 25 at 49, 181. See also the text accompanying notes 26 and 27, above.

⁵⁷ Kahan & Nussbaum, *supra* note 24 at 285. For a similar approach to the role of emotion in criminal law, see Victoria Nourse, “Passion's Progress: Modern Law Reform and the Provocation Defense” (1997) 106 Yale L.J. 1331.

⁵⁸ Kahan & Nussbaum, *ibid.* at 273.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* As Brian Rosebury has observed, albeit from a somewhat critical posture, this approach to emotion in the criminal law “invokes a far more ambitious conception of law as norm-enforcement, or as a means for the moral reformation of the emotions of the masses” (“On Punishing Emotions” (2003) 16 Ratio Juris 37 at 42).

based in assessments of and judgments about the world. Emotions are, therefore, themselves open to judgment.

This vision of emotions carries three implications essential to the argument in this article: two conceptual and one juridical. The first conceptual implication is that emotions involve thought on the part of the actor. Emotions are, as Nussbaum puts it, intelligent.⁶¹ The kind of thought involved in emotions is a critical engagement with the prevailing norms and social structures that suggest particular emotional responses. Emotions are responses to thoughtful reflection on what is good or bad, high or low, in the world around us.⁶² As a corollary, this view of thoughtful emotions includes the idea that societal structures have something to do with the emotions that we feel. Normative reflection and emotion cannot be meaningfully disaggregated. As such, embedded in each emotion is a value-based commitment that is open to examination and, potentially, condemnation. This point can be demonstrated by questioning a hypothetical given by Rosebury, who critiques the evaluative view of emotion and wants to distinguish between “simple intentional emotions and emotionally charged deliberative evaluations.”⁶³ He gives the example of someone who “sincerely dislike[s] manifestations of homosexual feeling ... but still [has] formed no hostility towards homosexuals: that is, no deliberative ‘evaluative judgement’ of homosexuals.”⁶⁴ Yet this is precisely the division between emotion and reflection that the evaluative view wants to resist. The “sincere dislike” to which Rosebury refers is not a mysterious instinct, immune from explanation; rather, it is always explicable as the product of some prior thoughtful reflection by the actor on the world as it is presented to him. In this case, that evaluation has produced a form of homophobic prejudice.

The second implication of the evaluative view of emotions, flowing directly from this last point, is that emotions can be mistaken—we can err in our emotions. This conclusion flies in the face not just of the mechanistic view of human agency, but of the folksy wisdom peddled by the likes of Oprah and Dr. Phil who would tell us that “it’s not a matter of right and wrong, it’s about feelings.” If emotions are a product of our critical, if often less-than-conscious, reflection about the norms and assumptions in the world around us, then we can fall into error—we can be wrong in our emotions. This means that emotions are, in fact, open to outside scrutiny and criticism; emotions can be evaluated. As Kahan and Nussbaum explain, emotional error can manifest in

⁶¹ Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2003).

⁶² See Robert C. Solomon, *The Passions* (New York: Anchor Press, 1976): “An emotion is a basic judgment about our Selves and our place in our world, the projection of the values and ideals, structures and mythologies, according to which we live and through which we experience our lives” (*ibid.* at 187). See also Robert C. Solomon, “On Emotions as Judgments” (1988) 25 *American Philosophical Quarterly* 183.

⁶³ Rosebury, *supra* note 60 at 45. Rather than adopting an evaluative view of emotion, Rosebury would prefer to focus upon the “degree of deliberative commitment to an action” (*ibid.* at 52).

⁶⁴ *Ibid.* at 46.

two ways. First, “[s]ometimes emotions are inappropriate because the person was simply wrong about what had happened, or about who was involved.”⁶⁵ So we might interrogate the bases for another’s emotions to test them for informational error. But the second kind of emotional error touches at the core of my argument: “Sometimes ... our criticism of an emotion will focus on the value-appraisals themselves, or, we might say ... the value-facts.”⁶⁶ That is, we can critique emotions because we object to the value judgments upon which they are based. The normative basis for the emotions is abject and, therefore, the emotion ought to be condemned, not tolerated.

These two conclusions—that emotions involve reflection or thought and that emotions can be wrong, so are open to criticism—give rise to a third implication particularly germane to the juridical context with which I am concerned. When the law turns its attention to the human actions that flow from emotion, as is the case in defences such as duress, it ought not to ignore the thoughtful element of emotions and the possibility of value-errors. Indeed, this is the true moment of judgment. When faced with a circumstance in which a person reacts to strong emotion, it is insufficient to state simply that the individual’s choice was constrained and, therefore, his conduct was not morally voluntary. This approach dodges the difficult question. It is based on a reductionistic view of both emotion and human agency. Most significantly, this approach retreats from the moment of judgment. The evaluative view would require the law to ask whether we accept the bases for this emotion—whether, in a case of provocation, we accept the notion that homosexuals are to be feared more than heterosexuals or whether, when it comes to duress, a threat to a loved one fairly withdrew the accused’s responsibility to show respect and care for others.

