

## THE HEART OF THE MATTER: EMOTION IN CRIMINAL DEFENCES

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*This article compares the understanding of emotion in psychological literature with the legal understanding of emotion as revealed in the criminal defences of provocation, self-defence and duress under the Canadian Criminal Code. The article begins by outlining theoretical approaches to understanding emotion in philosophy and psychology, and then identifies how these approaches are applied in the defences. The article criticizes the law's understanding of emotion for being narrow, gender-biased and inconsistent. It challenges the grounds of knowledge upon which assessments of criminal liability are made and offers a social constructionist approach to understanding emotion as a possible vehicle for reconsidering the defences. It is argued that the social constructionist approach is well suited to the assessment of conduct in its spatial, historical and cultural context, and for this reason ought to be emphasized in the legal assessment of liability.*

*Dans cet article, l'auteur compare la compréhension de l'émotion exposée dans les ouvrages de psychologie et la compréhension juridique de l'émotion telle qu'elle se révèle dans les défenses de provocation, de légitime défense et de contrainte prévues au Code criminel du Canada. L'auteur commence par décrire les approches théoriques de la compréhension de l'émotion dans les domaines philosophique et psychologique, puis il détermine comment les moyens de défense mettent ces approches en application. L'auteur critique la compréhension juridique de l'émotion parce qu'elle est restrictive, fondée sur des préjugés sexuels et incohérente. L'auteur remet en question les fondements de la connaissance sur lesquels reposent les évaluations de la responsabilité criminelle, et il présente une approche de la compréhension de l'émotion qui est axée sur l'interprétation du social et qui pourrait servir à un réexamen des moyens de défense. L'auteur soutient que l'approche axée sur l'interprétation du social convient à l'évaluation du comportement dans les contextes spatial, historique et culturel et, que pour cette raison, on doit lui accorder une plus grande importance dans l'évaluation de la responsabilité en matière juridique.*

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## I. INTRODUCTION

Emotion is ubiquitous. A day will not go by without our feeling a range of emotions. Our emotional state affects how we behave—our performance in the workplace, the quality of our relationships and our physical health. Recent literature suggests that emotion is integral to intelligence<sup>1</sup> and rationality.<sup>2</sup> Crime is full of it. Criminal acts are perpetrated in hatred, greed, envy, jealousy, anger, compassion and fear. The results of crime produce grief and hatred in victims; sorrow, remorse, self-loathing and anger in perpetrators; and a desire to punish within the wider community which is channelled into the conduct of police, prosecutors and judges.<sup>3</sup> The media feeds the emotions of each of these actors and adds a unique, and too often misdirected, hysteria.

Despite the prevalence of emotion in all aspects of life and crime, its place in the criminal law is ambivalent. When people enter a courtroom, etiquette demands that actors suppress their relevant personal emotions: The judge is a picture of calm, rational authority; the family of the victim glares coldly and silently at the accused; the accused, eyes averted, stares blankly at the floor; court orderlies, clerks and stenographers report, catalogue and snooze; lawyers address the judge in the formal, droll language of the court. The adversarial system distinguishes what is 'factual' from what is 'emotional'. Examination and cross-examination keep stories free of emotional content—"Please tell the court what *happened*, Mr. Jones, not what you *felt*." The method of questioning is logical and methodical. If a lawyer's voice is raised in passion, it is often as a tactical ploy. However, the ability of witnesses to convey the appropriate emotional state is vital to their credibility.<sup>4</sup>

The law's ambivalence to emotion extends to the rules of criminal liability. Criminal offences focus on the conduct of the accused, and specifically, on issues of voluntariness and intention. Actors are considered to always be capable of calm deliberation, unless they are mentally ill or suffering from an extraordinary and temporary psychiatric condition. Only in criminal defences does the law explicitly consider emotion, and thus, only at this stage does the law reveal its understanding of the role of emotion in human behaviour. In this article, I examine three defences: provocation, self-defence and duress. These defences lend themselves to comparative analysis because they all excuse or partially excuse conduct that would otherwise be murder. The defences arise in similar scenarios, and yet the extent to which they excuse criminal conduct varies. This article argues that the variation in excusatory power of the defences results from the law's unique understanding of emotion in each defence. The article concludes that the law's understanding of

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<sup>1</sup> See D. Goleman, *Emotional Intelligence* (New York: Bantam, 1995); "The EQ Factor" *Time* [Chicago] (2 October, 1995).

<sup>2</sup> See R. de Sousa, *The Rationality of Emotion* (Cambridge, Mass.: MIT Press, 1987) [hereinafter de Sousa]; J. Elster, "When Rationality Fails" in K. Schweers Cook & M. Levi, eds., *The Limits of Rationality* (Chicago: University of Chicago Press, 1990); A. R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Grosset/Putnam, 1994) [hereinafter Damasio]; R. Solomon, *The Passions* (Notre Dame: University of Notre Dame Press, 1976) [hereinafter *The Passions*].

<sup>3</sup> See W. Connolly, "Desire to Punish" in *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995) [hereinafter "Desire to Punish"]; M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Random House, 1979).

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

emotion is narrow and inconsistent. The law understands emotion either as a highly volatile entity that 'suspends reason', or excludes it from the legal inquiry.

The concept of emotion evolves throughout this paper. To begin with, it is the subject of inquiry. The article traces the legal understanding of emotion drawing on modern psychological literature as a point of comparison. Later, emotion is a tool for analyzing the structure of the criminal defences. The article uses a 'mechanistic' and 'social constructionist' understanding of emotion to explore the defences' structure. Broadly, the article challenges the epistemological foundation of the criminal law, which is based on an opposition between reason and emotion. The analysis is reflexive: I examine the influence of emotion on the construction of criminal defences, and the influence of the application of defences on the law's understanding of emotion. Emotion emerges not as a peripheral consideration in the criminal law, but as the very heart of the matter.

## II. UNDERSTANDING EMOTION

There are many modes of discourse used to explain emotion. In one mode, emotion is a semantic term used to describe a particular feeling state that is distinguished from a number of other states, such as appetites and moods.<sup>5</sup> A related discourse categorizes and names emotions, creating taxonomies to encompass human emotional experience.<sup>6</sup> Another mode of discourse distinguishes between a healthy and an unhealthy emotion. Although to experience emotion is normal, to experience it when given the wrong cues, or to experience it on the right cues but disproportionately to those cues, might be considered unhealthy, or even pathological.<sup>7</sup> This paper does not attempt to identify a precise point at which healthy and unhealthy emotion begins and ends. The idea that there is a definable 'normal' range of behaviour is problematic. One of the aims of this paper is to challenge the law's categorization of what is considered normal in relation to the experience of emotion.

Finally, there is a mode of discourse concerned with the primary characteristics that define emotion; in particular, this discourse addresses the extent to which emotions are associated with or caused by 'affective', 'cognitive' or 'social' processes.<sup>8</sup> This discourse examines the relationship between emotion and reason, and emotion and self-control. An immense body of literature on emotion in philosophy and psychology contributes to this discourse. In this article, I analyze emotion in the criminal law using two theoretical approaches in the psychological literature. I

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<sup>5</sup> Appetites such as hunger and thirst are defined in purely physiological terms, whereas emotion has a more complex etiology requiring some form of mental process before or after a physiological arousal. Moods are similar to emotions but tend to have less specific objects. The mood of depression, for example, might be said to be aimed at the world in general. One can be depressed without being able to specify a particular object. Emotion, on the other hand, is experienced *at*, *with*, or *about* something, or someone, in particular.

<sup>6</sup> See C. Darwin, *The Expression of the Emotions in Man and Animals* (New York: Greenwood Press, 1955); C.G. Lange, "The Emotions: A Psychological Study" in C.G. Lange & W. James, *The Emotions* (New York: Hafner Publishing Co., 1967) at 35 [hereinafter "The Emotions: A Psychological Study"]; J.-P. Sartre, *The Emotions: Outline of a Theory*, trans. B. Frechtman (New York: Philosophical Library, 1948) [hereinafter Sartre]; C.E. Izard, *The Psychology of Emotions* (New York: Plenum Press, 1991) [hereinafter Izard]. For a critique of taxonomies of emotion, see E. Bedford, "Emotions and Statements about Them" in R. Harré, ed., *The Social Construction of Emotions* (Oxford: Basil Blackwell, 1986).

<sup>7</sup> Conditions accepted by the Courts as mental illness in Canada and the United States are contained in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, D.C.: American Psychiatric Association, 1994).

<sup>8</sup> These terms will be explained below.

describe these approaches as the 'mechanistic'<sup>9</sup> and the 'social constructionist' approaches, as they derive from different epistemological foundations.

The mechanistic approach is concerned with the bio-physical and psychological causes and effects of emotion. It proceeds from an assumption that these causes and effects can be known, or at least meaningfully approximated. The law has traditionally adopted various forms of a mechanistic understanding in the rules of criminal liability.

The social constructionist approach suggests that the bio-physical and psychological causes and effects of emotion cannot be known with any meaningful degree of accuracy, and that, in any case, emotion is more usefully explained in terms of the relationships between people in their unique spatial, cultural and historical contexts. The law's understanding of emotion has an important impact on its understanding of an actor's capacity for control or choice. This in turn has an impact on how the law formulates and applies criminal defences.

#### A. Early Philosophical Perspectives

Aristotle (384-322 BC) provides one of the earliest definitions of emotion. Emotion is "that which leads one's condition to become so transformed that his judgment is affected, and which is accompanied by pleasure and pain. Examples of emotion include anger, fear, pity, and the like, as well as the opposites of these."<sup>10</sup> For Aristotle, emotion is an ethical concern. It is of interest because it reflects on a person's character. It does this negatively to the extent that a person's character reveals an inability to control impulsive behaviour. The stronger a person's moral training and the stricter his or her ethical principles, the more control he or she has over emotion.

Christian teachings in the Middle Ages perpetuated an image of emotion as being opposed to reason and thus antagonistic to a virtuous life. Emotions were linked to the sinful nature of sexual urges and the need to control them. As good was opposed to evil, or salvation to damnation, so was reason opposed to emotion, and as with evil and damnation, emotion was a state to be overcome.<sup>11</sup> The theologian Thomas Aquinas (1225-1274) developed a sophisticated theory of reason and emotion that was grounded in his understanding of the relationship between the body and the soul. For Aquinas, the body has lower and higher states. The lowest state is the 'vegetative', which is the level that plants attain. 'Brute' animals reach the next level of the 'sensitive', and only 'man' reaches the highest level of the 'intellective'.<sup>12</sup> Aquinas' philosophy suggests that human beings are responsible for all their actions. The intellective capacity has the power to overcome the 'lower' urges and desires of the sense-appetite. "When we want to rise from lower to higher things, first, senses come to our aid; then, imagination; then, reason; then, understanding; then, intelligence; and,

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<sup>9</sup> I borrow this term from D. Kahan & M.C. Nussbaum, "Two Conceptions of Emotion in Criminal Law" (1996) 96 Colum. L. Rev. 269 [hereinafter Kahan & Nussbaum].

<sup>10</sup> Aristotle, *Rhetoric*, trans. J. Solomon, quoted in R. Solomon, "The Philosophy of Emotions" in M. Lewis & J.M. Haviland, eds., *Handbook of Emotions* (New York: Guilford Press, 1993) at 4 [hereinafter *Handbook of Emotions*].

<sup>11</sup> See, e.g., Saint Augustine, *Confessions*, trans. V.J. Bourke (New York: Fathers of the Church, 1953) at 300 [hereinafter St. Augustine]: "Is Thy hand, O all-powerful God, not strong enough to heal all the diseases of my soul and to extinguish with Thy more abundant grace these lascivious passions, even during my sleep? Thou wilt increase, O Lord, Thy gifts more and more within me, so that my soul, escaping from the viscous snare of concupiscence, may follow me to Thee, so that it may not be in rebellion against itself...."

