

# A Due Measure of Fear in Criminal Judgment

Benjamin L. Berger

*Osgoode Hall Law School of York University*

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# A Due Measure of Fear in Criminal Judgment

Benjamin L. Berger\*

## I. INTRODUCTION

In the long history of the common law trial, criminal judgment has always been a fearful event. This is obviously true for the accused who, until these modes of adjudication were effectively abolished in 1215 C.E., was likely to undergo trial by ordeal. Whether by hot iron, cold water or, for the high-status accused, trial by battle, the event of judgment itself was a cause for trepidation on the part of the accused, as were the mortal consequences of a finding of guilt. However, James Whitman has elegantly shown that, after the end of the ordeals, this fearsomeness was no less acute for the adjudicator, who experienced a deep moral anxiety in criminal judgment. An appreciation of this anxiety is key to understanding the development of the criminal trial in the common law world.<sup>1</sup> Whitman explains that the *act* of judgment was understood to be a perilous and risky business, indeed. “Early modern Christians”, he writes, “experienced great anxiety about the dangers that acts of judgment presented for the soul” because “any sinful misstep committed by a judge in the course of judging ‘built him a mansion in Hell’”.<sup>2</sup> This sense of the peril in judgment was greatest for those engaged in imposing criminal punishments — the so-called “blood punishments” — because the individual who judged, whether professional judge or juror, was responsible for and was polluted by this bloodshed, wielding the sword just as the soldier did. Phrases rang in the ears of these judges and jurors with a moral resonance that inspired trepidation of a form we find hard to imagine today: “Judge not, that ye be

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\* Assistant Professor, Faculty of Law, University of Victoria. Many thanks to Jamie Cameron, Hamar Foster and Robert Leckey for their comments on earlier drafts of this piece, and to Alison Latimer and Lyndsay Watson for their research assistance.

<sup>1</sup> James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2007) [hereinafter “*The Origins of Reasonable Doubt*”].

<sup>2</sup> *Id.*, at 3.

not judged”;<sup>3</sup> “they that take the sword shall perish with the sword”.<sup>4</sup> The stakes were, thus, the highest imaginable not only for the accused but for the judge — the fate of his soul was at issue in each act of criminal judgment. As Whitman explains, this fear led not only to a complex theology of judging but also to techniques of moral comfort for judges and jurors, techniques that gave rise to the characteristic features of our modern criminal trial. The jury trial itself was a means of shuffling moral (and immortal) peril for judgment from the judge to the juror. Similarly, the concept of proof beyond a reasonable doubt, the so-called “golden thread”<sup>5</sup> of our own criminal justice system, was not a device of factual proof designed to protect the accused but, rather, a device of moral comfort used to *encourage* conviction by assuring the juror that, so long as the juror experienced no *reasonable* doubt, the juror’s soul was safe. So although our image of the bloody and vicious forms of criminal judgment of our common law past is not far from the truth, we often fail to recall the fearsome anxiety that infused the system, an anxiety that meant that although the progenitors to our modern judges and juries “did wield the sword of vengeance ... they did not find it easy to do so. On the contrary: they struggled mightily with the moral duties of judging”.<sup>6</sup>

Despite the welcome loss of officially countenanced blood punishments in Canada, great anxiety on the part of the accused facing criminal judgment remains. In the moment of criminal judgment, she or he stands before the awe-full power of the law, a power and force that is an omnipresent feature of all dimensions of state law but that is naked in the field of criminal law unlike any other. And, of course, the accused still faces consequences that have every capacity to destroy the life, if no longer the physical body, of the convict. There is still much fear in being judged; time has not severed this link between the medieval and the modern accused.

What, though, of the moral anxiety of the judge? Is there still a clear feeling — and do we still see the jurisprudential artefacts — of deep judicial anxiety about the dangers associated with the act of criminal judgment? My sense is that, increasingly, we do not. There are, of course, a number of reasons why this is so. We have taken a rather technocratic turn in the criminal law, viewing it more as an instrument of

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<sup>3</sup> Matthew 7:1 (King James Version).

<sup>4</sup> Matthew 26:52 (King James Version).

<sup>5</sup> *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462; *R. v. Lifchus*, [1997] S.C.J. No. 77, [1997] 3 S.C.R. 320 (S.C.C.) [hereinafter “*Lifchus*”].

