Excuses and Intelligibility in Criminal Law

Diana Young*

Introduction

The criminal justice system is designed to allot praise and blame, and to judge behaviour rather than understand it. Excusing conduct is a function of judging, however, and the criminal law has made efforts to modify the labels it attaches to certain behaviours by developing a rationale for excusing. In the examples discussed in this paper, courts have excused an action committed in response to overwhelming pressure on the grounds that the action was in some sense involuntary. In such cases courts have sometimes found that otherwise criminal conduct may go unpunished on the grounds of necessity or duress.

Courts have had difficulties articulating a satisfactory rationale setting out the parameters of such defences. I will argue in this paper that this difficulty stems from a concept of the individual and her relationship to the environment that is both fundamental to legal reasoning and resistant to the processes involved in understanding the defences of necessity and duress.

In Part 1 of this paper I will discuss two conceptions of the individual and how they relate to legal theory. These conceptions posit differing views of the meaning of autonomy. The way we think about autonomy is crucially important to legal reasoning because autonomy is so closely linked to criminal liability. Generally we are not thought to be responsible for our actions unless we were free to act differently.

I have considered the first conception of the individual primarily with reference to the work of Alan Brudner,[1] which links freedom, or autonomy, with reason. In his view, to be human is to have an innate capacity for reasoning. Moral reasoning is independent of the physical and affective components of the individual; it is described as the "worldless" or

* Assistant Professor, Department of Law at Carleton University.

[1] Alan Brudner, "Owning Outcomes: On Intervening Causes, Thin Skulls, and Fault-undifferentiated Crimes", (1998) 11 Can. J.L. & Jur. 89 [Brudner, "Owning Outcomes"].

"disembodied" self, which transcends the constraints of the body and the emotions. This transcendence could potentially allow people to experience limitless freedom within the realm of moral reasoning. Since autonomy, seen as the capacity for moral reason, is a primal fact of human existence, the assessment of an accused's moral blameworthiness in terms of the criminal law turns on the extent to which the will was instrumental in bringing about a particular result. A disembodied conception of autonomy can be more easily reconciled with the view that impartial legal judgments are best achieved through the application of the same rules to everyone.

I will consider a second conception of the individual primarily with reference to Jennifer Nedelsky's work.[2] She has suggested an alternative picture of the individual that does not posit autonomy as an intrinsic feature of humanity. Instead, she offers a model of autonomy that is developed through relationships with others and through "creative interaction with the environment".[3] She describes this version as "embodied autonomy". If we accept the idea of the embodied agent as an accurate description of the individual, and if autonomy is central to criminal liability, then the physical and social realities in which an individual resides become more important to the judging process in criminal cases.

The inseparability of agency and context implied by the embodied notion of autonomy is linked to Sarah Hoagland's concept of intelligibility as an alternative to the dichotomy of praise and blame that tends to characterize moral judgments.[4]

The autonomy of the embodied agent is intrinsically connected to this context. Embodied autonomy implies that autonomy and constraint are closely interconnected, but because the criminal law seeks to impose universally applicable norms, the process of assessing criminal liability often must exclude information regarding the embodied agent's social and physical position. As a result of the failure of legal theory to articulate what it means for the embodied

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[2] Jennifer Nedelsky, "Meditations on Embodied Autonomy" in Andrew D. Weiner and Leonard V. Kaplan, eds., *Graven Images, Volume 2, The Body* (Madison: University of Wisconsin Press, 1997) at 159 [Nedelsky, "Mediations"].

[3] *Ibid.*

[4] Sarah Lucia Hoagland, *Lesbian Ethics: Toward New Value* (Palo Alto: Institute of Lesbian Studies, 1989).

agent to have autonomy, we tend to assign liability on the basis of bright lines drawn between voluntariness and involuntariness, intent and inadvertence, capacity and incapacity.

Some of the "hard cases" of criminal law demonstrate this. Part 2 of this paper considers the doctrines of duress and necessity as an illustration of how courts have struggled with issues of autonomy and constraint. The defences of duress and necessity arise when exceptional circumstances lead to the commission of an offence, such that we feel it should not attract criminal liability. They apply to actions where it is difficult to assign moral responsibility to the agent because the question of whether the action was voluntary or involuntary can only be understood by addressing the problem of autonomy in the face of conditions of constraint. This feature of constraining conditions compels the adjudicator to consider context. *R. v. Perka*[5] and *R. v. Ruzic*[6], illustrate that Canadian courts have approached the problem by attempting to link necessity and duress with the fundamental principle that there should be no criminal responsibility for involuntary acts.

These cases represent an attempt by the courts to fit a conception of embodied agency into a system of reasoning that identifies moral agency with the agent's independence from physical and social context.

PART 1: Volition as Reason

In *Perka*[7], the Supreme Court of Canada asserted that a defendant in extenuating circumstances might be acquitted of a criminal offence on the grounds of necessity; however, it also expressed concerns about sheltering certain defendants from the full effect of a general prohibition. Wilson J. remarks:

> The underlying principle...is the universality of rights, that all individuals whose actions are subjected to legal evaluation must be considered equal in standing. Indeed, it may be said that this concept of equal assessment of every actor, regardless of his particular motives or the particular pressures operating upon his will, is so fundamental to the criminal law as rarely to receive explicit

[5] [1984] 2 S.C.R. 232 [*Perka*].
[6] [2001] 1 S.C.R. 687, aff'g (1999), 41 O.R. (3d) 1 (Ont. C.A.)[*Ruzic*].
[7] *Perka, supra* note 5.

> articulation. However, the entire premise expressed by such thinkers as Kant and Hegel 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 supports the view that an individualized assessment of offensive conduct is simply not possible. If the obligation to refrain from criminal behaviour is perceived as a reflection of the fundamental duty to be rationally cognizant of the equal freedom of all individuals, then the focus of an analysis of *culpability* must be on the act itself (including its physical and mental elements) and not on the actor.[8]

Wilson J.'s view reflects a theme of moral philosophy, which has had a profound impact on how we think about responsibility in criminal law. That theme presents the idea that justice has its source in rational processes and is therefore universal. Justice operates outside any individual actor and must be free from any predilections relating to individual characteristics in order to maintain its objectivity. This is why legal reasoning in the criminal law involves, to a large degree, recognizing and isolating a legally relevant action, plucking it out from its social, historical and relational context, and determining whether it matches a description of an offence found in the Criminal Code. The idea of Criminal Law as a process of defining behaviour in accordance with universally applicable criteria is deeply embedded in our concept of what it means to be objective in determining liability. This conception of criminal culpability does not deny that individuals each have a variety of attributes that differentiate them from each other, but those attributes – physical condition, emotional makeup, social position – are contingent and arbitrary because they are not brought about by the agent's will. The will, on the other hand, is distinct from individual attributes. It is the will that frees us from the tyranny of our attributes, because it gives us the capacity to rise above them. An individual who responded solely to the demands of his attributes – impulses dictated by physical and emotional pressures – would not truly be an agent because the individual does not choose those attributes. Our agency is a function of our ability to make conscious and rational choices. This capacity to freely choose through the process of reasoning is crucial to the concept of what it is to be human.