<sup>12</sup> St. Thomas Aquinas, *The Disputed Questions on Truth*, trans. J.V. McGlynn (Chicago: Henry Regnery Co., 1952) [hereinafter Aquinas]; see also P. Kreeft, *A Summa of the Summa* (San Francisco: Ignatius Press, 1990).

in the highest place, there is wisdom, which is God Himself.”<sup>13</sup>

René Descartes (1596-1650) transformed Aquinas’ relation between the intellective and the sensitive into an opposition between reason and emotion. Whereas for Aquinas both are functions of the body (and therefore corruptible), for Descartes, reason is a faculty of the soul, and emotion an uncontrollable function of the body.<sup>14</sup> Reason and emotion are unique in substance and have different influences on human action. The passions are aroused by perception. The sensory faculties such as sight and hearing receive signals from the outside world, which cause a disturbance in the heart. The heart then sends ‘animal spirits’ flying. These reach the ‘pineal gland’ at the centre of the brain, and lead to action. The influence of the passions over the animal spirits is counteracted by the actor’s reason, which originates in the soul. Reason allows the actor some control over the number, type and level of excitement of the animal spirits reaching the pineal gland. It accounts for volitional action. When the passion aroused is sufficiently strong, however, reason has no power to inhibit the movements of the body.<sup>15</sup>

In the 18th and 19th centuries, the distinction between reason and emotion was still fundamental to philosophical discourse. For Immanuel Kant (1724-1804) and G.W.F. Hegel (1770-1831), morality is in the realm of reason which dictates the will. Emotions are linked to natural inclinations for procuring pleasure.<sup>16</sup> They have no moral quality in themselves, but take on moral significance if a person’s will is made subservient to them. The human will “is the kind of will that is affected but not determined by impulses.”<sup>17</sup> Kant and Hegel do not dismiss the power of emotion to influence the will. However, they assert that the important questions of morality and justice can be assessed in terms of reason, since reason is capable of overcoming the impulses of emotion. Questions of the influence of emotion on the will are complicated and best omitted from the moral inquiry. There is no need to examine physical impulses in a moral assessment, only the reasons for action and the particular harm done. To focus on this aspect of action, they are prepared to focus exclusively on the will.

David Hume (1711-1776), a contemporary of Kant, inverted the relationship between reason and emotion.<sup>18</sup> For Hume, models of reason cannot explain a good deal of human behaviour. He describes the passions as being of a higher order than reason, for it is the passions that move us to action. Reason has no such power. Actors make decisions based not on objective reasons, but on idiosyncratic emotional whims that draw the person in a particular direction.<sup>19</sup>

Finally, Friedrich Nietzsche (1844-1900) states that the frailty of human nature is important

<sup>13</sup> Aquinas, *ibid.* at 267.

<sup>14</sup> R. Descartes, “The Passions of the Soul” in *The Philosophical Writings of DESCARTES*, vol. 1, trans. J. Cottingham, R. Stoothoff & D. Murdoch (New York: Cambridge University Press, 1985) 328 [hereinafter Descartes].

<sup>15</sup> *Ibid.* at 330-45.

<sup>16</sup> I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (New York: Macmillan, 1985) [hereinafter Kant]; G.W.F. Hegel, *HEGEL’s Philosophy of Right*, trans. T.M. Knox (Oxford: Clarendon Press, 1967) at 72.

<sup>17</sup> Kant, *ibid.* at 13.

<sup>18</sup> D. Hume, *A Treatise of Human Nature*, ed. by L.A. Selby-Bigge, 2d ed. (Oxford: Clarendon Press, 1978).

<sup>19</sup> John Dewey was later to reconcile the opposing positions of Kant and Hume by rejecting the distinction between reason and emotion. For Dewey, both reason and emotion are factors in the determination of action. There can be no action without a combination of the two. John Dewey, *Lectures on Psychological and Political Ethics: 1898*, ed. by D. F. Koch (New York: Hafner Press, 1976)[hereinafter Dewey].



in the investigation of moral responsibility.<sup>20</sup> In so stating, Nietzsche rejects a model of responsibility that makes any assumptions about the human capacity to reason. He recognizes that psychology is a rich source of knowledge about human action and therefore about the morality of that action, and he endorses the use of psychology in the awakening of moral observation. According to Nietzsche, "Mankind cannot be spared the horrible sight of the psychological operating table, with its knives and forceps."<sup>21</sup>

There is a constant theme in this brief survey. Although [pre-20th century] philosophers differ in their opinions of the worthiness of emotion and its importance relative to reason, they all envision an opposition between reason and emotion. The work of these philosophers has influenced the contemporary legal jurisprudence of personal responsibility and criminal liability. For example, in a discussion of the theoretical foundations of the defence of necessity in *Perka v. R.*, Wilson J. stated, "[T]he entire premise expressed by such thinkers as Kant and Hegel [is] that man is by nature a rational being, and that this rationality finds expression both in the human capacity to overcome the impulses of one's own will and in the universal right to be free from the imposition of the impulses and will of others."<sup>22</sup>

## B. *Psychological Perspectives*

In the 20th century, psychologists have made most of the important contributions to the understanding of emotion. I discuss the work of theorists who analyze emotion in terms of its biological and physiological causes and effects,<sup>23</sup> in terms of its psychological origins and expression,<sup>24</sup> and as a social construction.<sup>25</sup> The proponents of each approach agree that emotions influence perceptions, thoughts and actions in some way. However, the subjective experience of emotion and, in particular, the degree to which actors have control over their behaviour while in an extreme emotional state are more contentious.

### 1. *Theories Emphasizing Affect*

William James and Carl Lange were the first to espouse a comprehensive psychological theory of emotion.<sup>26</sup> Their theory emphasizes emotion as a physiological change, subsequently

<sup>20</sup> F. Nietzsche, *Human, All Too Human*, trans. M. Faber (Lincoln: University of Nebraska Press, 1984) at 39 [hereinafter Nietzsche].

<sup>21</sup> *Ibid.* at 41. Indeed, as Nietzsche wrote these words, an explosion in empirical psychology was about to occur.

<sup>22</sup> [1984] 2 S.C.R. 233 at 271, 14 C.C.C. (3d) 385 at 415, Wilson J. [hereinafter *Perka* cited to C.C.C.].

<sup>23</sup> E.g., "The Emotions: A Psychological Study", *supra* note 6; R.B. Zajonc, "On the Primacy of Affect" (1984) 39 *American Psychologist* 117 [hereinafter Zajonc]; Izard, *supra* note 6; Damasio, *supra* note 2.

<sup>24</sup> See, e.g., R. Plutchik, *The Psychology and Biology of Emotion* (New York: Harper Collins College, 1994); S.P. Thomas, "Emotions and How They Develop" in S.P. Thomas, ed., *Women and Anger* (New York: Springer, 1993); R. Lazarus, "Thoughts on the Relation between Emotion and Cognition" (1982) 37 *American Psychologist* 1019 [hereinafter "Thoughts on the Relation between Emotion and Cognition"]; N.H. Frijda, "Appraisal and Beyond" (1993) 7 *Cognition and Emotion* 225 [hereinafter "Appraisal and Beyond"].

<sup>25</sup> See, e.g., R. Harré, *Social Being* (New Jersey: Littlefield, Adams & Co., 1980) [hereinafter *Social Being*]; C. Armon-Jones, "The Thesis of Constructionism" in R. Harré, ed., *The Social Construction of Emotions* (Oxford: Basil Blackwell, 1986) at 32; J.D. Greenwood, *Realism, Identity and Emotion* (London: Sage Publications, 1994) [hereinafter Greenwood]; J. Bohan, ed., *Seldom Seen, Rarely Heard: Women's Place in Psychology* (Boulder: Westview Press, 1992) [hereinafter Bohan].

<sup>26</sup> "The Emotions: A Psychological Study", *supra* note 6 at 13. See also W. James, *The Principles of Psychology* (New York: Dover Publications, 1890); W. James, "What is an Emotion?" (1884) 9 *Mind* 188.

experienced as a particular feeling state or emotion. "[W]e feel sorry because we cry, angry because we strike, afraid because we tremble."<sup>27</sup> The James/Lange theory dominated behavioural psychology at the beginning of the 20th century. It resulted in an explosion of empirical research into the biophysical causes of emotion.<sup>28</sup>

The discipline of neuroscience has added new approaches to the analysis of the origins and functions of emotion. Neuroscientists look to the brain as the source of emotion. Some theorists argue that the brain is no more than a complicated, pre-programmed computer, and that all affective reactions can be explained in terms of the brain's chemical properties and set reaction patterns.<sup>29</sup> Others draw a clear distinction between the human brain and computers, rejecting analyses that compare brain functions with computer programming.<sup>30</sup> I will use the term 'affectivists' to describe psychologists who emphasize the biophysical and neurological origins of emotion, and the term 'mechanisms' of emotion to describe the influence of these biophysical and neurological correlates on the experience of emotion.

In recent work on the mechanisms of emotion, neurologist Antonio Damasio was surprised to find that one of his patients, in whom a disease had destroyed the part of his brain that experiences feeling, but in whom all the reasoning faculties were functioning perfectly, suffered a profound defect in his ability to make decisions. "I had before my eyes the coolest, least emotional, intelligent human being one might imagine, and yet his practical reason was so impaired that it produced, in the wanderings of daily life, a succession of mistakes, a perpetual violation of what would be considered socially appropriate and personally advantageous."<sup>31</sup> This phenomenon led Damasio to explore more closely the neurological relationship between reason and emotion. He concluded that "human reason depends on several brain systems, working in concert across many levels of neural organization, rather than one single centre. . . .[E]motion, feeling and biological regulation all play a role in human reason. The lowly orders of our organism are in the loop of high reason."<sup>32</sup> Just as emotion is integral to effective reasoning, so is cognition central to emotion. Damasio establishes a complex relationship between reason and emotion that can be understood only "in the context of the organism's interacting in an environment."<sup>33</sup>

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

<sup>27</sup> "The Emotions: A Psychological Study", *ibid.*

<sup>28</sup> The willingness to analyze empirically may have been at the expense of a coherent philosophy of emotions. Anthony Kenny, a philosophical psychologist who was particularly prominent in the 1960s, suggests that the explosion of empirical research may be explained by the fact that physiological changes in the body in response to particular stimuli could be accurately measured. "[T]here was a temptation to experimental psychologists to pretend that in measuring these phenomena, they were measuring emotion." A. Kenny, *Action, Emotion and Will* (New York: Humanities Press, 1963) at 34.

<sup>29</sup> E.g., José A. Jáuregui, *The Emotional Computer*, trans. E. Jáuregui & P. Jáuregui (Oxford: Blackwell, 1995) [hereinafter Jáuregui].

<sup>30</sup> Gordon Globus suggests that the human brain defies analysis in terms of its programming. It is self-organizing and capable of metaphysical enlargement. G. Globus, *The Postmodern Brain* (Amsterdam: John Benjamins, 1995).

<sup>31</sup> Damasio, *supra* note 2 at xi.

<sup>32</sup> *Ibid.* at preface.

<sup>33</sup> *Ibid.*

unchecked...toward...murder."

Most contemporary Affectivist theories concede that cognition has a role in the generation of emotional states. Some theories maintain that there are circumstances in which there is no room for a thinking process in emotional reactions. They maintain that the explanation for these reactions must lie purely in affect.<sup>34</sup> Generally though, affectivist theories are united in their assertion that biological and neurological processes have a significant influence over reason.<sup>35</sup>

## 2. Theories Emphasizing Cognition

In the early 1960s, two American psychologists, Schachter and Singer, devised an experiment designed to rebut the James/Lange theory.<sup>36</sup> The experiment involved injecting a number of subjects with a drug that would cause a state of arousal in them, and then subjecting them to two scenarios: one in which a person was acting toward the subject in a light-hearted and frivolous way, and one in which a person was acting in a manner designed to irritate the subject. It was found that the same state of arousal (that is, the same dose of the same drug) gave rise to different emotional states depending on the subject's appraisal of the circumstances. Schachter drew the conclusion that what distinguishes a physiological arousal as a particular emotional state is the appraisal of why that arousal occurred. In that way a general, indistinguishable arousal is transformed into an emotional condition by the interpretation of events surrounding the arousal.