<sup>6</sup> *The Origins of Reasonable Doubt*, *supra*, note 1, at 30.

public policy, harm-reduction and social rehabilitation than one of moral judgment and state violence. Judges can also now find a brand of moral solace in the existence of the *Canadian Charter of Rights and Freedoms*.<sup>7</sup> One can imagine that criminal law rights serve a kind of modern moral comfort function, assuring the judge that if the terms of the (overwhelmingly procedural)<sup>8</sup> rights protections are satisfied, so too are the key modern moral imperatives for which these documents capaciously stand. Most obviously, however, the salience of the kind of religious thought that inspired this anxiety in judgment in the past has diminished with modern secularization. This historical fear was associated with the saturation of public and private lives of the judge and juror alike with the world view and absolute authority of Christian moral theology. Most people — including judges and jurors — no longer move in their lives trembling with fear for the eternal fate of their souls. “In many aspects of life this is a good and liberating thing: humans who no longer quake and tremble are humans who live richer lives in many ways.”<sup>9</sup> There is a certain freedom to be found in a life not ruled by fear.

However, in matters of criminal judgment, matters that still involve such grave consequences, I am less sanguine about the apparent loss of judicial anxiety. Over time, this fear and anxiety in criminal adjudication has served a function: it has helped to restrain the violent hand of the criminal law. Be it in the development of demanding burdens and standards of proof or in the creation of procedural rules such as jury unanimity, this sense of moral discomfort in the exercise of criminal judgment has tended to translate into a kind of parsimony in the use of the criminal law. This restraint did not, of course, leave the law unable to address pressing social ills; it merely made the criminal law a tool of last resort, wielded with caution. Today, however, we see Parliament’s proliferation of crimes and toughening of sentences. In the courts, we

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<sup>7</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>8</sup> It is interesting to note that, both in the European Continental legal tradition and in common law history, resort to procedure was one means of absolving the judge of moral responsibility for the act of judgment. See *The Origins of Reasonable Doubt*, *supra*, note 1, at 94, 146.

<sup>9</sup> *The Origins of Reasonable Doubt*, *supra*, note 1, at 7.

have watched burdens reverse from Crown to accused,<sup>10</sup> confessions have become more readily admissible,<sup>11</sup> and there has been a slide to less demanding forms of *mens rea*.<sup>12</sup> These and other legal and jurisprudential moves seem to reflect a relative modern comfort with criminal judgment, a comfort that I find troubling. With Whitman, I wonder if, with the lessening in moral fear around criminal judgment, “we have slowly been losing the capacity to gaze into our own breasts and ask ourselves hard questions about when and how we have the right to punish others”.<sup>13</sup>

When Justice Bertha Wilson was appointed to the Ontario Court of Appeal, she had a “serious dearth of experience in criminal law” and is said to have claimed that she did not find the criminal cases terribly interesting.<sup>14</sup> Although, working closely with Justice G.A. Martin, she developed an appreciation for the criminal law, she wrote few criminal

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<sup>10</sup> See Don Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Thomson Carswell, 2005), at 401, where Stuart concludes that “Canada and the Criminal Code in particular is conspicuous for its overuse of reverse onus clauses” and that “[i]n its s. 1 decisions on reverse onuses, the Supreme Court appears to have been inconsistent with the minimum intrusion test and also far too accepting of arguments of law enforcement expediency.” See text accompanying footnotes 59 and 60, *infra*.

<sup>11</sup> See, e.g., *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500 (S.C.C.) [hereinafter “*Spencer*”], in which Deschamps J., for a majority of the Court, imposed an extremely high threshold for breaching the common law confession rule, a standard that seems even higher than the already demanding one enunciated in *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.). The *Spencer* majority found no error in the trial judge’s statement of the law as requiring that, to offend the common law confession rule, an inducement “must be *so overbearing* that it can be said that the detainee *has lost any meaningful independent ability to choose to remain silent, and has become a mere tool in the hands of the police*” (emphasis in *Spencer*) (at para. 27). Justice Fish’s forceful dissent, arguing that the effect of the majority’s judgment is to turn the common law confession rule into an operating mind test, is compelling. See also *R. v. Grant*, [2006] O.J. No. 2179, 209 C.C.C. (3d) 250 (Ont. C.A.), leave to appeal to S.C.C. granted [2007] S.C.C.A. No. 99 (S.C.C.), in which Laskin J., for the Court, concluded that the fact that unconstitutionally obtained evidence is conscriptive and non-discoverable ought not to end the s. 24(2) exclusion analysis. This decision, which picked up on the separate concurring reasons of LeBel J. in *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.), is currently under appeal to the Supreme Court of Canada.