There are two salutary effects of embracing an idiom based on this evaluative view of emotions. By adopting a more “judgmental” approach to criminal defences, the law would simply be more transparent and accurate. That is, the normative foundations for our criminal law, and the bases upon which society will condemn or exculpate, will be exposed to view, rather than hidden behind the veil of the voluntarist account. Rather than hearing that the accused was acquitted because her conduct was not morally voluntary, society would hear that the law recognized the legitimate pull of the accused’s love for her daughter and fear that she would be harmed, and so refused to blame her for a petty theft. But this effect is really just ancillary to the principal benefit of an evaluative idiom, that is, an increased capacity for law to engage changing social conditions and evolutions in communal norms. We are far less able to identify the norms and status hierarchies implicitly at play in the law of criminal defences when our vision is obscured by the opacity of moral involuntariness. If they cannot be identified, they cannot be criticized, challenged, or reformed. A more transparent idiom would allow debate and contestation on what we understand to be desirable reactions to legitimate social norms. This is good. It is

⁶⁵ Kahan & Nussbaum, *supra* note 24 at 287.

⁶⁶ *Ibid.*

good because it allows the law to ferret out regressive social structures, and it is good because it keeps the law sensitive to the evolution of social norms.

Indeed, this kind of legal change produced the triumph of recognizing that not all cases of self-defence involve an imminent threat of harm and an immediate violent repulse. In *R. v. Lavallee*,⁶⁷ the Supreme Court of Canada first allowed evidence of battered-women syndrome to help a jury understand why a woman might remain in an abusive relationship and why her self-defending response might not look like that of the stereotypical bar fight. In allowing this evidence, the Court was acknowledging the need to reconfigure the way the law thought about domestic violence and the reasonable person.⁶⁸ The androcentric norms of defensive behaviour⁶⁹ were challenged because they did not take account of the realities faced by abused women. Justice Wilson, writing for the majority, noted the role that the law had played in perpetuating violence against women and shielding domestic violence from the public eye. Although she acknowledged that the law had come some way in modern times, she recognized the need for further change:

Fortunately, there has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously. However, a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she

⁶⁷ [1990] 1 S.C.R. 852, [1990] 4 W.W.R. 1 [*Lavallee* cited to S.C.R.].

⁶⁸ See also *R. v. Malott*, [1998] 1 S.C.R. 123 at paras. 20, 28, 36, 155 D.L.R. (4th) 513, in which the Court confirmed that psychiatric evidence was admissible to help a jury to appreciate the reasonableness of an abused spouse's view of her situation and her response.

⁶⁹ Wilson J. writes:

Even accepting that a battered woman may be uniquely sensitized to danger from her batterer, it may yet be contended that the law ought to require her to wait until the knife is uplifted, the gun pointed or the fist clenched before her apprehension is deemed reasonable. This would allegedly reduce the risk that the woman is mistaken in her fear, although the law does not require her fear to be correct, only reasonable. In response to this contention, I need only point to the observation made by Huband J.A. that the evidence showed that when the appellant and Rust physically fought the appellant “invariably got the worst of it”. I do not think it is an unwarranted generalization to say that due to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat. The requirement imposed in *Whynot* that a battered woman wait until the physical assault is “underway” before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to “murder by instalment” (*Lavallee*, *supra* note 67 at 883 [references omitted]).

claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it.⁷⁰

The case of battered-women syndrome demonstrates the salutary impact that attention to social norms and hierarchies can have on the law.⁷¹ All defences should be amenable to this kind of evolution and social responsiveness. In my view, the *Ruzic* approach limits the law's capacity to effect these kinds of changes precisely because it submerges norms and social arrangements beneath the idiom of moral involuntariness. Placated by a description of impaired volition, we are never collectively forced to reflect upon the merits and quality of the evaluative basis for the emotion.

I have argued that the idiom of moral involuntariness is inadequate because it produces a kind of normative veiling. Indeed, the doctrine on the law of duress shows that, despite itself, the law is engaged in an attenuated evaluation of the reasonableness of emotions through its requirements of proportionality and the absence of legal alternatives. Even the notion of a real choice has thick threads of normative evaluation woven into it. What the law needs, then, is an idiom that exposes the normative foundations of individual action for evaluation, contestation, and reform. Such an idiom could not, by nature, be as formulaic as the mechanistic voluntariness approach. I argue that another concept already familiar to Canadian criminal jurisprudence—the notion of moral blame—strikes far closer to the mark.