Later theorists extended Schachter and Singer's work, claiming that arousal itself results from an appraisal or judgment of a situation. Lazarus proposed that, "emotion without thought would be mere activation without the directionally distinctive impulses of attacking in anger or fleeing in fear."<sup>37</sup> For these theorists, 'cognition', the thought process behind appraisal, is present at all

<sup>34</sup> Zajonc, *supra* note 23; A.C. Papanicolaou, *Emotion: A Reconsideration of the Somatic Theory* (New York: Gordon and Breach Science, 1989). There is a large body of research on the effect of emotional stimuli on facial expressions. External events make us smile or frown spontaneously and, it is claimed, without time for a cognitive process to have occurred. See, for example, Izard, *supra* note 6. At least one theory suggests that facial expressions affect brain temperature which in turn affects the sensation of emotion. R.B. Zajonc, S. Murphy & D. McIntosh, "Brain Temperature and Subjective Emotional Experience" in *Handbook of Emotions*, *supra* note 10.

<sup>35</sup> See, e.g., K. Lorenz, *On Aggression*, trans. M.K. Wilson (New York: Harcourt, Brace & World, Inc., 1963) at 248 [hereinafter Lorenz]: "By itself, reason can only devise means to achieve otherwise determined ends; it cannot set up goals or give us orders. Left to itself, reason is like a computer into which no relevant information conducive to an important answer has been fed; ....The motive power...stems from instinctive behaviour mechanisms much older than reason and not directly accessible to rational self-observation....These deepest strata of the human personality are, in their dynamics, not essentially different from the instincts of animals."

<sup>36</sup> S. Schachter & J. Singer, "Cognitive, Social, and Physiological Determinants of Emotional State" (1962) 69 *Psychological Review* 379. The primacy of cognition for emotional reactions actually has its origins in the work of Aristotle. See *Nicomachean Ethics*, trans. J.E.C. Weldon (London: Macmillan, 1912) at 135.

<sup>37</sup> "Thoughts on the Relation between Emotion and Cognition", *supra* note 24 at 1020. See also, R. Lazarus, et al., "Cognition, Emotion and Motivation: The Doctoring of Humpty-Dumpty" in K. Scherer & P. Ekman, eds., *Approaches to Emotion* (Hillsdale, N.J.: L. Erlbaum Associates, 1984); R. Lazarus, "On the Primacy of Cognition" (1984) 39 *American Psychologist* 124 [hereinafter "On the Primacy of Cognition"]; R. Lazarus, et al., "In Search of the 'Hot' Cognitions: Attributions, Appraisals and Their Relation to Emotion" (1993) 65 *Journal of Personality and Social Psychology* 916; R. Lazarus & C.A. Smith, "Appraisal Components, Core Relational Themes, and the Emotions" (1993) 7 *Cognition and Emotion* 233 [hereinafter "Appraisal Components"]; "Appraisal and Beyond", *supra* note 24; N.H. Frijda, "Lazarus' Labour of Love" (1994) 8:5 *Cognition and Emotion* 473 [hereinafter "Lazarus' Labour of Love"]; R. Solomon, "On Emotions

phases that lead to the incidence of an emotional state. Rationality theorist Ronald de Sousa describes the role of emotion in making decisions as "break[ing] the ties of reason."<sup>38</sup> For de Sousa, emotion fulfils this task in a number of ways. First, it provides a *desire* to make a decision, which motivates the person to action. Rational decision-making might provide many good reasons to make a decision, but emotion provides the motivation to make choices. Second, emotion helps reduce the number of factors deemed relevant to the choice so that the reasonable choice is more evident.<sup>39</sup>

Robert Solomon incorporates a cognitive understanding of emotion into a broader philosophy that aims "to return to the passions the control and defining roles in our lives that they have so long . . . been denied."<sup>40</sup> He describes emotions as an expression of a personal value system. The arousal of a particular emotion is an indication that the person experiencing the emotion has evaluated the circumstances in which they are placed in a particular way. Emotions can therefore be judged according to the values they expound.<sup>41</sup> "Every emotion . . . is a personal ideology, a projection into the future, and a system of hopes and desires, expectations and commitments and strategies for changing our world."<sup>42</sup>

What is meant by cognition is not clear. It cannot be equated with the legal concept of intention since it need not be "deliberate, rational, or conscious."<sup>43</sup> Furthermore, "[C]ognition cannot be equated with rationality. The appraisals that shape our emotional reactions can distort reality as well as reflect it realistically."<sup>44</sup> It is controversial whether cognitive processes are conscious or subconscious; reflective or unreflective; deliberate, habitual or instinctive. What is meant by cognition affects the level of personal responsibility a person has for his or her emotional reaction. Without attempting to resolve these uncertainties, I describe as 'cognitivists' those theorists who emphasize the elements of appraisal, thought and judgment to explain emotion.

The division between cognitivists and affectivists projects into a division in the wider debate concerning the relationship of emotion and reason.<sup>45</sup> Affectivists hold that emotions are internal phenomena that emanate from the person under particular conditions. Emotions are distinct from, and not controllable by, reason. Cognitivists understand that there is an inextricable connection between emotion and reason. Emotion is a result of appraisal, and appraisal depends largely on an actor's understanding of, and relationship with, his or her physical and social environment.

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as Judgments"(1988) 25 *American Philosophical Quarterly* 183 [hereinafter "On Emotions as Judgments"]; R. Solomon, "Sympathy and Vengeance: the Role of Emotion in Justice" in S.H. van Goozen, N.E. Van De Poll & J. A. Sergeant, eds., *Emotions: Essays on Emotion Theory* (Hillsdale, New Jersey: L. Erlbaum Associates, 1994) [hereinafter "Sympathy and Vengeance"].

<sup>38</sup> de Sousa, *supra* note 2 at 16.

<sup>39</sup> *Ibid.* at 15.

<sup>40</sup> *The Passions*, *supra* note 2, preface at i.

<sup>41</sup> See generally, *The Passions*, *supra* note 2; R. Solomon, *A Passion for Justice* (Reading: Addison-Wesley, 1990); R. Solomon, "Philosophy of Emotions" in *Handbook of Emotions*, *supra* note 10; "Sympathy and Vengeance", *supra* note 37; "On Emotions as Judgments" *supra* note 37.

<sup>42</sup> *The Passions*, *supra* note 2 at 212.

<sup>43</sup> "Thoughts on the Relation between Emotion and Cognition", *supra* note 24 at 1022.

<sup>44</sup> *Ibid.*

<sup>45</sup> See, for example, the debate between Zajonc, "On the Primacy of Affect", *supra* note 23 and Lazarus, "On the Primacy of Cognition", *supra* note 37. At one level, the difference is one of emphasis: affectivists concentrating on biological and physiological changes in actors to explain the incidence of emotion and emotional reactions, and cognitivists concentrating on the role of appraisal and judgment.

### 3. Social Theories of Emotion

Human beings, and consequently their emotions, are understood by social theorists to be constituted by their interpersonal relationships.<sup>46</sup> Some social theories are a direct extension of theories emphasizing cognition. These theories understand emotion to be an appraisal of surrounding circumstances, and place a particular emphasis on the role of the social environment in shaping that appraisal.

I will complete my analysis of each of the criminal defences of provocation, self-defence and duress by drawing on social constructionism, a recent movement in psychology, to explain a role for emotion which has explanatory power outside the language of cognition and affect. Social constructionism arose primarily as a reaction to positivist research methods in psychology which, it asserts, ignore the complex influence of the social environment on the incidence of emotion. Whereas theories emphasizing cognition and affect, and more traditional social theories, attempt to explain emotion in terms of the 'mechanisms' which cause it, social constructionists are more concerned with the symbolic meaning of the incidence of emotion in a particular environment. Constructionists are impatient with definitive statements about emotions and the partisan nature of the debate over their origin and expression. They reject traditional research methods and modes of explanation which yield universal truths based on objective empirical observation, because they believe human psychology is location and context specific.<sup>47</sup> Constructionists understand the role of the psychologist to be in the realm of cultural studies such as anthropology, and emphasize cross-cultural and trans-historical influences on human interaction.<sup>48</sup>

A proponent of constructionism, Rom Harré, describes people and what they do as "products of social processes."<sup>49</sup> He rejects the notion of there being 'basic' human emotions and describes the categorization of emotions as "not much more than an illegitimate a priori projection of a local biologism onto other forms of life."<sup>50</sup> Instead, he argues that psychology should be the study of "forms of symbolic interaction."<sup>51</sup> He does not deny that affective and cognitive processes are present in human action, but views them not as immutable, preconditioned attributes, but as patterns of behaviour which are "elaborated and transformed as they are absorbed into the symbolic universe of actual human associations."<sup>52</sup>

#### C. Legal Perspectives on Emotion

Recent work by American legal theorists Dan Kahan and Martha Nussbaum is directly related to my analysis of emotion in the criminal law.<sup>53</sup> Kahan and Nussbaum focus on how two concepts of emotion, the 'mechanistic' and the 'evaluative', influence the interpretation and application of criminal laws. They describe the mechanistic understanding of emotion in extreme affectivist terms.<sup>54</sup> Emotions are described as "impulses or drives that go their own way without embodying

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<sup>46</sup> See *The Passions*, *supra* note 2; de Sousa, *supra* note 2; *Social Being*, *supra* note 25.

<sup>47</sup> For a criticism of constructionist research methodology, see Greenwood, *supra* note 25 at 141. "Emotions are not themselves constituted...by our socially constructed descriptions of them."

<sup>48</sup> *Social Being*, *supra* note 25.

<sup>49</sup> *Ibid.* at 2.

<sup>50</sup> *Ibid.* at 4.

<sup>51</sup> *Ibid.* at 12.

<sup>52</sup> *Ibid.* at 11.

<sup>53</sup> Kahan & Nussbaum, *supra* note 9.

<sup>54</sup> *Ibid.* at 278-82.

reasons or beliefs.”<sup>55</sup> Emotions “follow laws of their own.”<sup>56</sup> The authors describe the ‘evaluative’ understanding of emotion in the language of cognition. According to this view, emotions themselves contain an evaluation of the object. As such, they are capable of being evaluated, both in terms of the values expounded through the experience of having the emotion, and the values expounded through the action chosen to express the emotion.<sup>57</sup> The authors acknowledge the role of social factors in the development of emotion but do not explore the possibility that these factors might be constitutive of emotion in themselves. Instead, they look to how well the mechanistic and evaluative conceptions account for social factors.

Besides the work of Kahan and Nussbaum, there is very little work by legal scholars explicitly considering the role of emotion in the criminal law. Some legal theorists have contributed their own understandings to the theory of affect in relation to the partial defence of provocation.<sup>58</sup> Finally, the American legal pluralist William Connolly emphasizes a social construction of emotion in his examination of the *desire* of the community to punish perpetrators of crime.<sup>59</sup>

An historical investigation of psychological, philosophical and legal perspectives reveals a diverse and changing understanding of emotion. Prior to the 20th century, the dominant theories of emotion, and therefore those which influenced the rules of criminal liability, were the work of a small number of philosophers. The understanding of emotion has become more complex in the 20th century due to the existence of a huge body of literature from various theoretical perspectives, some of which will be explored.

### III. EMOTION IN CRIMINAL DEFENCES

Many interesting questions of responsibility, and in particular, explicit consideration of emotion, are raised in the construction and application of criminal defences. The way the legal model of liability is constructed, what the law *excuses* reveals most clearly what the law *punishes*. Similarly, what the law excuses reveals the law’s understanding of emotion and the role of emotion as an element of excuse. In law, an assessment of an actor’s emotional condition is explicitly made only in the defence of provocation. When relying on that defence, it suffices to establish that the ordinary person could have lost their self-control. It then does not matter that the actor had available to him or her a range of options other than the commission of the crime, for it is understood that the actor was not capable of taking them. On the other hand, the defences of self-defence and duress focus on what options are objectively available to the actor. The incidence of extreme emotion does not affect the availability of these defences.<sup>60</sup> Extreme fear is a relevant factor only in providing a context for the choices available to the actor. Whereas in the defence of

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<sup>55</sup> *Ibid.* at 279-80.

<sup>56</sup> *Ibid.* at 278.

<sup>57</sup> *Ibid.* at 285. Kahan and Nussbaum draw a clear distinction between arousal and expression.

<sup>58</sup> See, for example, H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at 183. In one line, Hart dismisses emotion as no more than involuntary affect: “If you strike me, the judgment that the blow was deliberate will elicit fear, indignation, anger, resentment: these are not voluntary responses.” See also P. Brett, “The Physiology of Provocation” (1970) Criminal L.R. 634.