It is the capacity for freedom in this theoretical, or formal sense that provides scope for ethics and moral responsibility. Alan Brudner adopts this view of free will when he draws an

[8] *Ibid.* at 270-271 (emphasis in original).

analogy between criminal responsibility and a Hegelian conception of property.[9] That conception suggests that agency is fully realized when the objects that we use to achieve our aims become our own. By this account, the agent co-opts the object entirely when its meaning is given by the agent's purpose for it. Similarly, criminal responsibility for a particular outcome is fully imputable to an agent when that outcome fully reflects the agent's will. These conceptions of property and imputation "both presuppose an idealist outlook according to which an object's reality is perfected by the meaning it gains in relation to the agent's purpose".[10] Thus:

> The search for what is strictly imputable to agency led to the disembodied self because it was a search for what belongs unconditionally to freedom as distinct from that which depends on chance factors independent of the self's control.[11]

For this reason, Brudner connects blameworthiness to imputability. The extent to which the agent can be said to "own" the outcome of his actions, or the extent to which the outcome reflects the agent's purpose, is the extent to which the consequences of his actions are imputable to him. Degrees of imputability vary from full subjective *mens rea* with specific intent to mere negligence. This explains why, for example, manslaughter is treated as a less serious crime than murder. It also explains why even in negligence-based crimes courts go to great lengths to limit liability to situations where, even if the accused did not foresee the consequences of his actions, he had the capacity to do so.[12]

Imputability, by this account, is a function of the extent to which the "disembodied self" succeeds in remaking its environment in its own image, because it is in this that it realizes the freedom which is essential to criminal responsibility. An individual's freedom is expressed in concrete terms only where his environment is a reflection of his "worldless self". The free person is not a reflection of his environment.

Under these conditions, it makes sense to think of the rules of justice as being universal. The will, which reposes in the disembodied self, is the realm of rationality. While individual attributes are infinitely variable, the rational transcends individual differences. It is the capacity

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[9] Brudner, *supra* note 1.
[10] *Ibid* at 103.
[11] *Ibid.* at 101-102.
[12] See *e.g.*, *R. v. Creighton*, [1993] 3 S.C.R. 3 [*Creighton*].

for rational thought that provides scope for the subject's free moral choice, and gives him the power to transcend his individual circumstances, and to comply with the universal requirements of right.

Voluntariness or *mens rea* is relevant to culpability because an unintentional act, not being freely chosen[13], does not challenge the supremacy of a law founded on the assumption of the individual's formal freedom.[14] Social context and personal characteristics, because they are necessarily distinct from this conception of freedom, are not usually relevant to the issue of culpability.[15] The idea that the particularity of the individual may affect the meaning of the act is inimical to legal reasoning in a system that requires universality and homogeneity of application for its claim to legitimacy.

Context and Intelligibility

This version of objectivity is occasionally called into question when we identify or empathize with an offender. We feel a sense of empathy when an agent's actions, seen within their surrounding circumstances, are understandable. In such cases, the broad concepts of wrongdoing, and such blunt descriptions of character as "murderer" or "thief" seem unsatisfactory. Nils Christie observed:

> All other things being equal, though obviously they are not, it seems to be a plausible hypothesis that the greater the amount of information on the totality of the life of the relevant system members, the less useful (and needed) are the generalized concepts such as "sickness", "madness", - and "crime". The system members come to know

[13] In the sense of having been the result of the accused's reasoning capacity.

[14] See, *e.g.,* Alan Brudner, "A Theory of Necessity" (1987) 7 Oxford J. Legal Stud., 339 at 349:

> The reason that motive is regarded by the law as irrelevant to culpability is that, from the standpoint of the authority of law, all motives are on a par; they are the motives of an individual ego. Accordingly, the concept of law cannot rationally admit as a ground of exculpation the fact that a choice was coerced, for if the law is contradicted by an unlawful consequence that is desired by the agent, it must also be contradicted by an unlawful consequence that is intended by the agent because necessary for the satisfaction of another desire. Rather, the only excusing conditions consistent with the notion of law are those under which the law, though breached, is undisturbed in its supremacy. However, such conditions are precisely those which negate the implicit claim to validity of the wrongful act because they signify that the consequence was not chosen.

[15] Such considerations are relevant at the sentencing stage, however.

> so much about each other, that the broad concepts in a way become too simple. They do not add information, they do not explain.[16]

When people don't empathize with an offender, when his motives are not intelligible, they are more likely to see objectivity as best served by the rigid application of universal rules, and are more comfortable assigning blame on these terms. However, when people experience empathy, they might see the principle of universality averred to in the quotation from *Perka* reproduced above as the triumph of technicality over common sense.

These kinds of reactions to moral problems give some credence to Sarah Hoagland's conception of intelligibility as a form of judgment. She suggests that approaching moral judgment through the dichotomy of praise and blame, or responsibility and excuse, that tends to result from the application of set rules of conduct to individual situations may result in errors of moral judgment. When people's circumstances or experiences vary a great deal from our own, we may be too quick to see their responses as irrational or immoral. On the other hand, an open communication might help to show how these responses were rational or even morally correct in the circumstances. Intelligibility results from this process of inquiry into context and understanding the reasons for people's choices.

However, if we understand moral reason as a product of an isolated, "worldless" self, then our analysis of the moral quality of an act will be limited, as Brudner suggests, to a determination of the extent to which the outcome of an agent's activities accord with her volition. In such an analysis, there will be no inquiry into the way in which her will might have been shaped by her circumstances, because the freedom that gives rise to criminal liability only exists if we suppose that the will is independent of those circumstances. But it is just this form of inquiry that may make the agent's actions intelligible.

Therefore, the intelligibility of an actor's conduct might come into conflict with our need for rationality in the judging process (which is essential if we are to exclude the influence of unacceptable prejudices from that process). If moral reasoning is inextricably linked to universal

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[16] N. Christie, *The Limits to Pain*, (Oslo: Universitetforlager, 1981) at 81.

processes of rationality, and therefore transcends individual differences, then moral reasoning necessarily excludes consideration of an individual's circumstances. Moral blameworthiness must turn on a stark distinction between intentional and inadvertent action. The result is a dissonance between what we know about the complexities of human agency and what we have come to identify as impartiality in judgment.

However, there have been theories that challenge the connection between autonomy and the conception of the disembodied self, which may provide relief from this dissonance. If such challenges are valid, a form of compassion based on an understanding of context appears more rational - more in keeping, in fact, with the realities of human existence.

Agency and Responsibility

I suggested above that the equation of moral blameworthiness with *mens rea* is connected to an idealist view of autonomous individual. Similarly, the *actus reus* of an offence has a mental component. If an action was involuntary, in the sense that the agent had no conscious control over his physical movements, then there can be no criminal liability.[17] Although moral blameworthiness is now a constitutional requirement of criminal liability, intent, or voluntariness, rather than motive, or reasons, has come to consume almost all of the courts' inquiry into the question of blame.[18]

Although *mens rea* doesn't necessarily involve intent to bring about the specific harm caused by the commission of the offence, in most cases the issue of moral blameworthiness turns on the determination of whether there was an opportunity for the will to affect outcome.[19] If the will can be understood as operating free of individual predilections, if universal moral rules derived from pure reason is the source of volition, then perhaps it makes sense to limit the

[17] *R. v. Daviault*, [1994] 3 S.C.R. 63.

[18] See *R. v. Ruzic, supra*, note 6 at 712:

> Morally involuntary conduct is not always inherently blameless. Once the elements of the offence have been established, the accused can no longer be considered blameless. This Court has never taken the concept of blamelessness any further than this initial finding of guilt, nor should it in this case.

inquiry into moral blameworthiness in this way. The absolutism of the *mens rea*/voluntariness analysis is a reflection of the equation of moral reasoning with free will, which stands apart from the personal circumstances of the agent.

This conception of the will has sometimes been disputed. On an obvious level, the very fact of our physical existence leads to the conclusion that if free will implies an ability to choose without constraint, then the will is never entirely free. An assessment of whether an act can be said to be the product of free will is, on this account, largely a question of degree.