<sup>12</sup> After citing Dickson J.’s (as he then was) judgment in *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.), as the high-water mark in the Court’s expressed commitment to subjective forms of fault for criminal offences, Don Stuart writes that a “review of the current law on fault will reveal that a low level objective standard is pervasive for public welfare offences and that, while the subjective approach is still required for many crimes, for a significant number of crimes there are now less demanding standards of fault”. (Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed. (Toronto: Thomson Carswell, 2007), at 170 [hereinafter “*Canadian Criminal Law*”]). Kent Roach writes of the “increasing acceptance of objective fault as a form of *mens rea*” (Kent Roach, *Criminal Law*, 3d ed. (Toronto: Irwin Law, 2004), at 165).

<sup>13</sup> *The Origins of Reasonable Doubt*, *supra*, note 1, at 7.

<sup>14</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 88 [hereinafter “*Judging Bertha Wilson*”].

judgments while at the Ontario Court of Appeal.<sup>15</sup> Most can recall one or two of her most celebrated criminal law judgments from her time at the Supreme Court of Canada, but this is not the aspect of her jurisprudence that is remembered most sharply. In this chapter, my purpose is to look at her contributions to Canadian criminal law in light of this pressing question that I have introduced, the question of what J.H. Baker has called the “agonies of decision”.<sup>16</sup> In doing so, my hope is that a different light will be shone on Justice Wilson’s work in the criminal law, one that illuminates the way in which she offered a principled and powerful resource for thinking about the nature and moral burdens of criminal judgment. This piece will examine three of Justice Wilson’s key interventions in modern Canadian criminal law, specifically in the law of criminal defences, in light of this theme. Certain of the judgments that I will examine have been the subject of considerable academic attention. My purpose is not to rehearse these debates but, rather, to offer a way of reading these cases — both individually and together — in a different light. Looking closely at her decisions in *R. v. Perka*,<sup>17</sup> *R. v. Chaulk*<sup>18</sup> and *R. v. Lavallee*<sup>19</sup> reveals a judge who is palpably aware of the complexities of the lives that appear before her in a criminal case, the violence of the criminal law, and the consequent ethical imperative to proceed with caution and humility. It is my view that we should want judges who, seized with a keen sense of the limits and consequences of the criminal law, tremble at the moment of judgment. One can read Justice Wilson’s criminal law jurisprudence as embodying this due measure of fear in criminal judgment.

## II. THE IRREDUCIBLE COMPLEXITY OF LAW AND LIFE

The first of Justice Wilson’s criminal law interventions that I want to take up is, indeed, one that is relatively well known. *Perka*<sup>20</sup> is remembered by most as much for its intriguing facts as for the

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<sup>15</sup> *Id.*, at 92.

<sup>16</sup> J.H. Baker, *Oxford History of the Laws of England*, vol. 6 (Oxford: Oxford University Press, 2003), at 47. Baker uses this term in the course of describing the manner in which “judges sought refuge from the agonies of decision” by following the letter of procedure and — creating a distinction that is still at least notionally with us today — leaving all questions of fact entirely to the jury.

<sup>17</sup> [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.) [hereinafter “*Perka*”].

<sup>18</sup> [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 (S.C.C.) [hereinafter “*Chaulk*”].

<sup>19</sup> [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.) [hereinafter “*Lavallee*”].

<sup>20</sup> *Perka*, *supra*, note 17.

jurisprudence arising from the case. The facts read like a hypothetical conjured in the imagination of a professor of moral philosophy. The accused were charged with importing narcotics and of possession for the purposes of trafficking when the police found them camped, along with their boats and 33.49 tons of marijuana worth between 6 and 7 million dollars, in a cove on the west coast of Vancouver Island called “No Name Bay”. At trial, the defence led evidence that the accused had been engaged in an operation to smuggle the narcotics from South America to Alaska. While en route, the ship carrying the illicit cargo, the “Samarkanda”, suffered a series of mechanical difficulties and, when the weather took a turn for the worse, the ship headed for shelter in No Name Bay. Owing to a malfunctioning depth-sounder, the ship grounded on a rock and the captain, fearing for the crew and the cargo, ordered everyone and everything ashore. Yet by bringing the cargo ashore, the crew would seem to be committing the offence of illegal importation of narcotics.