<sup>59</sup> Connolly unpacks the language of responsibility to find seething beneath it a strong desire to punish. Desire is “an organisation of energy, beyond [the need for food, clothing or nurture], to possess, caress, love, emulate, help, befriend, defeat, stymie, boss, fuck, kill, or injure other human beings.” “Desire to Punish”, *supra* note 3 at 49.

<sup>60</sup> Establishing extreme emotion might, however, have evidentiary value, adding weight to the assertion that there was no safe avenue of escape, or that the accused did in fact apprehend death, or grievous bodily harm in face of the threat.

provocation it is explicitly understood that the ordinary person might lose his or her self-control, in the defences of duress and self-defence the accused is at all times understood to be capable of choosing available lawful alternatives to the commission of the offence. In the defence of duress, the accused is understood to have the capacity to choose a safe avenue of escape, and in the defence of self-defence, to have the capacity to respond only with necessary and proportional force to the coercive threat. A standard of reasonable conduct is expected of the actor *despite* conditions engendering extreme emotional stress.. In the following analysis, I will explore in more depth the role of emotion in each defence and discuss the implications of its divergent treatment.

#### A. *The Defence of Provocation*

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

(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the *heat of passion* caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the *power of self-control* is provocation for the purposes of this section if the accused acted on it on the sudden and before there was *time for his passion to cool*.

(3) ...

[Emphasis added]

The section makes specific reference to emotion and uses terms describing it in terms of time, temperature and control which are characteristic of a mechanical understanding of emotion. Emotion is relevant in the defence because of its relationship to the capacity for self-control.

##### 1. *The Path to a Loss of Self-Control*

Control operates at a number of levels. It requires "a capacity for critical reflection: the ability to step back from one's immediate desires and assess the actions they incline one to perform, in light of the moral reasons one has grasped and accepted," the "capacity to make choices as a result of deliberation" and the "capacity to translate choices into behaviour."<sup>61</sup> There are many theories for how these capacities for control can be lost.

##### (i) *An Affectivist Approach*

The most extreme affectivist theorists would understand that a loss of self-control is the result of uncontrollable biological, physiological and neurological changes within the actor. Descartes gave a graphic description of the arousal of anger. Anger "involves great agitation of the blood." This agitation affects "primarily the bilious blood coming from the spleen and the small veins in the liver. This blood enters into the heart and there, because of its abundance and the nature of the bile with which it is mingled, it produces a heat more extreme and more intense than any that may be produced by love or joy."<sup>62</sup> For Descartes, in a state of extreme anger, passion is so overpowering that the soul has no chance of counteracting its effect on the pineal gland. Nietzsche also states that there is great difficulty in restraining oneself from action when passions are aroused. "[T]o have thoughts of revenge and to execute them means to be struck with a

<sup>61</sup> R.J. Wallace, *Responsibility and the Moral Sentiments* (Cambridge, Mass.: Harvard University Press, 1994) at 158.

<sup>62</sup> Descartes, *supra* note 14 at 399.

violent—but temporary—fever.”<sup>63</sup>

In his controversial work, *On Aggression*, Konrad Lorenz suggests that aggression results from an internal buildup of excitement in the instinctual centres within the nervous system which is spontaneously released when it has found an object on which to direct the aggressive energy.<sup>64</sup> A buildup of tension is released like steam in a hydraulic pump. From the “idea of emotions as ‘inner’ entities . . . is the notion that they may need to be contained lest they spill out. Such a metaphor may reinforce the notion prevalent today that unwanted emotions can be ventilated and hence disposed of under controlled conditions.”<sup>65</sup> One theory in neuroscience has reinforced the emphasis on instinctual drives, conceptualizing the brain as a complicated computer with preset programs which are triggered into action given the right circumstantial cues.

The biological laws which activate the emotional mechanism of anger, are laws which function with absolute independence from the individual’s consciousness and free will . . . the urges to take revenge or to defend himself [are triggered] with an intensity mathematically calibrated by the neural computer, following a precise program—an ‘eye for an eye’.<sup>66</sup>

Legal theorists have contributed their understandings of affect. Dewey talks of emotions “welling up from sources which are at the back of the individual’s consciousness...It is as much a source of surprise to the individual...when these great emotional waves roll in on him.”<sup>67</sup> Jeremy Horder identifies degrees of anger from mild irritation in which one might grunt, to outrage in which one might scream, and finally to such a degree of anger that there is a “temporary displacing . . . in the process of practical reasoning of the normally absolute priority given to the obligations of reliability, and the ethical perspective of the abstract” in which one has lost self control.<sup>68</sup> When the anger is so extreme that self-control has been lost, a person is incapable of exercising moral judgment, leaving only sensation and desire. Given that the actor is faced with a person who has severely provoked them, the desire might be to eliminate that person.

## (ii) A Cognitivist Approach

Aristotle talked of anger originating not in the person but in the provocation. The merits of the person’s response can only be determined by whether the provocation is in fact unjust. Although the impulsive or emotional response is irrational, it is still capable of obedience to reason. Therefore, an emotional response, such as in anger, reflects on the person’s character. The person of good character has control over his or her emotional reactions and will act with an increasing ferocity proportionate to the level of insult. There is an element of judgment in the response. The person of no self-control will react even when there has been no injustice.<sup>69</sup>

<sup>63</sup> Nietzsche, *supra* note 20 at 54-55.

<sup>64</sup> Lorenz, *supra* note 35 at 49-56. Leonard Berkowitz criticizes the lack of empirical evidence for such a buildup and points out that there is no biological sight that could contain the instinctual drive. L. Berkowitz, *Aggression: Its Causes, Consequences and Control* (Philadelphia: Temple University Press, 1993) at 380. Carol Tavris also criticizes the notion of a buildup of anger and a need to express it. C. Tavris, *Anger: The Misunderstood Emotion* (New York: Simon & Schuster, 1982) at 120-43.

<sup>65</sup> K. Oatley & J. Jenkins, “Human Emotions: Function and Dysfunction” (1992) 43 Annual Rev. Psychology 55 at 57.

<sup>66</sup> Jáuregui, *supra* note 29 at 206-07.

<sup>67</sup> Dewey, *supra* note 19.

<sup>68</sup> J. Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 173.

<sup>69</sup> Aristotle, *supra* note 36, Book 1, Chapter XIII.



Cognitive theories do not rely on the incidence of physiological changes in the person. Although actors might have no control over the arousal of emotion, they have a significant level of control over how to deal with the feelings invoked. The translation of anger into aggression is a matter of choice. This finds support in neuro-psychological research. The ability to change behaviour in response to a fluctuation in environment in accordance with a desired goal (such as eliminating someone in hatred) is known as "skilled executive behaviour." This skill is "incompatible with both extreme mental and emotional disturbance" and is better understood as the result of a choice to so act.<sup>70</sup>

Since for cognitivists there is always an element of choice in an emotional state, there may never be a loss of self-control. If a person's reaction in an extreme emotional state is chosen, the element of excuse may disappear altogether. With no loss of self-control, there is only a state of violence which is at all times connected in a complicated way to reason. Cognitivist theories might consider that there could only ever be a condition of lost self-control when a person is not capable of making a whole series of choices, including: a choice whether or not to get angry, a choice whether or not to allow one's anger to reach a state corresponding to a loss of self-control, and once in this state, a choice whether or not to act with homicidal violence. They might conclude that it is not possible to be devoid of so many choices regardless of the extremity of the (normal) emotional state.

### (iii) *Between Cognition and Affect*

Between the two extremes, there are many theories which suggest complex connections between cognition and affect, and which are distinguished by more subtle distinctions. Although our knowledge of what happens to the body is vast, many fundamental questions remain unanswered as to the causes and effects of motivation for action. For example, it is uncertain whether cognitive appraisal or autonomic arousal comes first, and how bodily changes translate themselves into action.<sup>71</sup> Carroll Izard argues that affect is responsible for emotional states but not for any action resulting from such states. He describes the reaction of a person in an extreme state of anger in graphic bio-physical terms but adds that there is a further inhibitory phase between stimulus and reaction. "In anger the blood 'boils', the face becomes hot, the muscles tense. There is a feeling of power and an impulse to strike out, to attack the source of anger. The stronger and more energetic the person feels, the greater the need for physical action. In rage the mobilization of energy is so great that one feels one will explode if one does not ... act in anger in some way."<sup>72</sup> There is a strong feeling of impulsiveness and the 'dimension of control' is lower than for any other emotion. If there is to be a response, there is a high degree of uncertainty as to when it is likely to occur and the degree of its extremity. However, Izard goes on to state that although anger physiologically prepares the person for the aggressive response, "it does not compel [the person] to act."<sup>73</sup>

Some theorists emphasize a complex relationship between physiological arousal and cognition. Lazarus suggests that an emotional state can distort cognitive appraisal. There is a complex

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<sup>70</sup> H. Hall, "Extreme Emotion" (1990) 12 U. Hawaii L. Rev. 39 at 52-53.

<sup>71</sup> For a discussion of these uncertainties, see J.W. Kalat, *Biological Psychology* (Pacific Grove: Brooks/Cole, 1992).

<sup>72</sup> Izard, *supra* note 6 at 241.

<sup>73</sup> *Ibid.* at 248. It is this distinction between readiness for action and the resulting response which separates cognitivists from affectivists, and which throws doubt on the concept of a loss of self-control. See also Berkowitz, *supra* note 64 at 20.

interplay between reason and emotion, with cognition being a combination of the two. "Emotions appear to be powerful influences on how we think and interpret events. They are the result of cognition but in turn affect cognition. The causal linkages one perceives among emotion, motivation and cognition depend, in part, on where in an ongoing behaviour sequence one arbitrarily stops the action."<sup>74</sup> Perhaps self-control is not lost and there is a capacity to choose, a capacity which is progressively affected as the intensity of the emotion increases. Frijda suggests that an emotional response is absolute with regard to the degree of insult, and because of this, the response is single-minded, without thought of the long-term, extraneous consequences. Although there is still control over the action in response, it must be understood in light of the emotional state of the actor, and what this suggests about the actor's appraisal of the gravity of the insult.

This list of approaches is not exhaustive.<sup>75</sup> In any case, the law does not subscribe to any particular theory. It has its own understanding of the influence of emotion on human behaviour expressed through its concept of a loss of self-control. On occasion, courts have expressed dissatisfaction at the law's understanding. For example, in *R. v. McPherson*, Lord Goddard stated, "How can it be said that the appellant was acting in a gust of passion when he fired not one but four shots, and each shot involved the breaking of the gun to reload it and the taking out of cartridges four separate times?"<sup>76</sup> Lord Goddard recognized that when a person is extremely angry, it is one thing for them to act out of character and perhaps to lose self-control, and quite another for them to be capable of intentional killing. The fact that the elements of voluntariness and intention are present means that the actor has picked up the knife, loaded the gun, or if they find the lethal weapon already in their hand, they have pointed the gun and pulled the trigger or thrust the knife with a great deal of force. The law asserts the possibility of this apparently rational, goal-directed activity, while under a state of lost self-control. It is difficult to distinguish the part of control that is lost from the part retained.

## 2. Confining Loss of Self-Control

Having established the concept of a loss of self-control, the law is faced with applying it to particular fact scenarios. Since the concept is central to the defence, only events which could be relevant to the affective reaction of a loss of self-control are considered. The defence looks particularly at the final provocative act, and other conduct by the victim which renders the final provocation sufficiently grave for the actor to lose self-control. This fits perfectly into Lorenz's hydraulic concept of anger—prior provocative acts are the steam that fills the pump; the final act is when it discharges.<sup>77</sup> Because the concept of a loss of self-control is defined imprecisely, the scope of the defence of provocation is potentially very wide. To limit this scope, the law requires that other criteria be satisfied for the defence to be made out; namely, proportional and timely response while in a state of lost self-control.

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<sup>74</sup> "On the Primacy of Cognition", *supra* note 37 at 126.

<sup>75</sup> See also L. Tancredi & N. Volkow, "Neural Substrates of Violent Behaviour: Implications for Law and Public Policy" (1988) 11 *Int'l J. of L. & Psychiatry* 1 at 48; Berkowitz, *supra* note 64; Izard, *supra* note 6; "Appraisal Components", *supra* note 37; P.S. Greenspan, *Emotions and Reasons: An Inquiry into Emotional Justification* (London: Routledge, 1988) at 139.