This analysis still posits the existence of a will that can be conceived of as distinct from our physical and affective components. Constraint, which flows from these components, is viewed as an unfortunate characteristic of physical life, which impedes the will with the demands of physical and emotional existence. When choosing between alternatives we are subject to pressures that are not the products of conscious choice. Psychoanalysts tell us, for example, that much of what makes up our personalities resides in the unconscious and gives rise to desires and emotions that are compelling, but not necessarily explicable on a conscious level. The fact that we inhabit physical bodies means that we have, to varying degrees, limitations and needs for our continued survival. Our capacity to experience pain or pleasure subjects us to pressures to seek material things necessary to our comfort. If not for its vulnerability to invasion by these kinds of pressures, the will, on this account, would be pure and limitless. The moral agent might still hope to transcend these pressures, however, through the use of moral reasoning.[20]

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[19] Courts have found that an offence carried an element of moral blameworthiness even if the actor did not actually desire to bring about the consequences of his/her action, if those consequences were foreseeable. See, *e.g.*, *R. v. Creighton, supra* note 12.

[20] This sort of limited acknowledgement of the impact of embodied reality on the will is implicit in Brudner's view that the penal law can be divided into a pure agency paradigm and a welfare paradigm. If the agent realizes her freedom through objective transformation of her environment, she still requires basic physical supports if this freedom is to be meaningful. See Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995) at 246.:

> Viewed from the standpoint of realized freedom, welfare means the satisfaction not only of contingent preferences but also of values indispensable to the coherent self-expression of agency – values whose goodness is thus based on reason rather than subjective desire. In order that the goals one chooses be authentically one's own or self-determined, one must have a minimum degree of life security, physical health, education, and economic wherewithal.... These are not primary goods in John Rawls's sense, because they are not things every rational agent would want more of to achieve the ends that he has. Rather, they are goods every rational agent would want to a sufficient degree in order that the ends he pursues can be freely chosen rather than chosen under prejudice or constraint.

Nedelsky asserts that autonomy is not a primal fact of human existence, but a capacity that must be realized through relationships of interdependence and connection with others.[21] We develop autonomy, and create choices for ourselves, through "creative interaction with our environment."[22] She suggests that autonomy should really be regarded as a type of embodied agency, wherein physical existence creates an environment with which the agent interacts, developing autonomy through the values implied by her choices – autonomy being a function of the consciousness of those choices.

This leads to another way to think about the physical and affective components of the individual - we could conceive of them as integral parts of the will, which give meaning to our choices. The pressures that are part and parcel of embodied existence also give the freedom of the will its meaning. It is because we experience pressures that we experience preferences. The pressures exerted on the will may be multifaceted and contradictory. But without them there are no preferences, and without preferences we are faced with a choice between neutral alternatives. Such a choice could only be arbitrary and devoid of meaning.[23] Thus:

> It is not because we are free and moral agents that we are able to make moral choices. Rather, it is because we make choices, choose from among alternatives, act in the face of limits, that we declare ourselves to be moral beings.[24]

In short, it is the very fact of embodied existence, and the limitations implied by that existence, that gives meaning to the choices we make.

We can see how this idea of intelligibility connects to Nedelsky's conception of embodied autonomy by remembering that the choices of the embodied agent are inextricably linked to her environment or context. The idea that we can make moral assessments through the application of universal, predetermined rules, so persuasive if we think of the will as separate

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[21] Nedelsky, "Mediations", *supra* note 2. See also Jennifer Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Stud. 1, Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1997) 42 McGill L.J. 91 [Nedelsky, "Embodied Diversity"].

[22] Nedelsky, "Mediations", *ibid.*, at 167-168.

[23] A.J. Ayer, "Man as a Subject for Science", in Peter Laslett and W.G. Runciman, eds., *Philosophy, Politics and Society*, (New York: Barnes & Noble Inc, 1967).

[24] Hoagland, *supra* note 2, at 231.

and transcendent of embodied existence, seems less compelling if we accept Nedelsky's alternative conception of autonomy. We may only be able to recognize the moral quality of an action by understanding the features of the embodied agent more fully – in other words the strict application of moral rules that allow for excuses only where there is a failure of reason might not provide an accurate picture of the moral quality of an act. The infinite variability of embodied existence means that moral judgments are always made across divisions of experience. The greater these divisions, the less likely the actions of the person being judged will be intelligible. Nedelsky suggests that there is some hope for bridging these divisions, through the process that she describes as "enlargement of mind":

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account...The more views we are able to take into account, the less likely we are to be locked into one perspective, whether through fear, anger or ignorance.[25]

It involves communication and open-minded inquiry into the experiences of people who may be very different from ourselves.[26] It is this sort of inquiry that may make an agent's choice intelligible.

Critiques of this nature present a challenge to moral theories that posit the existence of an independent will that stands apart from individual attributes. They suggest that an autonomous will is a function, not a precursor, of embodied existence. The will does not simply act on the environment – the environment also acts upon and in fact develops the will. Determining whether a person "intends" an act and its consequences might not provide a complete picture of moral quality of the act if the intention is itself not the product the pure, "disembodied self", but a "self" that can never be distinct from the individual's environment and attributes. The interaction between the self and its environment calls into question metaphors of ownership or control as determinants of criminal responsibility, because such metaphors suggest a stark

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[25] Nedelsky, "Embodied Diversity", *supra* note 21 at 107.

[26] See *R. v. R.(D.S.)* [1997] 3 S.C. R. 484 at 506, where the ruling of L'Heureux-Dubé and McLachlin JJ. adopts Nedelsky's idea of "enlargement of mind" This is reflected in their observation that "...notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them."

division between the self and its environment. These critiques gives rise to two observations concerning criminal liability.

First, they have a bearing on the kinds of claims we can make about the criminal law as a reflection of universal justice. They suggest that any concept that makes freedom crucial to responsibility cannot be understood in isolation from an individual's circumstances and attributes, but only as a function of those circumstances and attributes. In that case, assessing the moral quality of an act requires an understanding of context. It is this understanding which lends intelligibility to an agent's conduct.

It also raises questions about what conception of autonomy might be applied to necessity and duress cases. The defences of necessity and duress are quintessentially about understanding the context of an accused's action. Often in these cases we recoil from imposing criminal sanctions because once the circumstances the accused was facing are made clear to us, his response to them seems intelligible. An intelligible action, even if it constitutes a criminal offence, might not seem to merit moral opprobrium. These doctrines require courts to expand the scope of inquiry beyond the traditional *actus reus/mens rea* analysis to a consideration of circumstances or context because they have the effect of exculpating people from criminal liability for *intentional* acts. At the same time, the logic of the universal rule, (in which volition comprises the entirety of the fault component of an offence), requires us to base any exculpation on an analysis that removes volition from the picture. But there is a world of difference between a judgment that takes account of the conditions leading to the actions of a reasoning, moral agent, and a judgment that denies the agency of the judged altogether.

There are other concerns associated with straying from universalism in our application of legal rules. For one thing, identification with an accused may be a purely visceral response to a situation, and we tend to resist the idea that it should have a place in defining criminal liability because it seems to be at odds with the principle that the judging process should be rational. It is

true that sometimes identification with an offender may have its roots in impulses to which we would rather not give effect – an unwarranted prejudice toward the complainant, for example.[27]

In addition, the idea that we must locate an action in a life, in a social structure, or in a particular consciousness suggests a dangerous expansion of the criminal law's highly coercive power to judge not only actions but also character.[28] The law's coercive power– the law's violence, in Robert Cover's words – we feel should be restricted in scope to narrowly defined, codified offences.[29]

But the *law* is fundamentally about enforcing norms of conduct through judgment and punishment. If these judgments have to take full account of all the circumstances of the accused, it is hard to see how the idea of enforceable norms of conduct could maintain its coherence, because there are, no doubt, always reasons for even the most heinous of offences.