At trial, the defence argued necessity, on the basis that the captain and crew had no choice but to seek temporary refuge in Canada. The judge instructed the jury on the then-still incipient defence of necessity and the jury acquitted. The principal issue on appeal before the Supreme Court of Canada was whether the judge had properly charged the jury on this defence.<sup>21</sup> The Court concluded that he had not. Specifically, the trial judge failed to draw the jury’s attention to “the question of whether there existed any other reasonable responses to the peril that were not illegal”,<sup>22</sup> the requirement for a successful defence of necessity that there be no reasonable alternatives to the course of action leading to the charges.

The result at the Supreme Court was unanimous, but the reasoning was not. Chief Justice Dickson, on behalf of Ritchie, Chouinard, and Lamer JJ., wrote the majority decision. Justice Wilson wrote separate concurring reasons dealing with a narrow question: whether the defence of necessity ought to be conceived of solely as an excuse, as Dickson C.J.C. held, or whether the door ought to be left open for a way of thinking about necessity as a justification. Although not essential to the outcome of the case, this debate between Dickson C.J.C. and Wilson J. is

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<sup>21</sup> Chief Justice Dickson’s majority reasons also dealt with the question of when a “new” issue may and may not be raised on appeal and dismissed the appellants’ other legal argument — the “botanical defence”.

<sup>22</sup> *Perka*, *supra*, note 17, at 254.

what captured and has since held the attention of commentators, the case becoming a favourite for theorists of the criminal law.

Separate concurring reasons are always particularly interesting because, being penned in spite of agreement on the result, they suggest a deeply held difference on a principled point of jurisprudence. In this case, however, the split is particularly interesting for a couple of reasons. First, Wilson J. not only wrote alone, but separately from two of her colleagues with whom, on criminal law matters, she is often closely associated — Brian Dickson and Antonio Lamer. There is a tendency among commentators to group these three judges as together representing the more accused-rights focused sentiment that characterized the Court's early criminal Charter jurisprudence. There is no doubt that the three often concurred on matters of criminal law and can be so characterized. But Wilson J.'s split from the other two members of this triumvirate in *Perka*<sup>23</sup> suggests that, whatever the jurisprudential affinities, Wilson J. had a distinct take on questions of criminal law that is not reducible to simple characterization in terms of "liberal" or "conservative" with respect to the rights of the accused. Something else is at play in her separate reasons in *Perka*.

The second interesting feature of this split was that the issues about which she wrote in passionate disagreement — whether necessity is merely an excuse or can also serve as a justification — have little practical import for the accused or the operation of the criminal law. If an accused is successful in pleading a defence that results in a verdict of not guilty, it generally matters little to her or him whether the defence is theorized as an excuse or a justification. *Perka*<sup>24</sup> thus becomes an especially interesting case for coming to terms with Wilson J.'s conception of the criminal law. She agreed with Dickson C.J.C.'s conclusion that the trial judge had misdirected the jury and that a new trial was needed. Yet she saw fit to write separate reasons differing on a point of *obiter* that was, furthermore, of little practical consequence. What was at stake for her in these reasons?

Despite the unanimity of result and the marginal practical consequence of the point of difference between the majority and minority, the two judgments in *Perka*<sup>25</sup> cut a persistently large figure in Canadian criminal law theory. Why is this so? One immediately gets a

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



sense of the uniqueness of this case and the beginnings of an answer to this question when, in his discussion of the central point of contention in the case, three of Dickson C.J.C.'s first four citations are to Aristotle's *Nichomachean Ethics*,<sup>26</sup> Hobbes's *Leviathan*<sup>27</sup> and Kant's *Metaphysical Elements of Justice*.<sup>28</sup> Debates about whether to think of a defence as an excuse or a justification are really claims about the moral shape and scope of the criminal law. For this reason, legal theorists and philosophers have generated a robust literature creating, splitting and distinguishing concepts (and sometimes hairs) in an effort to come to a satisfying account of the divide between excuse and justification.<sup>29</sup> *Perka* is a rare instance of a case that engages in this literature, crossing the beams of law and philosophy, a fact that has secured for it a certain prominence in the philosophical and theoretical literature about Canadian criminal law.

But *Perka*<sup>30</sup> is also a rare opportunity to see judges making more or less explicit claims about the nature of choice, of judgment and of morality in the criminal law. Beyond a philosophical analysis of the quality of respective views on the nature of justification and excuse, it is here that I see the stakes of the case for Wilson J. Her reasons gesture towards a fundamental difference with her colleagues about how to think about the appropriate reach of the criminal law's claims regarding the rightness of conduct in a world that she seems so clearly to appreciate is filled with agonies arising from the complexities of lived experience.