<sup>76</sup> *R. v. McPherson* (1957), 41 Cr. App. R. 213 at 215 [hereinafter *McPherson*]. Lord Goddard had trouble reconciling the purposive behaviour of firing and reloading a gun with a loss of self-control.

<sup>77</sup> Lorenz, *supra* note 35.

(i) *Proportionality*

In *Mancini v. R.*, Viscount Simon L.C. suggested that even when 'out of control' the retaliation should be proportional to the provocative incident.<sup>78</sup> In *R. v. Phillips*, Lord Diplock attempted to interpret 'loss of self-control' so that it was consistent with this requirement:

This premise, [that there is no intermediate stage between icy detachment and going berserk] unless the argument is purely semantic, must be based upon human experience and is, in their Lordships' view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon.<sup>79</sup>

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

The concept of proportionality is a normative device distinguishing between homicides which warrant a partial defence, and homicides which warrant no defence at all. As such, the language used ought to be normative, and ought not to suggest that it is grounded in the logic of human experience, or that it carries the authority of a psychological reality. If the concept of a 'loss of self-control' is acknowledged to be normative, its implications as a normative construction can be challenged uninhibited by claims of logic and authority.

(ii) *Time for the Passions to Cool*

In all common law jurisdictions, loss of self-control in the heat of passion is deemed to have a limited life. If too much time has elapsed between the provocative act and the homicidal violence in response, it is determined that the response is not under a state of lost self-control. Again, this seems a sensible normative limitation to the defence, but as phrased it suggests that there is a definable end point to a loss of self-control that can be gauged with a sufficient degree of certainty for it to be considered an element of the defence.<sup>80</sup>

<sup>78</sup> *Mancini v. Director of Public Prosecutions*, [1941] 3 All E.R. 372, [1942] A.C. 1 at 9 (H.L.); See also *Stingel v. R.* (1990), 171 C.L.R. 312 at 325 [hereinafter *Stingel* cited to C.L.R.]: The High Court of Australia required that the conduct of the deceased person was "capable of provoking an ordinary person *not merely to some retaliation, but to retaliation 'to a degree and method of violence which produces the death'*" (*Holmes v. Director of Public Prosecutions*...[1946] A.C. 588 at 597...). [Emphasis added]

<sup>79</sup> *Phillips v. R.*, [1969] 2 A.C. 130 at 137-38 (P.C.) [hereinafter *Phillips*].

<sup>80</sup> The law provides no criteria for determining how long it takes for the passions to cool. In *Lynch v. Director of Public Prosecutions for Northern Ireland*, [1975] A.C. 653, 1 All E.R. 913 (H.L.) [hereinafter *Lynch* cited to A.C.], the trial judge left the defence of provocation to the jury when the accused had gone away and then returned 10 minutes later. In *McPherson*, *supra* note 76, Lord Goddard inferred that the time

There is no conclusive psychological evidence as to how long it takes for the intensity of an emotional reaction to subside. Theorists who emphasize the physiological causes of emotion tend to understand emotions as lasting between a few seconds and a few minutes, while those who emphasize cognition talk in terms of minutes or hours.<sup>81</sup> A number of empirical studies have demonstrated that the predisposition to respond aggressively to a provocative act can be quite enduring. In one study, researchers discovered that subjects who were provoked several weeks earlier while in a state of arousal were more likely to respond aggressively than those not so aroused when unexpectedly given the opportunity to retaliate a few weeks later.<sup>82</sup> Jáuregui, a neuroscientist, argues that once a person is seriously insulted, the insult will remain with them for years, periodically intensifying. The images associated with the insult will continue to be present, unless the source of the insult is eliminated. He claims that even after the elapse of a period of years, homicide is not cold-blooded murder but an understandable, and to some extent uncontrollable, reaction in anger.<sup>83</sup>

It is difficult to argue persuasively for any particular time limit. To make "the time in which the passions cool" an element of the defence is to claim a greater knowledge of the emotions than is actually possessed. In any case, the normative limits of the defence should not be determined in terms of time limits, but in terms of the social implications of allowing the defence in particular contexts. There may be contexts in which a long period of time between provocation and response ought not to preclude the defence,<sup>84</sup> and others in which the defence ought not to be available despite the elapse of a very short period of time.<sup>85</sup>

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

Anger has traditionally been the only emotion understood to lead to a loss of self-control, and yet theorists who emphasise affect point to extreme reactions under other emotional conditions. For example, fear can cause such a level of over-activity in the autonomic nervous system that vital organs can overload even to the point of death. "Intense fear is experienced as complete insecurity

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to load a gun a second time might be sufficient time for the passions to cool. More recent cases have suggested that if there is a temporal gap even of only a few seconds between a first and subsequent attack, this may be sufficient for the passions to have cooled. The High Court of Australia was divided on this point in *Masciantonio v. R.* (1995), 183 C.L.R. 58, 69 A.L.J.R. 598 [hereinafter *Masciantonio* cited to C.L.R.]. McHugh J. in dissent expressed doubt about whether the ordinary person could lose his or her self-control to the extent that the accused did when there was an 'appreciable lapse' of time (of a few seconds) between a first and subsequent assault; *Phillips, ibid.*

<sup>81</sup> "[Emotions] usually last for some time, from minutes to hours, and during that time they manifest 'flux', that is...[they] are constantly changing appraisals, states of action tendency, and of activation." "Lazarus' Labour of Love", *supra* note 37 at 476.

<sup>82</sup> Study by Bryant & Zillman, cited in J.R. Averill, *Anger and Agression: An Essay on Emotion* (New York: Springer-Verlag, 1982) at 134. Averill suggests that anger can last for days, though the intensity will vary in this time. He also states that fear can last for hours, and grief for months. It must be noted that there is a distinction between the tendency towards an aggressive response, and succumbing to the impulse towards aggression that is characteristic of a loss of self-control in the defence of provocation.

<sup>83</sup> Jáuregui, *supra* note 29 at 218-19. Like Descartes, Jáuregui emphasizes a constant struggle of actors to exercise control over their neural and biological urges.

<sup>84</sup> Such as scenarios in which the actor has been subject to a history of degrading treatment and a series of insults, but loses self-control some time after experiencing the latest of these incidents.

<sup>85</sup> Such as the scenario in *Masciantonio*, *supra* note 80, in which the actor has lost his self-control and attacked in violence, and soon after the first attack, attacks again to 'finish off' the victim.

or uncertainty about safety. There is a feeling that everything is running out of control."<sup>86</sup>

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

[T]here can now be no convincing reason for confining the doctrine [of provocation] to loss of self-control arising from anger or resentment. The doctrine naturally extends to a sudden and temporary loss of self-control due to an emotion such as fear or panic . . . This extension . . . conforms . . . to the conceptual relationship between the doctrine and the mental elements in the offences of murder and manslaughter.<sup>87</sup>

The recognition of a close connection between anger and fear has also been extended to the emotion of sadness,<sup>88</sup> and there seems no good reason why the defence should not also be available to actors who kill under other emotional conditions such as compassion, depression or jealousy. There may need to be a defence for mercy killings, or for women who kill their husbands in despair at the disastrous state of their relationship.<sup>89</sup>

If the normative framework of the defence of provocation is reconceived to extend the list of emotions which can lead to a loss of self-control, there will be new practical difficulties. The provocative act leading to a loss of self-control, and the external manifestations of the loss of self-control, may be very different in instances of fear and anger. The loss of self-control in anger is traditionally characterized by external signs of rage, and in particular the extremity of the violent response. Fear might be characterised by very different external signs which are not easily detectable: typically a state of paralysis and submission (while retaining the ability to respond with a decisive act of homicidal violence). It may be that the loss of self-control in sadness is not triggered by a "sudden provocation" but is something that increases gradually over time, there being no clear indicator when it has reached the point of a loss of self-control.

#### 4. *Provocation and an Evaluative Concept of Emotion*

Kahan and Nussbaum argue that all the elements of the defence of provocation which are not well explained by the mechanistic concept of a "loss of self-control" can be better explained by their 'evaluative' understanding of emotion. The requirement of a particular gravity of provocation seems on its very face to be an evaluative concept; the gravity being determinative of what constitutes a reasonable angry response in a particular social context. Also, an evaluative concept of emotion explains the existence of a partial defence. An assessment of such behaviour is necessarily complex. Offering a partial defence is a means of recognizing a serious wrongdoing

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<sup>86</sup> Izard, *supra* note 6 at 299. See also "The Emotions: A Psychological Study", *supra* note 6 at 48: "At first, fear acts upon the heart in such a way as to cause an increased activity; but overwhelming fright seems to paralyse the heart and thus even cause death." Sartre, *supra* note 6 at 64: "[T]he true meaning of fear is apparent; it is a consciousness which, through magical behaviour, aims at denying an object of the external world, and which will go so far as to annihilate itself in order to annihilate the object with it."

<sup>87</sup> *R. v. Van Den Hoek* (1986), 161 C.L.R. 158 (H.C.) at 168. In this case, Mason J. relies not on any developments in knowledge of the person in the social and natural sciences, but on a statement by Glanville Williams in *Textbook of Criminal Law*, 2d ed. (London: Stevens, 1983) at 524: "Anger is the domain of the law of provocation, fear that of the law of private defence—though fear is also capable of amounting to provocation." In *Van den Hoek* at 167.

<sup>88</sup> See S. Tomkins, *Affect, Imagery, Consciousness* (New York: Springer, 1963). Tomkins argues that anger and sadness are "activated by similar ingredients of neural firing," quoted in Izard, *supra* note 6 at 196. Izard identifies a similar relationship between anger and fear which when combined with Tomkins' hypothesis, "suggests the possible existence of a sadness—anger—fear bind."

<sup>89</sup> See Horder, *supra* note 68.

while still acknowledging this complexity. Further, the "time for the passions to cool" might be understood not to suggest anything definitive about the nature of the emotions and their duration, but simply as a recognition that when a certain amount of time has passed since an event took place, in most cases the acceptable reaction should not be so extreme, since there is the possibility to explore other ways to redress the wrong. Having reinterpreted each of the elements of the defence of provocation, Nussbaum and Kahan seem satisfied that the defence can survive in its current form. It is at this point that I part from their analysis. Kahan and Nussbaum's analysis polarizes emotion into cognition or affect. They argue persuasively that the criminal law has traditionally adopted a mechanistic understanding of emotion. They reject this understanding and instead embrace a cognitively based concept of a loss of self-control. My discussion of emotion in terms of cognition and affect does not require the acceptance of one theory over another. On the contrary, I argue that the law should not be contributing to the vast literature on the origins of emotion by accepting any particular theory as paramount. By focusing the understanding of emotion on the debate over its origin and expression is to be trapped in a narrow understanding of emotion, for it assumes the existence of a separate entity called 'emotion', and requires the specific consideration of how this entity is expressed through action in any given scenario. I believe that in explaining the entity 'emotion', the defence is so entrenched in the language of affect, and the ideological and normative implications surrounding the defence so intrinsically unacceptable, that there is no hope of redeeming the defence in its current form.

#### 5. A Social Constructionist Approach to the Defence

In the legal concept of a loss of self-control, emotion is understood to be a powerful, irrational internal force which the individual cannot control. The emotion hinders the individual's ability to act reasonably. This understanding is antithetical to some theorists' understanding of emotion as integrally connected to our ability to act and be responsible. Solomon goes as far as to say that emotions are the characteristic of life over which we have the most complete ownership, and therefore, the most control.<sup>90</sup>

Social constructionists reject the concept of a loss of self-control. They consider anger to be the expression of an actor's values in their particular social environment.<sup>91</sup> C. Terry Warner argues that the perception of anger as uncontrollable is a self-deception. People look for external, or uncontrollable internal causes for their anger which do not exist. This deception prevents them from taking responsibility for their anger.<sup>92</sup> Solomon provides a similar analysis of anger:

The anger is my own as well as the control; the "suppression" is but part of the structure which I am imposing upon the world through my anger. To think otherwise is to view my anger as not mine, not my responsibility, allowing me to abuse other people and self-righteously condemn them ... without ever taking responsibility for my own judgment.<sup>93</sup>

The defence of provocation feeds this lack of responsibility by providing a bio-physical explanation

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<sup>90</sup> *The Passions*, supra note 2 at preface. See also discussion of Solomon's understanding of anger, *infra* note 93, and accompanying text.