Hoagland's proposal of intelligibility as an alternative to praise and blame as a mode of moral judgment is primarily concerned with informal social relationships and political associations. While an approach like intelligibility might be useful as a means of negotiating such relationships, it seems clear that it does not offer a viable alternative mode of legal

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[27] *R. v. Latimer* [2001] 1 S.C.R. 3 aff'g (1998), 131 C.C.C. (3d) 191 (Sask. C.A.) [*Latimer*] is a case in point. Although the Latimer decision was controversial because of the length of the sentence imposed, it is relevant to this discussion because the minimum sentence was not a product of judicial discretion but of the way in which Latimer's action was defined by the Criminal Code, i.e., as second-degree murder. Many Canadians saw the minimum punishment for second-degree murder as too harsh for a mercy killing. The controversy over *Latimer* was probably partly the product of the ease with which many people were able to identify with his suffering and that of his daughter. This identification may also have been a product of the fact that Latimer was very much part of mainstream Canadian society – "...a typical, salt of the earth...prairie farmer", in the words of one Court of Appeal judge. Another disturbing possibility is that the support Latimer received was connected to society's failure to value the life of his daughter due to her disability. There is a risk that empathy, and the resulting desire to be lenient, is the result of impulses that should not affect the adjudicative process.

[28] In saying this I am aware that there are many ways in which the criminal law may be used to punish character rather than actions. These include choices made with respect to the communities we subject to the greatest police scrutiny, and the ways in which lifestyles are perceived by Criminal Justice officials who may have considerable discretionary power in terms of how accused people are treated and how their charges are ultimately disposed of. But I think this kind of problem is less acute in a society that criminalizes certain narrowly defined, discrete acts. In the absence of clearly articulated rules, state agents – police, Crown Attorneys, and adjudicators in the Criminal Justice System – enjoy an increased scope of discretionary power. There is evidence that marginalized individuals who are drawn into the system are also frequently disadvantaged by the ways in which those state agents exercise their discretionary power. See, *e.g.*, Ontario, *Report of the Commission of Systematic Racism in the Ontario Criminal Justice System*, (Toronto: Queen's Printer, December 1995).

[29] Robert Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601.

reasoning. It may offer a clue, however, as to why there are times when the circumstances of the offender seem to make the application of the broad definitions provided by the Criminal Code inappropriate.

If an adjudicator experiences compassion for an accused, it may be a mistake to dismiss that sense of compassion as sentiment or prejudice. If we identify with an offender it may be because there are aspects of his context than make his choices intelligible. Understanding context matters in making moral judgments if we accept this idea of the individual as "embodied agent", because it paints a picture of the moral agent that is perhaps more complex than the subject whose reasoning power allows her to transcend particular attributes in matters of moral choice. It suggests not that there is no agency or freedom, but that agency itself is a product of, and therefore contingent on, the realities of embodied existence.

In the following section, I will consider the doctrines of necessity and duress as ways in which the law has attempted to come to grips with embodied agency and intelligibility. I will suggest that the Canadian courts' analysis of these defences is in an unsatisfactory state largely because of legal theory's inefficacy as a means of addressing the issue of the rational embodied agent and her relationship to moral freedom and criminal liability.

PART II: Necessity and Duress

A: Necessity: Reason as Compulsion

In *Perka,*[30] Dickson J. ties necessity cases to the principle that there is no criminal liability for involuntary acts. But "involuntariness" cases generally occur in situations where the actor had no conscious control over the movements of his body – the will, in other words, did not go with the act. An action that is not the result of a reasoning mind is not freely chosen, and so cannot be imputed to the actor. But in necessity cases, a crime is committed in circumstances where "no reasonable person" would act otherwise. The actor's loss of freedom does not occur because of the loss of his reasoning capacity. His loss of freedom springs from the very reasoning power

[30] *Perka, supra* note 5.

that Brudner would identify as the source of freedom. In necessity cases reason is not freedom. Reason is compulsion.

Justification and Excuse – Reason and Fear

As a general rule exceptions to the criminal law, or defences that will shield an individual from conviction, fall into one of two categories: justification and excuse. In *Perka,* Dickson J. quotes Packer:

> ...conduct that we choose not to treat as criminal is "justifiable" if our reason for treating it as noncriminal is predominantly that it is conduct that we applaud, or at least do not actively seek to discourage: conduct is "excusable" if we deplore it but for some extrinsic reason conclude that it is not politic to punish it.[31]

A justification is not personal to the actor, and is not connected to any of his individual attributes. It can be formulated as a universally applicable rule. Fletcher cites as an example a mother's stealing food to give to her starving child.[32] If the theft is justified, then a third party could also steal to feed the child. If the theft is merely excused, then it is personal to the mother; the excuse would not apply to a third party who stole to feed the same child. The excuse recognizes normal human weakness in the mother's failure to resist the temptation to steal. The mother's relationship to the child produced pressure to commit the crime that no mother could withstand. A justifying condition would apply where the theft was morally correct. In that case, the affective relationship between the stealer and the child would have no bearing on the moral quality of the action. This is why the justification, but not the excuse, gives rise to a universally applicable rule.

Necessity may be analysed as either an excuse or as a justification. Conceived of as justification, necessity involves a choice between evils. Blackstone, quoted with approval in *Perka*, describes a justified action as "the result of reason and reflection", where a person

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[31] Herbert Packer, *The Limits of the Criminal Sanction,* (Stanford: Stanford University Press, 1968) quoted in *Perka, ibid.* at 247.

[32] George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co., 1978). Fletcher is an American legal theorist whose work has been very influential in the development of case law on necessity in Canada and other jurisdictions.

chooses to commit a crime in order to avoid a greater harm.[33] Conceived of as an excuse, necessity acknowledges the wrongfulness of the act but suggests that there were extenuating circumstances such that the act, though wrong, should not be punished. It rests on an assessment of what could be considered acceptable moral failure brought on by human weakness.

The law attempts to make sense of excuses such as mistake or insanity by analysing those cases as situations wherein the accused either did not intend the act or did not foresee its consequences. Such excuses do not challenge the supremacy of the law, because they do not question the validity of the prohibition itself. Necessity, like duress, is more problematic because the actor willingly brought about the illegal consequences.

Fletcher responds to this problem by developing the concept of "moral or normative involuntariness". It rests on the notion espoused by Hart and others that one should not be subject to punishment for offences one "could not help" committing.[34] He suggests that necessity as excuse implies that we must consider the action and the actor in context. "The focus of the excuse is not on the act in the abstract, but on the circumstances of the act and the actor's personal capacity to avoid either an intentional wrong or the taking of an excessive risk."[35]

Fletcher's theory of excuses represents an attempt to overcome the problem of applying legal reasoning to cases that seem to cry out for lenient treatment because of the context in which they occur. Analysing the excused offence as a type of involuntary conduct connects it to the traditional requirement that an act be voluntary in order to attract criminal liability.[36] It is an attempt to reconcile the universalism required by much of our legal theory and the inclination to look beyond the bare definition of an offence to the surrounding circumstances bearing on the moral quality of the act.

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[33] William Blackstone, *Commentaries on the Laws of England* (1941) (abridged edition of William Hardcastle Browne, Gavit, Bernard C., eds.) quoted in *Perka, supra* note 5 at 243.
[34] See *e.g. R. v. Hibbert*, [1995] 2 S.C.R. 973 at 1019 [*Hibbert*]. This is in keeping with the idea in traditional moral theory that moral reasoning is a function of volition and the key to volition is the capacity to reason.
[35] Fletcher, *supra*, note 32 at 798.
[36] *Perka, supra* note 5.