I respectfully reject the Court's contention in *Ruzic* that moral blameworthiness is established when the constituent elements of the offence are proven.⁷² Rather, I argue that moral blame is the essence of a finding of criminal liability. Consider the hypothetical, posed above, of the mother who, at the threat of serious harm to her

⁷⁰ *Ibid.* at 872-73.

⁷¹ One must also, though, be conscious of the potentially regressive impacts of the *Lavallee* decision, including the "syndromization" of women's experiences. In particular, the development of a battered-women syndrome has been persuasively critiqued as perpetuating a view that women who kill in justified response to domestic violence are deviant, rather than acting reasonably. On this point, see Isabel Grant, "The 'Syndromization' of Women's Experience" (1991) 25 U.B.C. L. Rev. 23; Martha Shaffer, "*R. v. Lavallee*: A Review Essay" (1990) 22 Ottawa L. Rev. 607. For a compelling critique of James Q. Wilson's book *Moral Judgment: Does the Abuse Excuse Threaten Our Legal System?* (New York: Basic Books, 1997) [Wilson, *Moral Judgment*]; Victoria Nourse, "The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law" (1998) 50 Stan. L. Rev. 1435. Nourse argues that Wilson's resistance to defences like battered-women syndrome is predicated on an unacknowledged divergence in normative commitments, rather than a genuine distinction between this defence and those that Wilson calls "traditional", like self-defence. See also Wilson, *Moral Judgment*, *ibid.* at 58. (I have chosen to use the term "battered-women", conscious of the fact that the alternate term, "battered-spouse", tends to obscure the highly gendered nature of the violence involved. I am also, however, aware that this language poses a possible "syndromizing" potential of the sort that I describe earlier in this note.)

⁷² "Once the elements of the offence have been established, the accused can no longer be considered blameless. This Court has never taken the concept of blamelessness any further than this initial finding of guilt, nor should it in this case" (*Ruzic*, *supra* note 1 at para. 41, LeBel J.).

child, steals a car. When the law exculpates this mother on the basis of duress, is society's message (communicated through the criminal law) that we find this person morally blameworthy, but that she is excused for the mechanistic reason of a constraint on will? Surely not. We withhold blame of that mother's choice; it reflects a legitimate emotional evaluation of the competing pulls of her love for her child and the duty she owes others to respect their property. In this sense, John Gardner's claim that "[t]he gist of an excuse ... is precisely that the person with the excuse lived up to our expectations"⁷³ is far more satisfying.

Without foreclosing the possibility of a preferable idiom,⁷⁴ I therefore suggest that the idiom of moral blameworthiness better achieves the evaluative goals for which I have argued. Substituting the concept of "blame" is not a perfect solution. Its merit lies, however, in the fact that it is an inherently evaluative concept. The conclusion that one is worthy of blame is a conclusion always made by reference to a set of normative standards. Intrinsically based as it is on value judgments, the conclusion that someone is blameworthy invites the question "why?", and the answer will always be an evaluative one: the accused did something despicable, breached a social more, et cetera. By contrast, when asked the question "why?", one who concludes that someone acted involuntarily can, as I have argued, respond simply and descriptively that the individual's will was overborne by emotion. The idiom of blame better orients discussion around our normative expectations for the person in the particular situation, rather than relying on the nonevaluative and mechanistic vision of emotions as inputs and actions as outputs. The trend in the doctrinal development of criminal law defences should be to reintroduce meaningful and open judgment into the law of criminal defences, with the ultimate goal of exposing social norms to debate and progressive reform.

IV. Why the Pull to the Idiom of Moral Involuntariness?

This approach is not the one that the Supreme Court adopted, and it is not the dominant one in Canadian criminal law. Free will, rational choice, and a mechanistic understanding of emotion will now dominate the discourse surrounding criminal defences. Duress will be available when the law concludes that we have lost our agency, not that we legitimately acted out of love for ourselves or those close to us.

⁷³ Gardner, *supra* note 37 at 578. Further on, Gardner explains:

The question is whether that person lived up to expectations in the *normative* sense. ... The character standards which are relevant to these and other excuses are not the standards of our own characters, nor even the standards of most people's characters, but rather the standards to which our characters should, minimally, conform (*ibid.* at 579 [emphasis in original]).