<sup>91</sup> *Social Being*, supra note 25 at 4: "The self is a location, not a substance or attribute. The sense of self is the sense of being located at a point in space, of having a perspective in time and of having an awareness of some kind of being."

<sup>92</sup> C.T. Warner, "Anger and Similar Delusions" in R. Harré, ed., *The Social Construction of Emotions* (Oxford: Blackwell, 1986).

<sup>93</sup> *The Passions*, supra note 2 at 169.

for homicidal violence.

Consider the most common scenario giving rise to claims for the defence of provocation: the loss of self-control by the jealous man in the face of infidelity by his wife (or female sexual partner).<sup>94</sup> In the 18th century, the defence of provocation was potentially available to a man who responded with homicidal violence upon discovering his wife in the act of adultery. The availability of the defence was indicative of a particular understanding of the marriage relationship, and of the comparative social positions of women and men within that relationship. A man was considered to have a right of exclusive possession over his wife. Adultery was such a flagrant infringement of this right, and such a slight to his honour, that a response in homicidal violence was partially excusable.<sup>95</sup>

Over this century, the status of women in relationships, employment and citizenship has changed significantly and what is a socially acceptable emotional response by a man to a woman's infidelity has also changed. The response of the law has not been to withdraw the defence of provocation but to reformulate the defence so that it avoids consideration of the negative social implications of anger as they arise in the defence. It does this by understanding anger not as outrage, in which the resulting conduct might be viewed as the correcting of the wrong,<sup>96</sup> but as loss of self-control, which is grounded in affect.<sup>97</sup> Thus, instead of being reformed to reflect contemporary social values, the defence represents an exception to these values.

The law has attempted to keep the defence within socially acceptable limits by demanding an objective standard of self-control of the actor. The extent to which particular characteristics of the accused can be considered in the objective ordinary person test has proved controversial.<sup>98</sup> However, with an affectivist understanding of anger in the defence, the controversy has a limited scope. The characteristics of the accused are only relevant to the extent that they help explain the increase in the affective pressure in the pump (the provocation) leading to a final release (the loss of self-control). The possibility that concepts such as gender, sexual orientation and culture are themselves socially constructed is not considered. With the focus of the defence so squarely on a loss of self-control, judges risk losing sight of the context in which the anger is expressed, and the normative values to be upheld through the defence. Some of the most common claims for the defence of provocation incorporate scenarios in which the actor's claim for a defence is abhorrent to contemporary values, and in which the conduct is less socially acceptable than other conduct which amounts to murder.<sup>99</sup>

The interpretation of the origins and incidence of aggression is particularly important in relationships between men and women. A loss of self-control in anger which explodes immediately after a provocative act, and before the passions have had time to cool, may well represent the most

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<sup>94</sup> E.g., *Thibert v. R.*, [1996] 1 S.C.R. 37, 104 C.C.C. (3d) 1 [hereinafter *Thibert* cited to S.C.R.]; *Stingel*, *supra* note 78; *Moffa v. R.* (1977), 138 C.L.R. 601.

<sup>95</sup> *R. v. Mawgridge* (1707), 84 E.R. 1107 (K.B.).

<sup>96</sup> See *Averill*, *supra* note 82 at 317ff.

<sup>97</sup> For a discussion of the transition from anger to outrage to anger as loss of self-control in the defence of provocation, see *Horder*, *supra* note 68 c. 4 and 5.

<sup>98</sup> See the various approaches in *Camplin v. D.P.P.* [1978] A.C. 705 (H.L.); *R. v. Hill* [1986] 1 S.C.R. 313; *Stingel*, *supra* note 78; *Masciantonio*, *supra* note 80.

<sup>99</sup> One clear comparison can be drawn between homicidal violence committed by a person under threat of death, which, in the absence of the defence of duress, is murder, and homicidal violence in response to a non-violent homosexual advance, or homicidal violence in response to the discovery of sexual infidelity, both of which frequently give rise to the defence of provocation.

prevalent violent incidents of men, but perhaps not of women.<sup>100</sup> Anne Campbell develops an interesting thesis explaining how men and women understand aggression differently. For men, aggression is an instrumental force, used to serve particular goals, such as controlling others. For women, aggression is expressive, used to communicate their emotional state. Under this theory, when men encounter women's aggression, they view it as a threat and meet it with their own aggression. When women encounter men's aggression, they try to identify what men are trying to communicate through their aggression.<sup>101</sup> Women's experience of aggression might not be in sudden outbursts, but something that develops after reflecting on the provocative act and contemplating the most appropriate response. Women's aggression might be linked to emotions other than anger, such as fear and despair.<sup>102</sup> Despair is not as temporary as anger and action in despair may appear calm and deliberate. The defence of provocation might be, as Jeremy Horder suggests, "poorly equipped to deal with those who are driven to act as they do out of despair."<sup>103</sup>

Norms do not exist in isolation from legal rules. Legal rules not only reflect norms, but have an influence in developing what is the norm. Thus, if the legal rule espouses a norm that the ordinary man could lose his self-control when his wife is unfaithful, men might feel less constrained to control their behaviour in such a situation. As de Sousa puts it: "[I]n cultures where murderous jealousy is considered rational and inevitable, jealous husbands are surely less given to effective self-control."<sup>104</sup> One response to the disparity in the values held in the community and the values expressed through the defence, is to reject the defence in relation to particular scenarios such as cases of a non-violent homosexual advance or sexual infidelity. In *R. v. Thibert*, the dissenting judgment of Major and Iacobucci JJ. adopted this approach, dismissing the defence on purely normative grounds, pointing to the danger of supporting values through the defence which are unacceptable in the community.<sup>105</sup> The judgment avoided the language of self-control altogether. The majority began by expressing the same normative values as the minority, but went on to decide the case in the language of self-control.<sup>106</sup> Though the whole court agreed on the normative values at issue, they reached opposite conclusions on the facts because of the different emphasis each placed on the excusatory power of anger. Even though the majority of the Court in *R. v. Thibert* had in mind the relevant normative values, an affectivist understanding of emotion obscured those values in the particular context.

## B. Self-Defence

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

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

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<sup>100</sup> E.g., C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); A Coughlin, "Excusing Women" (1994) 82 California L. Rev. 1 [hereinafter Coughlin]; L.J. Taylor, "Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-defense" (1986) 33 U.C.L.A. L. Rev. 1679.

<sup>101</sup> See, for example, A. Campbell, *Men, Women and Aggression* (New York: Basic Books, 1993).

<sup>102</sup> See discussion on the application of the concept of a loss of self-control to emotions other than anger.

*Supra* note 86, and accompanying text.

<sup>103</sup> Horder, *supra* note 68 at 191.

<sup>104</sup> de Sousa, *supra* note 2 at 23.

<sup>105</sup> *Thibert*, *supra* note 94 at 65.

<sup>106</sup> *Ibid.* at 44-55.



- (a) he causes it under *reasonable apprehension* of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
  - (b) he *believes, on reasonable grounds*, that he cannot otherwise preserve himself from death or grievous bodily harm.
- [Emphasis added]

On its face, emotion is not a consideration in the defence at all. The law looks only to beliefs and apprehensions. In practice, however, emotion is important in making out a defence, because it affects the reasonableness of the relevant beliefs and apprehensions. *R. v. Lavallée* is a recent example. In that case, the accused shot her partner in the back of the head after he had threatened to kill her.<sup>107</sup> The accused had lived with her partner for three to four years. Expert testimony in her defence at trial attested to an extremely abusive relationship which included a history of physical violence inflicted upon her. The testimony explained how the history of the battering relationship could affect her beliefs as to her opportunity to escape from her batterer on the night in question. The Supreme Court held that this testimony was relevant to placing the accused's actions in context, and to explaining how her apprehension of death could be reasonable in the circumstances she faced. "[T]he *mental state* of the accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality." [Emphasis added]<sup>108</sup>

The focus of the defence is squarely on the cognitive elements of beliefs, mental states and apprehensions, and the reasonableness of holding them. Any discussion of emotion must be understood in this context. In her judgment for the Court, Wilson J. makes specific reference to the fear of the accused on two occasions. She states, "[W]ithout such [expert] testimony I am skeptical that the average fact-finder would be capable of appreciating *why her subjective fear may have been reasonable* in the context of the relationship". Elsewhere she states, "[t]he law does not require *her fear to be correct, only reasonable*." [Emphases added]<sup>109</sup> These passages demonstrate that extreme fear is inextricably connected to the beliefs of the accused person. The reasonableness of her fear is inseparable from the reasonableness of her belief. In this way, extreme emotion is essential to the availability of the defence.

Viewed from a mechanistic perspective, it might seem that emotion does not have a central role in self-defence. If, despite the history of abuse, the defendant in *Lavallée* had been calm on the night in question, and in calmly rationalizing her options she believed she could only escape death at the hands of her partner by killing him, the defence would still be available on the same grounds as before. The reasonableness of the defendant's belief would not be affected by her calm demeanour. Conversely, if, in spite of the expert testimony, the jury deemed the accused's belief to be unreasonable, there is no defence regardless of the level of fear the accused might have experienced as a result of the threats she faced. An affective understanding of emotion fails to account for the excusatory power of the defence because it requires a separation of reason and emotion. The battered woman does not claim to have lost her power of reason, or her 'self-control'. On the contrary, she claims that, rather than detracting from her reasoning process, her emotion of extreme fear was an important confirmation of what was a reasonable course of conduct in her self-defence.

Although the environment which invokes the extreme emotional state can be accommodated as a contextual circumstance, the resulting extreme response to that environment, although a

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<sup>107</sup> [1990] 1 S.C.R. 852, 76 C.R.(3d) 329 (hereinafter *Lavallée* cited to S.C.R.).

<sup>108</sup> *Ibid.* at 880.

<sup>109</sup> *Ibid.* at 882.

potentially 'understandable' response, cannot always be accommodated in a generous test of reasonableness.<sup>110</sup> A reasonableness test can only be extended so far before it is excusing patently unreasonable conduct. The defence is given its widest scope possible through the use of expert testimony. Such testimony explains how conduct which seems patently unreasonable in the experience of the judges of fact, can be reasonable in contexts they have never previously encountered. Expert evidence broadens the understanding of what *can be* reasonable. It does this by explaining why an actor's extreme emotion is reasonable in the context. The normative focus in this approach to emotion in criminal defences is appealing. It avoids the difficult question, which is the very basis of the defence of provocation, of whether there could be circumstances in which the emotional stress is so extreme that actors have no control over their reactions, and whether in such circumstances, there ought to be an excuse available to actors.

Marilyn MacCrimmon argues that the current reasonableness requirement is based on a model of rationality in which the rational choice is that which best promotes the individual's personal interests.<sup>111</sup> For example, in a factual scenario like that of *R. v. Lavallée*, a male rationality might concentrate on whether or not the accused had any possibility of leaving the relationship. A different, perhaps female, rationality might emphasize the value of the relationship despite its flaws. With a focus on the value of the relationship, there are other relevant considerations beyond the question of the possibility of leaving the relationship such as a belief in the potential for the batterer to reform and the hope that the relationship might continue.<sup>112</sup> Such a model of rationality is possible if emotion is understood to be an integral part of the reasoning process. Emotion might reflect a range of phenomena which escape the clinical assessment of what has traditionally been understood to be pure reason.

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

However, some theorists express concern that experts are used not to give a new voice to women, but to translate women's experience into the entrenched male model of responsibility by making their claims the exception to the rule. Anne Coughlin suggests that the language of Battered Woman Syndrome "testifies to women's passivity, incompetence and timidity, without attributing to her any positive qualities or traits."<sup>113</sup> Evidence of the Battered Woman Syndrome is highly specific. It points to particular symbols for 'learned helplessness' and a 'battering cycle'.<sup>114</sup> These symbols will not always be appropriate to women's experience of abuse. In fact, there may be a

<sup>110</sup> Such circumstances might arise in self-defence cases in which the actor has an honest but unreasonable belief in the necessity of lethal force in self-defence. There is no such defence to even reduce murder to manslaughter. The High Court of Australia recognized the defence in *R. v. Viro* (1978), 141 C.L.R. 88, but subsequently rejected it in *R. v. Zecevic* (1987), 162 C.L.R. 645.