In *Perka,* Dickson J. relies heavily on Fletcher and finds that the doctrine of necessity could exculpate four defendants who were charged with importing narcotics and possession of narcotics for the purpose of trafficking. The accused individuals were transporting a large quantity of marijuana by boat from international waters off the coast of Columbia to a drop-off point in international waters near Alaska. Their vessel began to malfunction in bad weather off the coast of British Columbia. In the interests of their safety the crew decided to seek refuge in a cove on the shoreline. The boat ran aground and the crew off-loaded the cargo. The police discovered the marijuana and charged the defendants.

At trial the defendants pleaded the defence of necessity, arguing that they had to enter Canadian waters due to the dangerous weather conditions and the deterioration of the vessel. They were acquitted. Before the Supreme Court the Crown argued, among other things, that the trial judge had erred in leaving the defence of necessity with the jury.

Dickson J. found that on the facts of the case, there was evidence that could support a conclusion that the accused had acted in response to a life-threatening emergency, and that therefore the trial judge was correct to leave necessity with the jury. He discusses the major concerns that have been cited over the years by courts and scholars with respect to the doctrine of necessity: first, that necessity might import an unacceptable degree of uncertainty into the criminal law; and second, that it might have the effect of undermining the legislative authority of Parliament.[37]

Dickson J. argues that these concerns can be overcome if necessity is framed as an excuse rather than a justification:

> Conceptualized as an "excuse", however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situation where normal human

[37] This same concern was raised in *Morgentaler v. The Queen* [1976] 1 S.C.R. 616 [*Morgentaler*], and in *Southwark Borough Council v. Williams et al.,* [1971] Ch. 734. See also Fletcher, *supra,* note 32, at 792-3. Fletcher suggests that one way of limiting the use of exculpatory justifications that might respond to this problem is by reference to "legislative delegation". In other words, the court could recognise the justification if it appeared that the legislature had never foreseen the particular circumstances facing the defendant.

> instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in *The Nicomachean Ethics* (translator Rees, at p. 49), "overstrains human nature and which no one could withstand".[38]

By defining necessity as an excuse, Dickson, J. believes the court avoids the pitfalls that have concerned adjudicators over the years and that largely explain their reluctance to recognize a general defence of necessity.[39]

> Relating necessity to the principle that the law ought not to punish involuntary acts leads to a conceptualization of the defence that integrates it into the normal rules for criminal liability rather than constituting it as a *sui generis* exception and threatening to engulf large portions of the criminal law.[40]

His Lordship sees the involuntariness standard as providing a sufficient control on the defence, which he insists must be "strictly controlled and scrupulously limited". He would adopt the requirement enunciated in *Morgentaler*[41] that necessity only apply "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible."[42] From this rule Dickson J. derives three tests with respect to the defence of necessity:

> 1) At a minimum 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;
> 2) Given that the accused had to act, could he nevertheless realistically have act to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out*?
> 3) The harm caused by committing the illegal act must have been less than the harm so avoided.[43]

These criteria would link the defence of necessity to "the familiar criminal law requirement that in order to engage criminal liability, the conduct constituting the *actus reus* of

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[38] *Perka, supra* note 5 at 248.
[39] In this country it was not clear that a defence of necessity existed until the Supreme Court of Canada's ruling in *Morgentaler, supra*, note 37), which grudgingly suggested it was available in a narrow range of cases. Previously, courts had restricted the availability of necessity to the point of ineffectuality, relying on the English case of *R.. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.
[40] *Perka, supra* note 5 at 250.
[41] *Morgentaler, supra* note 37.
[42] *Ibid.* at 678.
[43] *Perka, supra* note 5 at 251-2.

an offence must be voluntary."[44] Dickson J. suggests that Fletcher's concept of "moral involuntariness" is applicable to this analysis. A morally involuntary act is not involuntary in the sense that actions of a person in a condition of automatism are involuntary, but, they are *morally* involuntary because the actor had no reasonable alternative to breaking the law. The act was wrongful, but it was an acceptable failure brought on by normal human weaknesses. On the other hand, justification is not "morally involuntary" because it implies that the actor engaged in a rational weighing of cost and benefits of an action. He was not compelled to commit the offence, but rather chose to do so based on his evaluation of the preferred course of action.

The contrast between the excuse as involuntary conduct and the justification as conduct produced by reflection seems to make sense in some circumstances. Fletcher, for example, refers to a hypothetical situation where a motorist is car-jacked. In this example the car-jacker, pointing a gun at the motorist, tells him he will shoot if the motorist stops the car. On the car-jacker's orders the motorist proceeds, but two people are lying on the roadway ahead and there is no way for the motorist to swerve so that he can continue without running them over. The motorist must choose between his own life and the lives of the two people on the road.[45]

If the motorist chose to sacrifice his own life, people would likely think that he had taken the morally correct course of action. At the same time, people would recognise that in these circumstances choosing the correct course of action would be extraordinarily difficult. For this reason, they might find it easy to forgive the motorist if he made the morally incorrect decision, giving in to his fear and running over the two people on the roadway. Doing so would constitute deliberate homicide. But one might ask whether the motorist should really be criminalized for showing an all too human weakness in a very unusual situation.

Fletcher would determine that question by asking whether the pressure brought to bear on the actor was so great that a reasonable person or a person of reasonable firmness would be unable to withstand it.[46] This analysis suggests that the law should not punish a person for

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[44] *Ibid.*, at 249.

[45] Fletcher, "The Individualization of Excusing Conditions" (1974) 47 So Cal. L.R. 1264 at 1279-80.

[46] Much of the case law includes this standard along with other criteria. See *e.g.*, *R. v. Perka*, *supra*, note 5 at 248-9; *R. v. Ruzic*, *supra*, note 6; *Director of Public Prosecutions v. Lynch* [1975] A.C. 653 (H.L.) at 670 [*Lynch*].

having failed to exceed the normal standards of behaviour that society expects from the individual.

Compare this, however, to an example of excusing conditions cited by Dickson J. He suggests that a lost alpinist who breaks into an isolated cabin in order to avoid freezing to death should be able to plead necessity. Although he was physically able to restrain himself from the "wrongful act" of breaking into the cabin, his act was not a true choice, as it was "remorselessly compelled by normal human instincts."[47] The act was morally involuntary.

However, this example of moral involuntariness is not necessarily consistent with the equation of excuses with human weakness. If the alpinist had chosen to sacrifice his own life rather than commit the so-called "wrongful" act of breaking into the cabin, people would regard his decision as more foolish than admirable. Unlike Fletcher's motorist, the alpinist's trespass does not seem a wrongful act brought on by human weakness so much as the only reasonable course of action available. His will was not overborne by fear. He did make the morally correct choice. It does not follow from the fact that the correct choice seemed obvious that the alpinist's ability to rationally choose was somehow impaired. But if we see necessity as an excuse, it seems to lead to the conclusion that the more unassailably rational an action is, the more likely it is to have been involuntary.[48]

If it seems odd to characterize a clearly rational action as involuntary, it may be because in law we are accustomed to seeing involuntariness as a *failure* of reason. Such defences as automatism or mistake of fact suggest actions that are not the product of reason but of its

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[47] *Perka, supra* note 5 at 249.