Chief Justice Dickson acknowledged that there were two possible views that one could take of the defence of necessity: one could view the defence as a justification or as an excuse. For Dickson C.J.C., the essence of a justification is that it "challenges the wrongfulness of an action which technically constitutes a crime".<sup>31</sup> For these kinds of actions, he argued, "people are often praised, as motivated by some great

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<sup>26</sup> Aristotle, *The Nichomachean Ethics*, trans. by J.A.K. Thomson (London: Penguin Books, 2004).

<sup>27</sup> Thomas Hobbes, *Leviathan: with selected excerpts from the Latin edition of 1668*, ed. by Edwin Curley (Indianapolis: Hackett Publishing Co., 1994).

<sup>28</sup> Immanuel Kant, *Metaphysical Elements of Justice*, 2d ed. by John Ladd (Indianapolis: Hackett Publishing Co., 1999).

<sup>29</sup> See, e.g., J.C. Smith, *Justification and Excuse in the Criminal Law* (London: Stevens, 1989); Michael Louis Corrado, ed., *Justification and Excuse in the Criminal Law: A Collection of Essays* (New York: Garland Pub., 1994); George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) [hereinafter "*Rethinking Criminal Law*"].

<sup>30</sup> *Perka*, *supra*, note 17.

<sup>31</sup> *Id.*, at 246.

or noble object”.<sup>32</sup> Apparently criminal acts that are nevertheless justified are matters that also enjoy a certain social approval. By contrast, an excuse “concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be attributed to the actor”.<sup>33</sup> The key divide between an excuse and a justification, then, is that the former are acts that the law insists are “wrong”, even if not to be punished, whereas the label “justified” is to be reserved for those actions whose “wrongfulness” the criminal law is unwilling to declare.

With the conceptual distinction so established, Dickson C.J.C. expressed his deep skepticism and discomfort with the notion of necessity ever serving as a justification. For him, this would be to suggest that “ostensibly illegal acts can be validated on the basis of their expediency” and “would import an undue subjectivity into the criminal law” that might turn the law of necessity into “the last resort of scoundrels”.<sup>34</sup> Rather, necessity is based “on a realistic assessment of human weakness” and, therefore, is to be conceived of as an excuse. We refuse to punish the accused who successfully pleads necessity not because we doubt the wrongfulness of the action but, rather, to recognize that we cannot expect a person, subject to the duress of circumstance, to act otherwise. For Dickson C.J.C., faced with an offence committed in conditions of necessity, we can remain comfortable with the criminal law’s categorical claim that the act was wrong, even while we excuse the actor on account of the intrinsic frailties of human nature. Secure in the criminal law’s *ex ante* decision that this action is invariably wrong, we pardon, but we do not praise.

The concept that Dickson C.J.C. introduced to support this conception of necessity is the now-constitutionalized notion of moral involuntariness,<sup>35</sup> drawn from George Fletcher’s theory of the criminal law.<sup>36</sup> The idea here is that, when an excuse obtains, we refuse to punish because, although the act was “wrong”, circumstances combined with human frailty mean that the accused had no *real* choice whether to commit the offence or not. Such actions are “morally involuntary”. Implicit in this concept is the idea that, had we been more resilient than

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, at 248.

<sup>35</sup> *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.) [hereinafter “*Ruzic*”].

<sup>36</sup> *Rethinking Criminal Law*, *supra*, note 29.

the average person to the duress of circumstance, we would have chosen to do otherwise. This foregrounding of a notion of choice at the core of the excuse led Dickson C.J.C. to insist that a criterion for a successful claim of necessity must be that there was no reasonable legal alternative than to act as the accused did, for “[i]f there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one.”<sup>37</sup>

The sole target of Wilson J.’s separate concurring reasons in *Perka* was this idea that “the appropriate jurisprudential basis on which to premise the defence of necessity is exclusively that of excuse”.<sup>38</sup> Justice Wilson accepted Dickson C.J.C.’s characterization of the distinction between excuses and justifications as turning on the wrongfulness of the act. She further accepted that “excuse speaks to the compassion of the court for the actor”,<sup>39</sup> though she emphasized that the basis for this compassion was the recognition that there was no purpose in punishing given that the act in question was one “which no rational person would avoid”.<sup>40</sup> Where she, alone, broke from Dickson C.J.C.’s reasoning was in her insistence that there *could* be circumstances in which the accused acted rightfully by breaking the criminal law out of necessity. This, I suggest, reflects much about her posture towards the criminal law and criminal judgment.