⁷⁴ Young evocatively argues that Sarah Lucia Hoagland's notion of intelligibility is a superior way of speaking about judgment, as compared to the normal dichotomy of "praise and blame." She recognizes, however, that it "does not offer a viable alternative mode of legal reasoning" (*supra* note 35 at 91-92).

Provocation will still operate as a partial defence, with little reflection on the privileging of anger as an excusing factor. Oddly, we will be entitled to act in self-defence not because we are entitled to care for ourselves, but because our wills are constrained.

I suspect that, at a fundamental level, most, including the members of the judiciary, would view Marijana Ruzic's act as excusable on the basis that we cannot blame her for seeking to protect her mother by importing narcotics. If my suspicion is correct, and the conceptual framework of moral involuntariness does not sit naturally in our minds, a clear question arises: why has the Court so wholeheartedly embraced this unintuitive idiom? I do not want to suggest that the Court was simply in error or failed to see the tensions that this approach produced. I expect that the Court struggled with these issues. Instead, the Court's embrace of the idiom of moral involuntariness is better explained by the underlying liberal philosophical structures evident in the Court's approach in *Ruzic*. This is, of course, not to assert that the judges are self-consciously adopting a liberal theory of criminal defences. The exercise here is not a psychological one of imputing subjective motivations to the judges of the Supreme Court; rather, there is a conceptual architecture latent in the doctrine, and what follows is an excavation and refining of this informing structure. Otherwise put, the exercise is exegetical, not biographical. My argument is that this latent theoretical apparatus exerts a strong centripetal pull towards mechanistic idioms like moral involuntariness.

Liberal theory expresses a strong resistance to public moralizing. The public sphere is supposed to be neutral with respect to conceptions of the good life. If neutral, it can serve as a meeting ground for citizens with various conceptions of the good life. Rawls' classic articulation captures the aspiration well:

The aim of justice as fairness, then, is practical: it presents itself as a conception of justice that may be shared by citizens as a basis of a reasoned, informed, and willing political agreement. It expresses their shared and public political reason. But to attain such a shared reason, the conception of justice should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm.⁷⁵

Rather than morality and normative views of desirable social states of affairs, the liberal public sphere is one predicated on reason, which can accomplish a kind of "overlapping consensus".⁷⁶ It is not that the liberal vision denies the existence of these kinds of values;⁷⁷ rather, these values should not be engaged in the debate and functioning of public institutions. The goal is a laudable one: to create a public space in which everyone can find some normative resonance or at least no dissonance.

⁷⁵ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 9.

⁷⁶ *Ibid.* at 11.

⁷⁷ "As an account of political values, a free-standing political conception does not deny there being other values that apply, say, to the personal, the familial, and the associational; nor does it say that political values are separate from, or discontinuous with, other values" (*ibid.* at 10).

The aversion to public moralizing as an impediment to social consensus is present wherever there are divergences in normative viewpoints. Yet this concern is, arguably, particularly pressing in a society such as Canada's, marked by significant ethnic and religious diversity. With all of its gifts, multiculturalism also produces unique challenges for and pressures upon public institutions. If the goal is a public sphere that can serve as a neutral meeting ground for all manner of personal, familial, or associational commitments, multiculturalism poses a constant challenge to those who design public institutions, such as politicians and judges, to reduce possible points of dissonance provoked by the existence or appearance of a public morality.

The criminal law has been an active site for working out precisely this kind of concern. The famous debate between Lord Patrick Devlin and H.L.A. Hart concerned just this issue.⁷⁸ As the most coercive and powerful engine of state social control, the criminal law is the paradigmatic example of a social institution that liberal ideology would seek to have elevated above the realm of public moralizing. From this liberal viewpoint, there is no more pressing locus for overlapping consensus, no greater need for a neutral meeting ground, than in the criminal law, which embodies the state's monopoly over legitimate violence against its own citizens. Herein lies the pull of mechanistic idioms like moral involuntariness.

In his article "The Secret Ambition of Deterrence", Dan Kahan considers the use of deterrence arguments in the political discourse surrounding crime and risk control.⁷⁹ He shows that arguments centred on deterrence have little impact on individuals' views of contentious topics such as gun control, hate crimes, and capital punishment. Why then, he asks, does political and legal rhetoric so consistently found arguments on this ineffectual notion? The answer, he suggests, is that use of the idiom of deterrence is a means by which the polity can avoid the inflamed contestation that would be the result of engaging these issues on moral or normative grounds:

We resort to the culturally ecumenical idiom of deterrence to avoid a style of public moralizing that principle, interest, and etiquette all condemn. In this way, deterrence cools—with intermittent success—an engine of debate that is pre-disposed to run at a white hot temperature.⁸⁰

Because it is centrally concerned with norms of behaviour,⁸¹ criminal law is an "engine of debate" that is particularly disposed to this high-temperature engagement. The sterilized idiom of deterrence allows the law to operate without risk of activating an evaluative chain reaction among competing normative views that, in the liberal imagination, could lead to a social meltdown.