[48] Brudner, in his discussion of *R. v. Almeida* (1949), 362 Pa. 596, 68 A2d 595, asserts that an action committed by an agent because felt obliged to do so by moral reason is voluntary in the highest sense. In *Almeida* a robber who engaged in a gunfight with a policeman was held liable when the policeman accidentally shot a bystander. Hart and Honore's argue that the robber should be held responsible for the death because the policeman's action, being in fulfilment of a legal duty, was not voluntary (*Causation and the Law*, 2nd ed. (Oxford: Clarendon Press, 1959). Brudner disputes this:

> ...(I)t is difficult to see how an act performed to discharge a legal duty can be regarded as involuntary. Since the agent has a choice between obedience and disobedience, and since he chooses to obey *because* duty commands him, the act is not only voluntary but free in the most demanding of Kantian senses. The fact that the agent is liable to a penalty for failing to perform his duty does not render his conforming act involuntary, for if he is moved by these considerations, he must still weigh the costs and benefits of shirking and make a choice (Brudner, "Owning Outcomes", *supra* note 1 at 95).

absence. This is not surprising if the criminal law is animated by the moral theory described in Part 1 where volition, which is the source of morality, is inextricably connected to reason. But the alpinist example demonstrates that one might also seek to be excused for actions not born of cognitive weakness, but of that very capacity to reason that is central to the responsible, moral agent. It suggests, in fact, the analysis of embodied agency, wherein the value expressed by an act may have to be understood by reference to the limitations faced by the agent. In the alpinist example, though the choice was illegal, the value thereby expressed was one that most people could respect.

Dickson J.'s requirement of proportionality also seems at odds with his characterization of necessity as an excuse. Necessity cannot succeed as a defence unless the harm inflicted by breaking the law is less than the harm so avoided:

> No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself, we will not excuse him.[49]

Interestingly, in discussing the requirement of proportionality Dickson J. refers with approval to Fletcher's analysis in *Rethinking Criminal Law*.[50] Fletcher, however, did not assert that the defence of necessity should be unavailable where a breach of the law inflicted a greater harm than compliance. He only suggested that if the harm was far greater, it would serve as evidence that perhaps the action was, after all, not normatively involuntary. "[S]urrendering to the threat in this case violates our expectations of appropriate and normal resistance to pressure."[51] Where the harm inflicted is proportionate to the harm avoided, it is more likely that the pressure exerted is such that a person of reasonable firmness would be unable to resist it. But certainly, according to Fletcher, our hapless motorist who causes two deaths to save his own life might still be excused on the grounds of moral involuntariness, even though compliance with the law would have brought about less harm than non-compliance. Dickson J., presumably, would convict the motorist, as the loss of two lives would constitute a greater harm than the loss of one.

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[49] *Perka, supra* note 5 at 252.
[50] Fletcher, *supra*, note 32.
[51] *Ibid.*, at 804.

Fletcher's version is more in keeping with what we would ordinarily consider to be involuntary conduct. Dickson J.'s requirement of proportionality implies that the actor must engage in a rational assessment of the relative benefits and drawbacks associated with each alternative - his reasoning power clearly has to be engaged in order to make the choice that will lead to acquittal. This suggests that the distinction drawn by Dickson J. between necessity as a justification and necessity as an excuse is a red herring, because we will not excuse conduct unless it was the product of the kind of "reason and reflection" that characterizes justified actions.

If we insist on seeing necessity as an excuse that allows for human weakness, we may find ourselves obliged to characterize perfectly sensible people as panicky, unreflective and out-of-control. We privilege the position of the unreasoning automaton over the reasoning agent, and affirm the independent, "Kantian" will by denying the autonomy of the embodied agent altogether. And it seems that we are led into this state of affairs because so much of the theory underlying the criminal law is bound to the presupposition of autonomy and moral reasoning as a product of the disembodied self. As a result, our analysis of the moral character of an action tends to turn on the question of voluntariness or intent – an action was either willed or it was not. Such an analysis poses no challenge to the conception of objectivity outlined in Part 1. It makes things very awkward, though, when we try to apply legal reasoning in our understanding of the activities of the rational, choosing agent who commits a criminal offence in response to the contingencies of his environment and his own limitations. Blameworthiness as a function of what the courts now call "moral voluntariness" fits imperfectly into analyses of blameworthiness as a function of intent because it rests on a separate conception of the agent and his relationship to his environment. The "disembodied self" as the source of agency no longer simply acts on the environment, but is responsive to it.

B: Reason, Volition and Fundamental Justice

We saw above that in criminal law theory there is no liability without volition, and that there is no volition without reason. However, as I outlined in Part 2, reason is seen not as volition, but as compulsion in necessity cases. We can only understand reason in this sense by moving beyond the unitary "worldless self" to which actions are imputed by reference to intent. We have to

consider the actor's context – those physical, social and affective aspects of his condition that shape the range of alternatives available to him and the value implied by each of those alternatives. However, an open-ended inquiry into features of context undermines the logic of universality in law because these features are infinitely variable from individual to individual. Courts have attempted to respond to this problem by manipulating the concepts of the "reasonable person" and the modified objective standard.

R. v. Ruzic: Duress and the Circumscribed Agent

Necessity and the common law doctrine of duress rest upon the same juristic principles.[52] Thus the concept of moral involuntariness formed the basis for the rulings of both the Ontario Court of Appeal and the Supreme Court of Canada in *Ruzic*. The accused was a woman from Serbia who was charged with importing heroin into Canada and possession and use of a false passport. At trial she pleaded duress, claiming that a man in Serbia, who was known by her to be dangerous, had threatened her and her mother with harm if she did not transport the drugs. She testified as to the state of lawlessness in Serbia, the proliferation of guns and organized crime, and the inability of the local police force to keep the peace. There was expert testimony to the effect that people in Belgrade were very afraid of crime and of various paramilitary groups that engaged in criminal activities there, and had no faith in the ability of the police to protect them.

Under section 17 of the Criminal Code, the defence of duress was not available unless the accused acted under compulsion by threats of immediate death or bodily harm from a person who was present when the offence was committed. Since the person who had threatened Ruzic was not with her when she boarded the plane at Serbia or when she arrived at her destination, she did not meet either the immediacy or the presence requirements of section 17. The trial judge found that section 17 violated section 7 of the *Charter*, and instructed the jury to consider whether they could acquit under the common law defence of duress, which included neither the immediacy nor the presence requirements. The jury acquitted Ruzic, and the Crown appealed on the ground that common law defence of duress should not have been left with the jury.

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[52] *Hibbert, supra* note 34 at 1017-18.

[54] [1985] 2 S.C.R. 486 [*Motor Vehicle Reference*]. That case dealt with a penal statute imposing a mandatory jail sentence for breach of an absolute liability offence.

Laskin J.A. of the Ontario Court of Appeal concluded that the immediacy and presence requirements contained in section 17, could allow morally involuntary conduct to attract criminal sanctions, which was contrary to the "principles of fundamental justice" within the meaning of section 7 of the *Charter*. He drew an analogy between cases of moral involuntariness and *Reference Re: Section 94(2) of the Motor Vehicle Act*[54] wherein the Supreme Court held that exposing an accused to incarceration for an absolute liability offence was contrary to the fundamental justice[55], because an accused who lacked *mens rea* was morally blameless.

Laskin J.A. agreed with Martha Shaffer's argument that moral blameworthiness should not hinge only on the presence or absence of *mens rea*.[56] Referring to *R. v. Langlois*[57] with approval, Laskin J.A. ruled that section 7 precludes the imposition of criminal liability[58] in cases of moral involuntariness:

> Persons whose conduct is morally involuntary are not morally blameworthy of the harm they have caused. At least moral blamelessness and moral involuntariness are sufficiently similar that just as convicting a person whose conduct is morally blameless violates the principles of fundamental justice, so, to, does convicting a person whose conduct is morally involuntary.[59]

He agreed that absolute liability cases are analogous to cases of moral involuntariness, thereby elevating moral voluntariness to an essential ingredient of an accused's state of mind if a conviction is to be valid under section 7 of the *Charter*. Just as the imposition of criminal liability in the absence of *mens rea* was contrary to the principles of fundamental justice, so too was the imposition of criminal liability in cases of moral involuntariness. In both cases the accused was morally blameless.