<sup>111</sup> M. MacCrimmon, "The Social Construction of Reality and the Rules of Evidence" in D. Martinson *et al.*, "A Forum on *Lavallée v. R.*: Women and Self-Defence" (1991) 25 U.B.C. L. Rev. 23.

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

<sup>113</sup> Coughlin, *supra* note 100 at 88.

<sup>114</sup> L. Walker, *Battered Woman Syndrome* (New York: Springer, 1984); A. Browne, *When Battered Women Kill* (New York: Free Press, 1987).

danger in adopting the language of psychology at all. Feminist psychologists have been critical of the research method of modern psychology. "An extensive literature identifies the scope of psychology's marginalization of women, including ... psychology's (mis)representation of the experience of women as deviant from the male norm."<sup>115</sup> Isabel Grant argues that to render an abused woman's conduct reasonable, expert testimony shifts the focus of the inquiry away from the fact of abuse. Furthermore, with the testimony being presented in the language of psychiatry, helplessness is easily translated into a syndrome.<sup>116</sup> With a syndrome established, the danger is that battered women are excused because they satisfy a label and not because their conduct is a reasonable response to their situation.<sup>117</sup> The law must learn to be open to more flexible evidence of women's experience of abuse.

The law must be careful not to impose expert evidence of the Syndrome in cases where it would not be appropriate. If evidence of the Syndrome is accepted too readily as the ultimate explanation of a woman's behaviour in an abusive relationship, it can be put to surprising and controversial uses. For example, the defence team for O.J. Simpson named Lenore Walker, the writer of two authoritative books on the Syndrome, as a defence witness; presumably to testify that Simpson did not fit the stereotype of a batterer.<sup>118</sup> There were cries that this took the use of research on the Battered Woman Syndrome too far. Melanie Griffith argues that courts should reject the use of the Battered Woman Syndrome where the victim's state of mind is not at issue.<sup>119</sup> However, if the Syndrome is presented as objective truth, it may be that such uses are unavoidable.

The law must also be careful not to accept expert evidence of the Syndrome to the exclusion of other important contextual considerations. Julie Stubbs and Julia Tolmie argue that race is too often ignored within the framework of evidence of abuse. They point out that in leading Canadian and Australian cases in which evidence of the Battered Woman Syndrome was introduced (*Lavallée* in Canada and *R. v. Hickey*<sup>120</sup> in Australia), at least one of the parties to the relationship was aboriginal, and yet, no mention was made of this in either of the judgments.<sup>121</sup>

The acceptance of a self-defence claim by battered women is consonant with a transformation in the place of women in society throughout this century. Prior to the 20th century, chastisement of one's wife was an accepted social practice in Western culture. Up to that time, there was no legal recourse for a woman in response to her husband's legitimate chastisement. Around the turn of the century, chastisement was outlawed in British and American common law.<sup>122</sup> A significant step in the transformation of women's status in relationships was the public focus on domestic violence in the 1960s. Throughout these social transformations, the generic construction of the defence of self-defence has not changed.<sup>123</sup> One of the elements of the defence in Canada is that the actor must

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<sup>115</sup> Bohan, *supra* note 25 at 2.

<sup>116</sup> I. Grant, "The 'Syndromization' of Women's Experience" in D. Martinson *et al.*, *supra* note 111.

<sup>117</sup> Wilson J. was cognizant of this danger in *Lavallée*, *supra* note 107 at 890: "The focus is not on who the woman is, but on what she did." Wilson J. goes on to quote a passage to this effect from Phyllis Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985) 8 Harvard Women's Law Journal 121 at 149.

<sup>118</sup> As it turned out, Walker was never called by the defence.

<sup>119</sup> M. Griffith, "Battered Woman Syndrome: A Tool for Batterers?" (1995) 64 Fordham L. Rev. 141.

<sup>120</sup> (14 April 1992), Supreme Court of New South Wales [unreported].

<sup>121</sup> J. Stubbs & J. Tolmie, "Race, Gender and the Battered Woman Syndrome: An Australian Case Study" (1995) 8 C.J.W.L. 122.

<sup>122</sup> J. Meier, "Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice" (1993) 21 Hofstra L. Rev. 1295.

<sup>123</sup> Symposium, (1993) Harvard L. Rev. 1499 at 1501ff.

face the threat of an unlawful assault.<sup>124</sup> This requirement has been criticised for assuming all actors to possess an equivalence of physical strength and defensive resources, and therefore, an equal ability to act in self-defence.<sup>125</sup> Recently, through the use of expert testimony, the generic elements have been considered in the particular psychological and social context in which they arise. When put in context, a whole variety of questions about the social appropriateness of a battered woman's action attain greater significance:

Why should a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself?<sup>126</sup>

The advent of self-defence claims by battered women is an important development in the law of self-defence. The law has been willing to confront new perspectives of the actor without altering the text of the law. Instead of creating a special defence for the battered women's self-defence claims, the law has applied a new and particular understanding of battered women plotted by psychologists and applied it within the parameters of the general self-defence claim. In doing so, new perspectives on the necessity of self-defence and the very concept of reasonableness have been discovered.<sup>127</sup> The approach has the potential to influence claims for self-defence which arise in a variety of different contexts, challenging the traditional understanding of what is a reasonable response to fear.<sup>128</sup> The self-defence claims of battered women are controversial because they bring sharply into focus what is reasonable and who—the law or medical experts—should be determining what is reasonable. As such, the controversy is where it should be, surrounding questions of value, power and control in society, and not, as in the defence of provocation, lost in an illusory inquiry into the normality of a loss of self-control.

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<sup>124</sup> See ss. 34(1) and 34(2) of the *Criminal Code*; *Reilly v. R.*, [1984] 2 S.C.R. 396, 55 N.R. 274; *R. v. Baxter* (1975), 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A.); *R. v. Bogue* (1976), 30 C.C.C. (2d) 403, 13 O.R. (2d) 272 (C.A.); *R. v. Whynot* (1983), 9 C.C.C. (3d) 449, 37 C.R. (3d) 198 (N.S. C.A.). For a general discussion, see I. Grant, D. Chunn & C. Boyle, *The Law of Homicide* (Toronto: Carswell, 1994) at 6-39. Note, however, that *Lavallée*, *supra* note 107, and *R. v. McConnell* [1996] 1 S.C.R. 1075 [hereinafter *McConnell*] have challenged the requirement of an imminent assault.

<sup>125</sup> Taylor, *supra* note 100; Willoughby, "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" (1989) 38 Kansas L. Rev. 169.

<sup>126</sup> Wilson J. provides this list of questions in *Lavallée*, *supra* note 107 at 871.

<sup>127</sup> E.g., A. McColgan, "In Defence of Battered Women Who Kill" (1993) 13 Oxford J. Leg. Stud. 508 at 527: "The application of self-defence to many battered women who kill does not involve any alternation or extension of the defence, rather a rethinking of the way in which the requirement that the defendant's use of force be reasonable is applied to cases other than those involving the traditional model of a one-off adversarial meeting between strangers." But see D. Hanson, "Battered Women: Society's Obligation to the Abused" (1993) 27 Akron L. Rev. 19 at 24: "[A]s battered women are often not faced with *immediate* danger to their life, self-defense is a tenuous theory upon which to rely. The [Battered Woman Syndrome] should be granted its own chapter within the book of defenses to a charge of homicide. The Syndrome should be uniformly applied and standards should be defined in order to properly inform battered women when they may act, and when they may not."

<sup>128</sup> E.g., in *McConnell*, *supra*, note 124, the Supreme Court accepted a comparison between expert evidence of Battered Woman Syndrome, which puts the beliefs of the battered woman in context, as well as on the affect of the prison environment on the reasonable beliefs of an inmate.

## C. Duress

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

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

As with self-defence, under the statutory defence of duress, the discussion of emotion is in the context of the actor's beliefs. This seems to exclude an understanding of emotion in terms of affect. The defence is also available in Canada under the common law.<sup>129</sup> The most recent formulation of the defence under the common law is in *R. v. Hibbert*.<sup>130</sup> The Supreme Court adopted the concept of "normative involuntariness" from *Perka* as the rationale for the defence.<sup>131</sup> The extent to which emotion is a consideration in the defence depends on the interpretation of this concept.

In interpreting normative involuntariness for the defence of necessity in *Perka*, Dickson J. for the majority of the Court engages in two distinct discourses. The first is the language of rational choice: compliance with the law must be "demonstrably impossible."<sup>132</sup> This suggests that in the cold light of day, the defendant must be able to point to his or her limited available options and to demonstrate that he or she effectively had no choice. Dickson C.J. accepts the view that it is "ideologically desirable for the government to treat its citizens as self-actuating, choosing agents."<sup>133</sup> If this approach is applied to the defence of duress, it would seem that it is not the circumstances of fear which ground the defence, but the absence of a rational alternative choice to complying with the threats. In this discourse, there is no separate consideration of emotion. However, this is not because the Court understands the relationship between reason and emotion to be integral. On the contrary, the Court accepts the division of reason and emotion and looks only to reason as a relevant consideration in the judgment of responsibility.

Intermittently, Dickson C.J. engages in another discourse which emphasises that the person must have been "compelled" to act by "normal human instincts. . . the situation must be so emergent and the peril must be so pressing that *normal human instincts cry out for action* and make a counsel of patience unreasonable." [Emphasis added]<sup>134</sup> This discourse suggests it is not only reason which dictates whether a course of action should be adopted but also *instinct*, which is the basis of affective reactions. It is unclear whether Dickson C.J. intends to distinguish the cries of instinct from the choice of reason. There are a number of possible interpretations. First, instinct may simply be a reason to act. When the instinct cries out (such as an instinct of self-preservation) it indicates that there is a good reason to act which ought not to be ignored. In this case, instinct

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<sup>129</sup> In *R. v. Paquette* (1976), [1977] 2 S.C.R. 189 at 195-96, 30 C.C.C. (2d) 417 at 422-23 [hereinafter *Paquette*] the Supreme Court of Canada held that the defence of duress under s. 17 of the *Criminal Code* applied only to principals but the common law defence was open to parties as well.

<sup>130</sup> *R. v. Hibbert*, [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193 [hereinafter *Hibbert* cited to S.C.R.]. In *Hibbert*, the Court simply accepts that the common law defence is available to parties to attempted murder. Given the Court's reliance on U.K. law in *Paquette* and subsequent changes in the availability of the defence in the U.K., it would have been helpful for the Court to have indicated the scope of the defence at common law in Canada.

<sup>131</sup> *Perka*, *supra*, note 22 at 398-99.

<sup>132</sup> *Ibid.* at 400.

<sup>133</sup> *Ibid.* at 399.

<sup>134</sup> *Ibid.* at 400 and *Hibbert*, *supra*, note 130 at 1017.

is understood cognitively—instinct cries out; the cry is appraised in the particular circumstances; and appropriate action is chosen. Alternatively, instinct might be understood to compel action as a bio-physical affect, much like a reflex. On this reading of instinct, Dickson C.J. could be interpreted as supporting an interpretation of normative involuntariness which includes uncontrollable reactions in states of emotional stress. Human instinct might include the incidence of emotion and the epithet “normal” might confine the relevant emotions to those that arise ordinarily, having the same limiting effect as the concept of the ‘ordinary person’ in the defence of provocation. If this interpretation were accepted, there would seem to be no barrier to arguing that the circumstances were so stressful (perhaps because the choices were so narrow) that the person “was not for the moment master of his own mind”, and acted while in this temporary condition. As such he or she should be wholly or partially excused.