⁷⁸ See the discussions excerpted in Richard A. Wasserstrom, ed., *Morality and the Law* (Belmont: Wadsworth Publishing, 1971) at 24-54.

⁷⁹ Dan M. Kahan, "The Secret Ambition of Deterrence" (1999) 113 Harv. L. Rev. 413.

⁸⁰ *Ibid.* at 477.

⁸¹ Kahan explains that "[b]ecause it is commonly understood to express community values, criminal law in particular is an important cue about what others believe" (*ibid.* at 487 [footnotes omitted]).

A similar dynamic informs the use of the voluntarist idiom in criminal law defences. A rhetorical focus on moral involuntariness has, thus, a potential functional purpose. Informed by the liberal vision of what the public space should look like and the need for consensus, the law can refrigerate the whole issue by speaking in the mechanistic terms of moral involuntariness instead of inflaming the passions of the populace on issues such as domestic violence, hierarchies of sexuality, and the legitimacy of harming others to protect one's own. In many respects, this is the kind of salutary subterfuge that Guido Calabresi and Philip Bobbitt argue occurs with the delegation of tragic choice decisions to "aresponsible" agencies such as juries.⁸² I do not suggest that this is necessarily a conscious decision on the part of legal decision makers. Rather, the powerful influence of the liberal concern for consensus, the intrinsically contested nature of the norms that animate the criminal law, and an increasingly diverse and multicultural society all add up to produce this understandable response. The idiom of moral involuntariness reflects a powerful, if latent, liberal theoretical aversion to public moralizing. It also reflects a functional concern to reduce social strife on issues involving contested normativity.

V. Why the Pull Should Be Resisted

I am not suggesting that the use of the framework of moral involuntariness is a doctrinal oversight or mistake. I think, rather, that it is an understandable response arising out of the convergence of an approach to law steeped in liberal premises and a functional concern to minimize social dissensus. It may be understandable, I would argue, but it is misguided for two reasons. First, it is founded on a particular (and particularly thin) construction of the liberal state. Second, it underestimates the extent to which normative messages are necessarily implicated in the criminal law and, as such, is not expelling social conflict from the law, but simply covering it up in favour of prevailing social structures.

Thoughtfully considered, the notion that the liberal public sphere should not engage in value-discussions finds itself in tension with two strains of thought, both aspects of the larger debate on what liberalism should be about. The first tension is endogenous to classic liberal theory itself. Part of Rawls' vision of political liberalism is the centrality of the notion of a deliberative democracy. In his reply to Jürgen Habermas, Rawls emphasizes that "[t]he essential idea is that deliberative democracy, and political liberalism also, limit relevant human interests to fundamental interests of certain kinds, or to primary goods, and require that reasons be consistent with

⁸² Guido Calabresi & Philip Bobbitt, *Tragic Choices*, 1st ed. (New York: Norton, 1978) at 57. Calabresi & Bobbitt argue that "giving no reasons, [the jury] avoids, or at least mitigates, the conflict between the wish to recognize differences and the desire to affirm egalitarianism in all its forms" (*ibid.*). But see Kahan & Nussbaum, *supra* note 24: "The law is more likely to be just, we argue, when decisionmakers are forced to take responsibility for their appraisals of wrongdoers' emotions, and when the public is allowed to see for itself the appraisals that its decisionmakers have made" (*ibid.* at 274).

citizens' mutual recognition as equals."⁸³ So what deliberative democracy demands is the reflective consideration of the extent to which public institutions reflect a crucial, albeit thin, layer of fundamental political values, equality foremost among them.

Although Rawls' commitment to a deliberative democracy is a restricted one—deliberation should take place with respect to publicly acceptable arguments and not comprehensive doctrines—his position is suggestive of a more general argument. A deliberative democracy requires that citizens contemplate and debate the nature and content of public institutions such as the law. If, in an effort to achieve neutrality and overlapping consensus, the idiom of moral involuntariness veils the normative foundations of the criminal law, the essential building blocks for social deliberation are taken off the table. Yet it ought to be the case in a credible liberal democracy that people are actively deliberating about such issues. Is there not something odd about a criminal law system that, embedded within a liberal atmosphere, hides from debate the normative bases for assigning blame? Without such debate, the results are not the reasoned and reasonable public decisions so valued by liberal theory. Overzealous pursuit of consensus and neutrality by means of a mechanistic approach to emotions and human agency in the criminal law undermines the equally essential deliberative aspect of the liberal polity.