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[55] See also Glanville Williams, *Criminal Law, the General Part*, 2nd ed., (London: Stevens & Sons Ltd. 1961) at 30; *Harding v. Price* [1948] 1 K.B. 695; *Beaver v. The Queen* [1957] S.C.R. 531; *R. v. City of Sault Ste. Marie* [1978] 2 S.C.R. 1299.

[56] Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the Criminal Code" (1998) 40 Crim. L.Q. 444. This view was also taken by Lord Edmund-Davies in *Lynch, supra* note 46 Shaffer also suggests, however, that if *mens rea* is sufficient to attribute moral blameworthiness, one could still conclude that, like defendants who suffer a disease of the mind within the meaning of section 16 of the Criminal Code, defendants in duress cases cannot be held criminally responsible because they were not sufficiently autonomous.

[57] (1993), 80 C.C.C. (3d) 28.

[58] At least where it involves a deprivation of liberty.

At the Supreme Court of Canada, LeBel J., writing for the majority, rejects the Court of Appeal's equation of moral involuntariness with the moral blamelessness of an absolute liability offence. He notes that the distinction between features that negate *mens rea* and those that render an intentional act morally involuntary was carefully preserved in *R. v. Hibbert*[60], where the common law defence of duress was defined as an excuse that only exculpated an actor once both the *mens rea* and *actus reus* of an offence had been established. He also finds:

> morally involuntary conduct is not always inherently blameless. Once the elements of the offence have been established, the accused can no longer be considered blameless. This Court has never taken the concept of blamelessness any further than this initial finding of guilt, nor should it in this case. The undefinable and potentially far-reaching nature of the concept of moral blamelessness prevents us from recognizing its relevance beyond an initial finding of guilt in the context of s. 7 of the *Charter*.[61]

Rather than rely on an analogy with the absolute liability cases, LeBel, J. prefers the approach taken by Dickson J. in *Perka*:

> The respondent's second approach, which relates moral involuntariness back to voluntariness in the physical sense, rests on firmer ground. It draws upon the fundamental principle of criminal law that, in order to attract criminal liability, an act must be voluntary. Voluntariness in this sense has ordinarily referred to the *actus reus* element of an offence. It queries whether the actor had control over the movement of her body or whether the wrongful act was the product of a conscious will.[62]

Perka was not, of course, a *Charter* case. However, it did equate moral involuntariness to involuntariness in the physical sense. The automatism cases that LeBel J. relies on demonstrate that physical voluntariness is a requirement of fundamental justice under section 7 of the *Charter*.[63] Therefore, he concludes that moral voluntariness is also a component of fundamental justice, and that the imposition of criminal liability for morally involuntary acts is a violation of an accused's section 7 rights.[64]

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[59] *Ruzic, supra* note 6 at 28.
[60] *Hibbert, supra*, note 34. See also *Lynch, supra* note 46.
[61] *Ruzic, supra* note 6 at 712.
[62] *Ruzic, supra* note 6 at 712-13.
[63] See *R. v. Parks*, [1992] 2 S.C.R. 871; *R. v. Daviault, supra* note 17.
[64] In addition, the court in *Hibbert* concluded that duress applies only once the Crown has proved both *mens rea* and *actus reus*. Therefore if *Hibbert* is a barrier to drawing an analogy between duress and lack of *mens rea* it is also a barrier to the analogy between duress and the kind of involuntariness that negates *actus reus* suggested by LeBel J.

LeBel J.'s concern in declining to connect moral involuntariness to moral blamelessness appears to be the concept's inefficacy in terms of providing a stable standard by which courts may judge conduct. But his approach does not really succeed in dissociating the two. His Lordship explains the result in cases like the *Motor Vehicle Reference* in these terms:

> It is clear from Dickson J.'s reasons in *Sault Ste. Marie* that a regime of absolute penal responsibility was deemed to breach the most basic principle of criminal liability and criminal law, and that criminal responsibility should be attributed only to an act that is the result of the deliberation of a free and conscious mind. This principle was recognized as one of the principles of fundamental justice within the meaning of s. 7 of the *Charter* in *Re B.C. Motor Vehicle Act*.[65]

However, if an accused who lacked *mens rea* is blameless because his action was not "the result of the deliberation of a free and conscious mind", surely the same reasoning would apply, *a fortiori*, to an accused who did not even have the mental element required for *actus reus* - and surely both would be considered blameless because their reasoning capacity was not sufficiently engaged to attract liability.[66]

Both Laskin J.A. and LeBel J. attempt to make sense of duress by connecting moral involuntariness to more traditional concepts of blameworthiness as a function of intent. The *Motor Vehicle Reference* and the automatism cases both tell us that where there is no opportunity for the will to affect outcomes, there is no moral blameworthiness, ergo, no criminal liability. But in duress and necessity cases, reason compels an accused to commit an offence, so that his action is the intentional "result of the deliberation of a free and conscious mind". Thus if morally involuntary conduct is, as LeBel J. asserts, "not always morally blameless", it is difficult to see how he can sustain the analogy between duress and physical involuntariness. If the two kinds of cases have neither intent nor blamelessness in common, what features do they share? LeBel J.'s analysis avoids, rather than faces, this basic challenge posed by the idea of embodied agency.

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[65] *Ruzic, supra* note 6 at 710.

[66] In *Daviault, supra* note 17 at 75, Cory J. suggests that absence of *mens rea* and *actus reus* will often overlap. It is certainly hard to imagine any case where the accused could have the *mens rea* required for an offence while lacking the basic intent required to consciously control his physical actions. At 102-103, Cory J. also suggests that where there is no *actus reus* there is no blameworthiness. This is surely correct.

An analysis based on moral involuntariness will require the adjudicator to consider the will as an integral part of a larger scene. In both *Ruzic* and *Perka*, surely the accused could be said to fully "own" the outcome of their actions, in the sense that Brudner uses the term. But in these cases it seems unfair to leave the analysis at that, because we can't reasonably conceive of the actors' wills in isolation from their environments. If their actions altered their environments in a way that fully reflected their volition, or freedom, it is also true that their volition was shaped by and reflected their environment. Understanding this is key to making the actions of the accused intelligible.

It is arguable that in breaking the law, the defendants in *Perka* made the only reasonable choice available (much like the uncontroversial decision of Dickson J.'s lost alpinist). However, the situation faced by Ruzic seems more complex than Perka's stark life-and-death decision. She could have chosen to stand up to the man who was threatening her, and taken measures to protect herself and her mother, sought help from other residents of the city, or attempted to escape Belgrade with her mother. Had she not capitulated to the threatener, he may not have thought it worthwhile to pursue the matter. These alternatives might seem more attractive when one considers that realistically, the course of action Ruzic did choose would probably not have secured any lasting safety for herself or her mother. She might have been unable to complete the drug transaction (which, in fact, was what happened) and the threatener might have killed her mother when Ruzic failed to come back with his money. It also seems doubtful that had Ruzic delivered the drugs and returned safely to Belgrade, the threatener would then have left her alone. It seems more plausible that, having capitulated once, she would have been targeted as a victim of continued extortion, exposing her to other dangers and leading her to commit crimes of escalating seriousness. Perhaps these complications do not make her conduct morally inexcusable. They just make her situation more typical of the complex realities of living, wherein moral dilemmas rarely involve the clear-cut choices between two alternatives that so often characterize the hypotheticals relied upon by legal theorists. However, it is hard to accept that *no* reasonable person would have chosen a different course of action than Ruzic. Nor was her choice necessarily a product of human weakness in the sense required by Fletcher's analysis. She could have been, throughout, a reasoning moral agent.