Sharing Dickson C.J.C.’s concern about the potential for undue subjectivity thereby creeping into the criminal law, Wilson J. was clear to limit her imaginings to those circumstances in which an individual was faced with conflicting duties. Moreover, she insisted on the distinction between “ethical considerations of the ‘charitable and the good’” and “duties imposed by law”.<sup>41</sup> To serve as a basis for a justificatory claim of necessity, the duty conflicting with that of obeying the criminal law would have to be one recognized by law. Finally, if a choice made between conflicting duties that leads one to ostensibly break the criminal law is to be called “rightful”, Wilson J. reasoned that there must be a proportionality between the duty discharged and that breached. Assessing this proportionality would require a court to “somehow attempt to come to grips with the nature of the rights and

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<sup>37</sup> *Perka*, *supra*, note 17, at 252.

<sup>38</sup> *Id.*, at 268.

<sup>39</sup> *Id.*, at 269.

<sup>40</sup> *Id.*, at 273.

<sup>41</sup> *Id.*, at 277.

duties being assessed”,<sup>42</sup> leading to a conclusion that the actions of the accused “can be said to represent a furtherance of ... the principle of the universality of rights”.<sup>43</sup>

There is a great deal of fodder for the criminal theorist or legal philosopher in this debate. Pivotal to me, however, is Dickson C.J.C.’s claim that, in this area of the law, “[t]he question ... is never whether what the accused has done is wrongful. It is always and by definition, wrongful.”<sup>44</sup> Justice Wilson’s decision in *Perka* can be read as levelled against this single claim to which she could not accede. The majority judgment, which remains our law in Canada, closed a door that Wilson J. earnestly felt needed to be kept open. This call to keep the door open, I argue, expresses a basic disposition towards criminal judgment. Justice Wilson’s reasons are built around the tacit idea that lived reality is too complex to admit of categorical claims about rightness or wrongness based on *ex ante* judgments of the criminal law. In her more generous conception of the defence of necessity, her judgment counsels the adjudicator to take a complex and self-critical posture towards the adequacy — and *desirability* — of the letter of the criminal law as a proxy for our moral assessments.

The duties — legal and otherwise — to which we are subject are many and the manner in which they might conflict is unpredictable. Justice Wilson invoked the case of an individual who trespasses in order to rescue a person to whom he owes a legal duty of care.<sup>45</sup> Are we so certain of the criminal law’s *ex ante* normative assessments to claim that such an act is wrongful? She drew on the facts of *R. v. Morgentaler*,<sup>46</sup> a case that clearly cast its shadow on the issues raised and the legal reasoning in *Perka*, arguing that “if one subscribes to the viewpoint articulated by Laskin C.J.C. in *Morgentaler* ... and perceives a doctor’s defence to an abortion charge as his legal obligation to treat the mother”,<sup>47</sup> then it becomes far from clear where the “right” lies.<sup>48</sup> Indeed,

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<sup>42</sup> *Id.*, at 278.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, at 254.

<sup>45</sup> Citing *Mouse’s Case* (1608), 12 Co. Rep. 63. She also invoked *R. v. Walker*, [1979] O.J. No. 4593, 48 C.C.C. (2d) 126 (Ont. Co. Ct.).

<sup>46</sup> [1976] S.C.J. No. 48, [1976] 1 S.C.R. 616 (S.C.C.).

<sup>47</sup> *Perka*, *supra*, note 17, at 276.

<sup>48</sup> It is, of course, tempting to see in these remarks a foreshadowing of her subsequent 1988 decision in the *Morgentaler* saga, one of her most passionate interventions in the intersection of criminal and constitutional law (*R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter “*Morgentaler*”]).

as one senses the spirit of these examples, it becomes hard not to argue that by limiting her argument to cases of conflicts between the commands of the criminal law and *legally recognized* duties, she sacrificed the full coherence of her vision in order to forestall the floodgates concern that anything more embracing would render the law of necessity Dickson C.J.C.'s "last resort of scoundrels". By her own admission, in insisting on a legally recognized duty, she excluded the case of the good Samaritan who trespasses to rescue a stranger, to whom no such duty is owed.<sup>49</sup> Surely this person is also deserving of our moral praise and is a perverse subject of criminal punishment.