The second tension within the liberal vision that augurs well for the voluntarist idiom is a more profound critique of the value of neutrality itself. This critique has flowed most powerfully from the pen of Charles Taylor, who has argued for a substantive, rather than procedural, understanding of the liberal project.⁸⁴ Taylor has suggested that, rather than a neutral meeting ground for all manner of private normative commitments, “[l]iberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with other ranges.”⁸⁵ Accordingly, “liberalism can’t and shouldn’t claim complete cultural neutrality. Liberalism is also a fighting creed.”⁸⁶ Taylor argues for a different conception of liberalism altogether:

I’d prefer to start off on another footing, and think of a liberal society as one that is trying to realize in the highest possible degree certain goods or principles of right. We might think of it as trying to maximize the goods of freedom and collective self-rule, in conformity with rights founded on equality.⁸⁷

If one adopts this more robust vision of the liberal project, the idiom of moral involuntariness is a fantastic failure, albeit in pursuit of social harmony. It veils the

⁸³ Rawls, *supra* note 75 at 430-31.

⁸⁴ Charles Taylor, *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) [Taylor, *Philosophical Arguments*]. See Benjamin Berger, “The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State” (2002) 17:1 C.J.L.S. 39.

⁸⁵ Charles Taylor, “The Politics of Recognition” in *Philosophical Arguments*, *ibid.*, 225 at 249.

⁸⁶ *Ibid.*

⁸⁷ Charles Taylor, “Liberal Politics and the Public Sphere” in *Philosophical Arguments*, *ibid.*, 257 at 258.

norms and hierarchies that are the appropriate focus for liberal reform. On this view, far from being a faithful friend to it, the voluntarist approach to criminal law frustrates the liberal project.

Both of these tensions internal to the conception of liberalism should provoke some reconsideration of the legitimacy of the trend, common in the criminal law and dramatically enacted in *Ruzic*, to veil norms behind sterilized idioms. Moreover, there is a second objection to this pull, an objection that is even more disruptive of the distaste for public moralizing and the desire to cool the passions of social contestation over the power of the criminal law. Put simply, the objection is that public moralizing is going on whether hidden behind the veil or not, and the temperature of normative debate is still high. The idiom of moral involuntariness is not a cooling agent but an oven mitt.

At the core of this objection is a plea to recognize the profound communicative effects of the criminal law. Sociologist Joseph Gusfield has contributed substantially to our appreciation of the symbolic impact of the law.⁸⁸ Gusfield argues that, whatever the result or rhetoric in a given instance, government actions (including courtroom decisions) have profound communicative effects:

A governmental agent's act may have symbolic import because it affects the designation of public norms. The courtroom decision or the legislative act often glorifies the values of one group and demeans those of another. Government actions can be seen as ceremonial and ritual performances, designating the content of public morality. Law is not only a means of social control but also symbolizes the public affirmation of social ideals and norms.⁸⁹

Even if the law speaks in sterilized, mechanistic terms, the pronouncement will have an effect upon the social status of groups within society. To give an obvious example, mitigating punishment on the basis of provocation when the basis for this claim is homosexual panic sends a strong message to sexual minority groups that they are not as valued as others. This is true even when homosexual panic is cast in terms of constraints on will and lack of autonomous control. Thus, even if the effect of a voluntarist idiom is to avoid ongoing debates about appropriate means of social organization and which set of norms should guide the law, it must be recognized that all law—including what James Wilson calls traditional defences⁹⁰—is a product of a particular vision of what is good and bad, who is high and who is low in society. If the mechanistic idiom will spare the majority from strife and discomfort, it will meanwhile profoundly deprive new or minority groups within Canadian society of

⁸⁸ Joseph R. Gusfield, "On Legislating Morals: The Symbolic Process of Designating Deviance" (1968) 56 Cal. L. Rev. 54.

⁸⁹ *Ibid.* at 57.

⁹⁰ Wilson, *Moral Judgment*, *supra* note 71.

the law's affirming communicative force.⁹¹ In the result, there is no way out of the drama of social hierarchies and normative competition. The criminal law always operates with a view from somewhere.⁹²

Drawing these two lines of critique together, the move towards nonevaluative idioms is misguided for two reasons. First, it is predicated on a narrow view of liberalism that fails to address those elements internal to liberalism that would counsel a more evaluative approach. Second, however, even if the focus on liberal neutrality could be defended, the voluntarist idiom's failure to account for the expressive power of the criminal law—even in its conservative silence—undermines the approach. A sterile idiom is not neutral; its conservative momentum affirms the status and norms of the historically powerful, while depriving the marginalized of the affirming messages of the law.