C: Intelligibility and the Reasonable Person

We saw above that if, in necessity and duress cases, we are to understand reason as a form of compulsion rather than volition, then judging in such cases will necessarily involve an expansion of the scope of inquiry from the traditional intent/inadvertence, capacity/incapacity kind of analysis to a consideration of context. It is the understanding of context that will make an agent's conduct intelligible, and this has a bearing on the assessment of an accused's blameworthiness.

A determination of the reasonableness of an accused's action seems simple enough when we share many of his circumstances and attributes but it has often been observed that the simplicity of the objective "reasonable person" standard is deceptive. In some cases, the conception of a reasonable person might simply be a person whose membership in the dominant class of society privileges their own perspective.[67] Nedelsky suggests that an adjudicator can overcome these differences in perspective through "enlargement of mind". However, if, as I suggested in part 1, legal reasoning is fundamentally about "isolating a legally relevant action, and plucking it out from its social, historical and relational context", the kind of information that makes this enlargement of mind process possible will be excluded from the process of adjudication.

The modified objective standard seems to offer some scope for inquiry into different perspectives in assessing reasonableness. In *Ruzic*, the Supreme Court took the position that a modified objective standard should be employed in duress cases:

> [Duress] focuses on the search for a safe avenue of escape (see *Hibbert, supra,* at paras. 55 and 62), but rejects a purely subjective standard, in the assessment of the threats. The courts have to use an objective-subjective standard when appreciating the gravity of the threats and the existence of an avenue of escape. The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration

[67] Phyllis Crocker, "The Meaning of Equality for Battered Women who Kill Men in Self-Defence" (1985) 8 Harv. Women's L.J. 151; Elizabeth Schneider, "Resistance to Equality" (1996) 57 U. Pitt. L. Rev. 477; Robin West, "Jurisprudence and Gender" (1988) 55 U. Chicago L. Rev. 1; D. Reaume, "What's Feminist About a Feminist Analysis of Law: A Conceptual Analysis of Women's Exclusion from Law" (1996) 2 Legal Theory 265.

> the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.[68]

The use of the modified objective standard in necessity and duress cases stands in contrast to the absolute objective standard (at least where the accused has the "capacity" to live up to the standard) relied on in cases of negligent offences such as unlawful act manslaughter.[69] If we think of necessity and duress doctrines as a means the courts employ to understand embodied agency, then almost by definition there has to be an enlarged scope for inquiring into the specific circumstances of the individual actor. It provides room for the adjudicator to engage in Nedelsky's process of "enlargement of mind" which, I suggested in Part 1, leads to intelligibility.

However, if we are to understand the "reasonable person" as a hypothetical individual standing in the circumstances of the accused, the obvious question is how to determine the factors that constitute an agent's "circumstances" for the purposes of the analysis. In other words, where does the "agent" stop and her "circumstances" begin?

For example, in *Rethinking Criminal Law* Fletcher suggests that an individual's background of deprivation should not be taken into account as an excusing condition. Rather, excusing conditions are unusual, emergent situations that "distort" the will, making the actor behave in atypical ways that do not reflect his "true character". A general background of social deprivation, on the other hand, makes antisocial behaviour typical for the actor. Armor disputes this distinction:

> (C)ould any of us presume to know the "true character" of a child who suffers unremitting rape or torture throughout his childhood? Then how can any of us presume to know that the wrongful acts of a former battered child reveals his "true character"?[70]

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[68] *Ruzic*, *supra* note 6 at 722. A modified objective standard is also applied with respect to necessity cases. See *Latimer*, *supra* note 27.

[69] See *Creighton*, *supra* note 12.

[70] Jody Armour, "Just Deserts: Narrative, Perspective, Choice and Blame" (1996), 57 U. Pitt. L. Rev. 525 at 540.

Of course, if it were possible to identify the contours of a person's "true character", which is presumably some core self that is isolated from the body and the environment, we could carve it out from its circumstances, and insert the "reasonable person" in its place. A determination of liability could then be made by comparing the actions of the "reasonable person" to those of the "true character".[71]

More realistically, however, application of the modified objective standard seems to involve a more or less arbitrary identification of some of the accused's circumstances that are then assumed to have determined her actions. The effect of selecting certain circumstances to act as determinants of behaviour is to erase the range of choices that complicate the picture of the individual stripped of agency – a picture that legal theory seems to require us to adopt if we are to relieve the individual of moral blame. But without a clear picture of what circumstances and "human frailties" can be taken into account before we abandon the idea of an "objective standard" altogether, the use of the modified objective standard will be problematic if the process of judging necessarily entails the use of stable, universal norms.

In deciding what scope of individual circumstances the reasonableness inquiry ought to take into account, it might be useful to start with an explicit recognition of what kinds of concerns the doctrines of necessity and duress were designed to address. I have suggested that these defences are an attempt to provide a principled means of understanding the responsibility and accountability of the embodied moral agent. This stems from the fact that unlike other types of excusing conditions, necessity and duress occur under conditions where the action is entirely voluntary, in the sense of being a reasoned response to circumstances. The proportionality requirement suggests that the basis for the excuse is not one of moral weakness, but of moral agency – the choice made by the agent expresses a value we can respect. It might be helpful, therefore, in determining what personal characteristics should be taken into account with respect to the modified objective standard to start from the assumption that we are not looking for evidence of infirmity, but of strength. In other words, what features of the individual might

[71] Armor's argument, in suggesting that justice in criminal cases would require judgments to take account of a wide range of circumstances faced by the accused, including a background of deprivation, is clearly at odds not only with Fletcher but also with retributivists such as Brudner. However, it is interesting to note that the notional "true

allow us to understand, not why she failed to live up to the requirements of right but how her actions were intelligible as an expression of a value we can respect? Such factors as age and sex in Ruzic's case, for example, might have a real bearing on the resources she might have been able to employ in selecting the option of compliance over the competing options of resistance. If we understand the modified objective standard as a means of asserting, rather than diminishing the moral agency of the accused it would provide some clarity to the scope of individual circumstances. Such a limitation seems to be necessary if the defences are not to become, in Lamer J.'s words, "a *sui generis* exception... threatening to engulf large portions of the criminal law".

Conclusion

The difficulty courts have experienced in articulating a legal basis for acquitting in cases of necessity and duress stems from the extent to which legal theory has been influenced by the conception of autonomy as distinct from and transcendent over the contingencies of embodied existence. In necessity and duress cases the accused's illegal actions are intelligible because when seen as part of a broader picture of the circumstances occupied by the actor, they seem *rational*. But it is difficult to decline to assign blame on the basis of intelligibility because such actions, being rational, must also be seen as intentional, in the sense that the actor clearly "owned" the outcome. This implicates Nedelsky's conception of the individual as embodied agent. The embodied agent does exercise autonomy and can be held accountable for her actions but the moral judgment of those actions cannot presuppose a picture of autonomy that allows the agent, relying on reason, to transcend the limitations of embodied existence. Embodied existence is instead part and parcel of the moral reasoning process. The defences of duress and necessity allow courts to give effect to a sense that an illegal act is intelligible by permitting a broader inquiry into the realities of embodied agency. The legal reasoning the courts use to deal with this intelligibility is somewhat unsatisfactory, however, because it requires them to describe a conception of embodied agency using legal theory that is accustomed to conceiving criminal liability in terms of strict divisions between intent/inadvertence and capacity/incapacity. When

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character" which is distinct from individual circumstances to which Armor refers here, bears a strong resemblance to the "worldless self" as the source of moral freedom discussed in Part 1.

we examine what is really going on in these cases, we find that often what we are looking for is not evidence of weakness, or the failure of reason, but rather evidence of moral and rational strength.