Overall, however, her reasons in *Perka* manifest discomfort with absolute confidence in the normative claims of the criminal law. They work hard to strike an appropriate balance between objectivity in the criminal law and the need to leave a space in which we can insist that the adjudicator — whether judge or jury — critically assess the contextual rightness of an act. What's more, her reasons reflect unease with Dickson C.J.C.'s treatment of the concept of choice in criminal law. Faced with the criminal law, the scope of responsible human conduct is broader, and the terrain more complex, than simply the choice to obey and the exigency-produced absence of real choice. Wrestling with the concepts of necessity, excuse and justification, she was simply not convinced that praise is never due to the lawbreaker.

Justice Wilson regarded *Perka* as "one of the most interesting judgments she ever wrote"<sup>50</sup> given, in part, the opportunity it afforded her to engage with philosophical literature, something she very much enjoyed. To be sure, the issues offer much of academic interest. Yet the practical impact of the law would have been virtually the same had the Court adopted her view of necessity as potentially justificatory.<sup>51</sup> To return to the question, then: what was at stake in penning this separate concurring judgment? What can we make of this decision? I argue that Wilson J.'s reasons in *Perka* can be read as reflecting a posture towards criminal judgment, an attitude that demands a margin of modesty borne

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<sup>49</sup> *Perka*, *supra*, note 17, at 276.

<sup>50</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 279.

<sup>51</sup> Conceiving of the defence of necessity as excuse or justification might have some impact on doctrines of party liability and could affect civil liability or have implications for other non-criminal areas. See, e.g., the English "conjoined twins" case of *A (Children)*, [2000] 4 All E.R. 961, [2000] E.W.C.A. Civ. 254. I have previously discussed my views on the defence of necessity in Benjamin L. Berger, "A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39(4) *Alta. L.R.* 848.

of the moral complexities that the criminal law must confront. Her insistence on keeping open the possibility of understanding necessity as a justification recognized the unpredictable and unforeseeable nature of the circumstances with which the criminal law must contend, and the consequent need for the possibility of a way to speak about morally laudable conduct that breaches the letter of the criminal law. She sought to deny the criminal law the authority to exhaust the possible characterizations of actions that breach its terms simply as either “punishable” or the product of “human frailty”. In some circumstances, she insisted, it might be that to break the criminal law is the positively right thing to do. If it is an uncomfortable and complex claim for the law to digest, such is the complexity of life and the consequent need for humility in criminal judgment.

### III. THE SAFER PATH IN CRIMINAL JUDGMENT

In his discussion of the tremendous moral anxiety experienced by early modern Christians involved in criminal judgment, James Whitman describes a particularly influential school of moral theology that would develop over the course of the central Middle Ages and would contribute, in complex ways, to the shape of our modern criminal trial. The anxiety experienced by our progenitor judges and jurors turned on the question of doubt. Doubt, at this time, was dangerous. The world was filled with possibilities for pollution and sin, all of which threatened the soul. In a perilous world like this, to act while experiencing doubt was to put the soul in eternal peril. The problem was sharply put by Pope Gregory the Great: “*Grave satis est et indecens, ut in re dubia certa detur sentential*”: “It is a grave and unseemly business to give a judgment that purports to be certain when the matter is doubtful.”<sup>52</sup> In the 12th and 13th centuries, the “safer way” school of moral theology developed to respond to the problem of knowing how to act in circumstances of uncertainty that posed great moral peril. The doctrine of the safer path was simple: “in cases of doubt, ‘*in dubiis*,’ one should act in such a way as to minimize the possibility of pollution.”<sup>53</sup> The theologians of the safer path spun a theory of degrees of certainty ranging from “doubt”, through suspicion and opinion, to the highest

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<sup>52</sup> James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2007), at 116.

<sup>53</sup> *Id.*, at 117.

certainty, “moral certainty”.<sup>54</sup> In matters of practical doubt — doubt about how one should act — one should always follow the safer path. When it came to criminal judgment, and the anxiety-inducing blood guilt and moral peril that accompanied it, the safer path doctrine proved formative for centuries to come. Its application to legal judgment was clear enough — if one had doubt, the safer path was not to judge. Whitman convincingly shows that, as late as the 18th century, jurors were still influenced by this theological conception and refused to convict if seized with even the smallest doubt. This is the soil from which the idea of proof beyond a reasonable doubt arose; proof beyond a reasonable doubt was a theological concept devised to comfort the conscience of the juror in the context of a justice system that *needed* them to act. The safer path should be taken, certainly, but your soul was safe if you acted with no *reasonable* doubt.