What about an approach to criminal defences—indeed, to criminal liability at large—that was more “judgmental”? Would an idiom more amenable to evaluating the content and normative bases of emotions, rather than simply viewing them mechanistically as forces acting on the individual, avoid these pitfalls? I think that it would. It would accept that the criminal law is always speaking in the register of norms and social recognition, and would seek to ensure that those expressions and affirmations were consistent with fairness and equality. After all, this is what the criminal trial comes down to in the end: a decision about whether we are prepared to say that a person is or is not fairly blamed for the conduct in question.

I concede that a progressive idiom such as I propose would pose certain challenges for our courts and even create certain risks. It is never easy to interrogate our traditions, whether personal or juridical, because sometimes this inquiry will reveal to us that we have been unfair or hurtful. Furthermore, the myth of value-neutral judgment remains a powerful one. There will be portions of the political community that have so internalized the seductive narrative of normless adjudication that the embrace of a more transparent mode of judgment might place strain on their sense of the judicial role. There is a risk that this portion of the community might experience discomfort with—or perhaps alienation from—the criminal justice system. There is one further risk: it is entirely possible—indeed, it is likely—that more transparency in the emotions endorsed in our criminal law could, from time to time, expose normative commitments that, although entirely inconsistent with progressive ends, have the support of the majority of the populace. That is, we could expose

⁹¹ See Gusfield, *supra* note 88:

Affirmation through law and governmental acts expresses the public worth of one subculture's norms relative to those of others, demonstrating which cultures have legitimacy and public domination. Accordingly it enhances the social status of groups carrying the affirmed culture and degrades groups carrying that which is condemned as deviant (*ibid.* at 58).

⁹² See generally Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986).

regressive, hurtful conceptions of legitimate and tolerable emotional judgments and find that the community *endorses* them. Would I be bound to accept such an outcome as a legitimate result of evaluative emotional reasoning?

My response to each of these concerns and criticisms involves its own brand of transparency. I come to this discussion with certain presuppositions about the way that the criminal law operates and with a set of partisan progressive commitments. These criticisms only have force when one rejects these presumptions and commitments. First, as I have explained, I assume that the choice is not between a mechanistic idiom barren of normative commitments and an evaluative one that introduces such judgments. Instead, the choice is between veiling value judgments and exposing them. Second, my political view is that applying a veneer to these normative foundations serves one segment of the political community—those that benefit from the status quo and for whom interrogation poses only the prospect of a loss of privilege—and disadvantages the historically marginalized and subordinated. Finally, my particular (admittedly partisan) progressive commitments lead to the conclusion that any examination of the values and norms being expressed by the criminal law must operate with a baseline assumption: whatever the criminal law is expressing, it must be in the service of diversity, antisubordination, and equality. Norms inconsistent with these baseline commitments are simply not tolerable aspects of our legal culture and must not be given force by the criminal law. That is, what can legitimately count as a basis for blame in the criminal law must be devoid of both discriminatory reasoning (on the part of the justice system or the accused) and subordinating effects. My assumption is that modern Canadian criminal law must be involved in both reflection and prolepsis. Happily, this last point is supported by the Canadian constitutional mandate to develop criminal common law and statute in accordance with *Charter* values,⁹³ which privilege precisely these principles.⁹⁴

Conclusion

At the core of the argument I have advanced is the view that language matters in the law. Language matters, on my account, because it can either draw us close to or push us away from our normative commitments. Charles Taylor has argued that a normative horizon is essential to human agency, that “the horizons within which we live our lives and which make sense of them have to include ... strong qualitative

⁹³ See e.g. *R. v. Swain*, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481; *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

⁹⁴ This point brings me rather close to Nourse, who argues that the criterion by which we ought to interrogate emotions in the criminal law is whether or not “the defendant appeals to the very emotions to which the state appeals to rationalize its own use of violence” (*supra* note 57 at 1338). Put otherwise, the criminal law’s judgment of emotions should be informed by the norms that we demand that the law itself express. In Canada these commitments are to be found in *Charter* values, as identified in our constitutional jurisprudence.