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

Given the restrictive scope Dickson C.J. leaves for the defence of necessity in *Perka*, it seems clear that his interpretation of normative involuntariness was intended to be limited to constrained rational choices, and was not intended to excuse conduct because it was uncontrollable. In *Hibbert*, the Supreme Court endorses a restrictive reading of Dickson C.J.’s interpretation of normative involuntariness. The Court in *Hibbert* states that the test for “involuntariness” is whether “the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could be called a choice. If he was making a choice, then the wrongful act cannot have been involuntary in the relevant sense.”<sup>135</sup> Having accepted a narrow interpretation of normative involuntariness, the Court is left with a defence which would not excuse people even when their conduct was reasonable in the circumstances. Perhaps cognizant of the narrow scope left for the defence, the Court holds that the objective test should explicitly consider the “human frailties” of the accused which once again suggests an affectivist understanding of emotion.<sup>136</sup>

It is not clear what is considered a relevant human frailty for the purposes of the defence. The Court relied on the discussion of human frailty in *R. v. Creighton* which held that relevant human frailties are those which “render the accused incapable of perceiving the correct set of facts” but do not include a “sudden and temporary incapacity to appreciate risk due to exigent circumstances.”<sup>137</sup> In the same case in dissent, Lamer C.J. discussed illiteracy as an example of a relevant human frailty in certain circumstances.

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

<sup>135</sup> *Hibbert*, *ibid.* at 1017.

<sup>136</sup> *Ibid.* at 1021.

<sup>137</sup> *R. v. Creighton*, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346 at 362, 105 D.L.R. (4th) 632 at 649.

particular circumstances.

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

The common law defence of duress in Canada has its origins in the United Kingdom. The House of Lords was asked to reconsider the availability of the defence for murder in *R. v. Howe*. The Court unanimously held that the defence was not available to a charge of murder. Lord Hailsham submitted that duress should be treated like provocation. He held that the defences of provocation and duress are both based on a "concession to human frailty" but that one involves a "loss of self-control" and the other involves a conscious decision, "coolly undertaken," to choose the lesser of two evils.<sup>138</sup> Lord Hailsham draws a sharp distinction between anger under provocation which is based in affect, and fear under duress which is based in cognition. He expects a higher standard of an actor's cognitive ability to refrain from committing homicidal acts under duress than under provocation.

The judgment of Lord Hailsham represents a common approach to defining the limits of the defence of duress. It raises once again the disparity in the level of self-control expected of actors under extreme anger and extreme fear, and demonstrates a tendency of courts when engaging in a mechanistic discourse to resolve questions of personal responsibility by making definitive statements about what is an ordinary level of control. Lord Hailsham was prepared to demand heroism of actors faced with life threatening situations.<sup>139</sup>

I have known ... too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either "just or humane" which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and poltroon in the name of a "concession to human frailty."<sup>140</sup>

In this passage, which was central to his judgment, Lord Hailsham makes a psychological assessment of those who submit to threats under duress—they are cowards who possess a less than ordinary degree of courage.

Such an analysis of human behaviour might find support if emotion is understood mechanistically. However, if emotion is a social construction, Lord Hailsham's analysis is questionable. For if emotion is a social construction, the context in which people experience emotion is vitally important to determining how their behaviour ought to be judged. To understand the fear experienced by the appellants, Howe, Bannister, and Bailey, in response to the threats of Murray, it would be necessary to assess their experience of fear in 1983 at a time when they have just been released from prison and come under the influence of Murray. On the facts of *Howe*, it may be that the claim for the defence is still weak. However, Lord Hailsham does not restrict his

<sup>138</sup> *Howe*, [1987] A.C. 417 at 435, 1 All E.R. 771 (H.L.) at 782 [hereinafter *Howe* cited to A.C.].

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.* at 432.

analysis to the facts of the case. Instead he judges the accused by the standard of ordinary people he has known who have performed acts of heroism. In doing so, Lord Hailsham takes accused persons out of their social contexts, and imposes his own context for the assessment of the ordinariness of their fear.

So who is Lord Hailsham's ordinary person? It is very likely that Lord Hailsham's experience of the heroism of "ordinary human beings of no more than ordinary fortitude" refers to his personal experience of heroism during the Second World War. In two separate autobiographical volumes, Lord Hailsham acknowledges the influence of the army on his life, particularly his active service during the war.<sup>141</sup> When Britain entered the war in 1939, Lord Hailsham was thirty-two years old. Although he could have avoided military service,<sup>142</sup> he enlisted at the earliest opportunity<sup>143</sup> and speaks with pride of his involvement in active duty.<sup>144</sup> Lord Hailsham experienced the dangers of war firsthand. He was dining in a restaurant in London with his father when it was bombed during a German Blitz; and, while on active duty in the Middle East as a junior officer with the Second Battalion of the Rifle Brigade, received a minor injury from Messerschmitt fire. He was also affected by the tragedy of loss of life during the war. He describes one occasion in which he had the unpleasant task of convincing the father of one of his comrades that his son had died and was not just 'missing in action'.<sup>145</sup> His active military service ended when he suffered an attack of infective jaundice in 1942.

Lord Hailsham's personal experience of the war influences what he understands can be expected of the emotions of others. He suggests in his concept of 'the ordinary hero' that the capacity to show courage in the face of fear that was displayed by soldiers and civilians during the Second World War can be attributed to a person facing a threat to their life during (relative) peacetime. Psychological studies have been carried out on the incidence and effect of fear experienced by soldiers and civilians during the numerous wars of the 20th century.<sup>146</sup> The studies suggest that both soldiers and civilians display an extraordinary ability to cope with the fear of

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<sup>141</sup> See Lord Hailsham, *The Door Wherein I Went* (London: Collins, 1975) and *A Sparrow's Flight: The Memoirs of Lord Hailsham of Marylebone* (London: Collins, 1990) [hereinafter *Sparrow's Flight*]. E.g., *A Sparrow's Flight* at 132: "During the war and since, I have had to comfort many victims of bereavement—husbands, wives, mothers, fathers, girlfriends, brothers, sisters. All these experiences are desperately poignant."

<sup>142</sup> *Sparrow's Flight*, *ibid.* at 129: "I might ... have made arrangements in the event of war to offer my service to the Judge Advocate General's department, for which my legal qualification and experience would, I suppose, have amply qualified me." At 145, Lord Hailsham writes he was offered a job in the Ministry of Economic Affairs but "turned it down on the ground that at my age my only honourable duty was to risk my life with my other contemporaries in the armed forces."

<sup>143</sup> *Ibid.* at 129: "After the war had broken out, my main preoccupation was to join the Army. I could, of course, have waited until I was called up, or placed myself in a reserved occupation. But this seemed to me an ignominious course."

<sup>144</sup> *The Door Wherein I Went*, *supra*, note 141 at 117: "I showed a willingness from the first to expose myself in an infantry battalion, ... and, in the event, I did, in fact, have the honour to lead an infantry platoon in a minor battle and numerous night patrols in the desert in 1941."

<sup>145</sup> *Sparrow's Flight*, *supra*, note 141 at 131-132.

<sup>146</sup> E.g., S. J. Rachman, *Fear and Courage* (New York: W.H. Freeman and Company, 1990); R. A. Gabriel, *No More Heroes: Madness and Psychiatry in War* (New York: Hill and Wang, 1987); E. Dinter, *Hero or Coward: Pressures Facing the Soldier in Battle* (London: Frank Cass and Company, 1985); Lord Moran, *The Anatomy of Courage* (London: Constable and Company, 1966); National Research Council, *Psychology for the Fighting Man* (New York and Washington: Penguin Books and the Infantry Journal, 1943); G. H. Quester, "The Psychological Effects of Bombing on Civilian Populations: Wars of the Past" in B. Glad, ed., *Psychological Dimensions of War* (Newbury Park, Cal.: Sage, 1990).



death during the adversity of war. A number of factors were identified as contributing to this ability. Soldiers are trained to deal with fear. Combat training includes exposure to fearful situations. Soldiers are encouraged to acknowledge their fear so that it becomes a normal phenomenon. They are taught to deal with their fear by keeping their minds on their tasks. Those perceived to be psychologically prone to fear are excluded from front-line combat. In addition, soldiers are paid; they have the possibility of promotion if they show courage; they hate the enemy; they have an ideological commitment to their role; they can legitimately transfer their fear into aggression; they are not isolated but in the company of other soldiers facing the same fear; and they have an incentive to avoid showing fear in front of their comrades.<sup>147</sup> Psychologists found that fear was reduced in civilians during air raid attacks as they became more used to dealing with the attacks, and more confident of the protection offered by shelters. Also, having time to consider the prospect of death, they were better prepared to live in the face of it.

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

Given the disparity in the social circumstances of soldiers and civilians during times of war and actors facing an isolated threat to their life, Lord Hailsham's psychological assessment of their cowardice is dubious. Criminal actors are at a considerable psychological disadvantage with respect to Lord Hailsham's "ordinary human beings of no more than ordinary courage" if the people to whom he refers were in circumstances of war when they displayed their 'acts of heroism'. The standard of their conduct cannot be legitimately compared.<sup>148</sup> Furthermore, Lord Hailsham's willingness to engage in such a comparison demonstrates his belief in the possibility and legitimacy of making universal statements about an actor's emotional state and what their state reveals about their character, choice and capabilities. He fails to understand that emotion is not a biological phenomenon which can be assessed objectively regardless of the circumstances, but a socially constructed entity specific to a particular context.

#### IV. CONCLUSION

The different approaches to understanding emotion in the objective tests of the defences of provocation, self-defence and duress mean that different emotions are granted different excusatory power. In the defence of provocation, the law has made a normative choice to emphasize affective processes connected with anger, and therefore to understand anger as arising spontaneously and uncontrollably within the individual. With this understanding of emotion, the law confronts many difficult questions about human behaviour under extreme emotional stress which it is not well equipped to answer. The understanding of emotion in the defences of self-defence and duress is quite different. In self-defence, the inquiry is unequivocally normative. There is an attempt to understand the emotion of the accused in the specific context in which it arises; then to judge the accused's response to the environment in terms of its reasonableness. In duress, fear is understood

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<sup>147</sup> See generally, Rachman, *ibid.*

<sup>148</sup> It is interesting that the rhetoric of the majority of the House of Lords in *Lynch*, *supra*, note 80 was very different. See, for example, Lord Morris at 670: "For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the courtroom measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed."

in a confusion of approaches, sometimes using the language of cognition, and at other times the language of affect. When it is desirable to restrict the availability of the defence, the law makes unequivocal statements about the degree of psychological fortitude that can be expected of actors.<sup>149</sup>

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

The disparities in the understanding of emotion between the defences of provocation, self-defence and duress have occurred because the law uses a psychology of emotion that emphasizes the mechanisms of cognition and affect to explain normative distinctions between the scenarios in which the defences arise. It has no coherent theory for understanding these mechanisms, altering its understanding of emotion according to the excusatory power it wishes each defence to possess. It has not been my intention to reveal a 'correct' approach to structuring the rules of criminal liability, but simply to suggest that an alternative understanding of emotion might be more responsive to some of the unacceptable normative implications which were discussed in relation to the operation of the defences. I believe, perhaps optimistically, that the law's understanding of emotion is maturing. My optimism is based predominantly on recent developments in the law of self-defence. There is a new concern for context in the application of the defence to battered women, which is influencing more generally the way self-defence claims are framed. My optimism is in spite of the continued existence of the defence of provocation which is based on an insupportable understanding of emotion. The defence inhibits the law's attempt to properly evaluate context by pouring contextual considerations into the obscure concept of a loss of self-control.

To conclude that the law must take context seriously is inane. Legal realists and others have been making this plea for a good part of this century. What is new in this article is a call for a deeper level of contextuality. Emotion has been the one entity in law which belies context. It operates as a ground of excuse despite what the context suggests ought to be the personal responsibility of the actor. Thus, though the context might suggest that the actor's conduct of killing the victim in extreme violence displays a high degree of culpability, his or her anger may yet partially excuse it. Conversely, emotion has been used as a ground of excuse to the exclusion of context, when the context itself might have excused the conduct. In this way, theorists fear that the Battered Woman Syndrome may be a means of framing important contextual considerations into the language of emotional pathology. The power of emotion to excuse, despite or instead of context, is possible because emotion is understood as a mechanistic phenomenon which is opposed to reason and thus resists the influence of socialization. The social constructionist approach to

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<sup>149</sup> See, e.g., Lord Hailsham's judgment in *Howe*, *supra*, note 138 at 423-36.

understanding emotion, on the other hand, challenges the law to incorporate emotion in a deeper contextuality which makes for a more transparent application of the rules of criminal liability and provides for a more satisfactory basis for criminal responsibility.