discriminations.”⁹⁵ For Taylor, this is not a failing in the human condition that we might one day overcome; it is “not meant just as a contingently true psychological fact about human beings, which could perhaps turn out one day not to hold for some exceptional individual or new type, some superman of disengaged objectification.”⁹⁶ Rather, our ability to make meaning of the world—to make discriminations and assessments and tell stories about our world—is not severable from our moral frameworks:

You cannot help having recourse to these strongly valued goods for the purposes of life: deliberating, judging situations, deciding how you feel about people, and the like. The “cannot help” here is not like the inability to stop blinking when someone waves a fist in your face, or your incapacity to contain your irritation at Uncle George sucking his dentures, even though you know it’s irrational. It means rather that you need these terms to make the best sense of what you’re doing.⁹⁷

If reference to the normative is essential for the integrity of individuals, it must also be essential to our institutions. The criminal law is, above all, concerned with precisely the kinds of evaluations for which Taylor says we need reference to strongly valued goods: “deliberating, judging situations, deciding how [we] feel about people ...”. This is why language is important. If we need this kind of reference to goods—to the way we think the world should be and people should behave—to engage in the act of judgment, it is language that will either impede or facilitate our access to these normative evaluations. Language draws our values into explicit awareness and creates a public space in which they can be examined, debated, admired, and despised.⁹⁸ Nowhere, I would argue, is this awareness more essential than in the criminal law. It is through this institution that we most clearly stand in judgment of one another and, if the good is essential to this act of judgment, then our language is essentially important.⁹⁹

In this view, the choice of idiom in a particular branch of the law is not merely a stylistic matter or a question of clear communication, but the exercise of a choice. It is not the choice of whether or not to reason through the criminal law on the basis of normative commitments. I have argued that this is an unavoidable aspect of our criminal law. There is no choice of this sort because there is no account of the reasons that we choose to exculpate for crime (or, indeed, to presume to punish in the first

⁹⁵ Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989) at 27.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at 59.

⁹⁸ Charles Taylor, “Theories of Meaning” in Charles Taylor, *Philosophical Papers I: Human Agency and Language* (Cambridge: Cambridge University Press, 1985) 248 at 263.

⁹⁹ See Henry M. Hart Jr., “The Aims of the Criminal Law” (1958) 23 *Law & Contemp. Probs.* 401. Hart argues the essence of a crime is that “[i]t is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community” (*ibid.* at 405).

place) that can truly excise judgments about the good and still make sense. Cast in the particular, there is no amoral view of self-defence or duress. Rather, the choice is whether to veil or to confront the social orderings and normative evaluations that support our legal doctrines. The choice, then, is about whether we want to acknowledge the judgmental aspect of our criminal law or whether we are prepared to risk perpetuating negative states of affairs so that we can have the comfort of linguistic placeholders that enjoy the appearance of a mechanistic certainty.

It is in this vein that I have argued that the idiom of moral involuntariness has hidden dangers. Scholars have begun to critique the decision in *Ruzic* on doctrinal grounds, and will no doubt continue to do so. There may be questions about whether moral involuntariness is a precise enough idea to constitute a principle of fundamental justice for the purposes of section 7 of the *Charter*, or whether this concept will be unexpectedly disruptive to the criminal law. In this article, I too have offered certain doctrinal critiques of the case. However, the purpose of this article has been to draw attention to the ideological deficit that *Ruzic* represents. It is a deficit that emerges in the space that the Court's chosen idiom opens up between criminal liability and our normative evaluations. It is a deficit that is not limited to the defence of duress or, for that matter, to the criminal law; rather, it appears wherever legal tests occupy the space of judgment and mechanistic language displaces human agency. Wherever it appears, I suggest that it is a deficit with the potential to distract our attention from regressive social hierarchies and normative commitments and, as such, with the potential to impede the justice and fairness of the law. I have suggested that, in the context of the criminal law, the language of "moral blame" is to be preferred over that of "moral involuntariness". Whatever the preferred idiom, what is needed instead is a way of speaking about human choice in the law that focuses attention on—rather than veiling—the normative quality of the emotions that inform the decisions that people make.

I recognize that there is a kind of historical irony in the argument that I present. The morality side of the law and morality debate was not associated with exactly progressive ends. Famously, Lord Devlin's position in his exchange with H.L.A. Hart was built on support for laws that would marginalize homosexual members of our community. And there can be little doubt that voluntarist, mechanistic, or otherwise sterilizing language takes these kinds of arguments off the table. So perhaps my desire to have more on the table would see me dining with the Devil. In the end, however, I suppose I am arguing that it is better—and safer—to be able to look him in the face than to be consigned to wonder where in the house he may be.

CASE COMMENTS

CHRONIQUES DE JURISPRUDENCE