In the modern Canadian criminal justice system, the concept of proof beyond a reasonable doubt is expressed in the Charter protection of the presumption of innocence, found in section 11(d). In *Lifchus*,<sup>55</sup> Cory J. accounted for the vital importance of the standard of proof beyond a reasonable doubt on the basis that “it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence.”<sup>56</sup> The concepts are the twin key pillars of our criminal justice system: “If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law.”<sup>57</sup> In a simile whose tragic undertones might suggest that the metaphor got slightly away from him, Cory J. described the two concepts as “forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit”.<sup>58</sup> Today, our moral comfort has more to do with seeking to ensure that the morally innocent are not convicted than with overtly theological concerns. Nevertheless, the concept of proof beyond a reasonable doubt continues to serve its role as the marker for the “safer path”, now joined by the presumption of innocence.

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<sup>54</sup> In *R. v. Lifchus*, [1997] S.C.J. No. 77, [1997] 3 S.C.R. 320 (S.C.C.), the Court commented that this phrase — “moral certainty” — ought not to be used when explaining the concept of reasonable doubt to the jury.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, at para. 27.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Yet in recent years, in the realm of criminal defences, we have watched as the Court has increasingly seen fit to justify breaches of the presumption of innocence. In *R. v. Daviault*,<sup>59</sup> the Court held that an accused would bear the burden of proving, on a balance of probabilities, intoxication akin to automatism. So holding requires, in effect, that the accused prove the absence of minimal *mens rea*. In *R. v. Stone*,<sup>60</sup> Bastarache J. held that the burden of proof for automatism would, thenceforth, lie on the accused. Most recently, the Court has held that proving all six elements of the newly recognized defence of officially induced error would be a burden borne by the accused.<sup>61</sup> One might have been forgiven for predicting that the Charter would have assiduously protected this core cautionary principle — for that is what it is — in Canadian criminal law. Indeed, it appeared that this might be so when the Court struck down certain reverse onus provisions.<sup>62</sup> But it all seemed rather less certain after the Court decided *Chaulk*<sup>63</sup> to the sole but strenuous objection of Justice Bertha Wilson.

*Chaulk*<sup>64</sup> involved the case of Robert Chaulk and Francis Morrisette who, in the early fall of 1995, entered a Winnipeg home, robbed it of its contents, and stabbed and bludgeoned the home's occupant to death. The two accused were aged 15 and 16, respectively, at the time of the murder. Having made full confessions, their sole defence was that they were insane at the time of the offence and, hence, were entitled to be found not guilty by reason of insanity, in the terms of section 16(4) of the *Criminal Code*, as it stood at the time.<sup>65</sup> The basis for their claim was that, suffering from a form of paranoid psychosis, the two believed they “had the power to rule the world and that the killing was a necessary

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<sup>59</sup> [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.) [hereinafter “*Daviault*”].

<sup>60</sup> [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290 (S.C.C.) [hereinafter “*Stone*”]. At para. 180, Bastarache J. justified his newly fashioned burden on the accused on the basis that automatism is easily feigned, that the knowledge rests with the accused, and that to do otherwise would be too onerous for the Crown. Justice Binnie objected strenuously to this reasoning.

<sup>61</sup> *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, [2006] S.C.J. No. 12, [2006] 1 S.C.R. 420, at para. 26 (S.C.C.) [hereinafter “*Tétreault*”]. For both intoxication akin to automatism and officially induced error the Court reasoned that reversal was needed because the accused is the “only one capable” of adducing the evidence: *R. v. Jorgensen*, [1995] S.C.J. No. 92, [1995] 4 S.C.R. 55, at para. 36 (S.C.C.), *per* Lamer C.J.C. See *Daviault*, *supra*, note 59, at 101.

<sup>62</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

<sup>63</sup> [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 (S.C.C.).

<sup>64</sup> *Id.*

<sup>65</sup> The insanity scheme has since been substantially reworked, shifting the language from that of “insanity” to “mental disorder” and instituting a more comprehensive and less discretionary treatment scheme for those found to be not criminally responsible by reason of mental disorder.



means to that end”.<sup>66</sup> They were aware that Canadian law prohibited the act, but believed that the law did not apply to them. The jury convicted them of first degree murder.

This sad case raised a number of issues before the Supreme Court of Canada, two of particular interest to the law of mental disorder. The first was the meaning to be given to the word “wrong” in the statutory demand that, for the defence of insanity to prevail, the accused must show that he or she was “incapable of appreciating the nature and quality of an act or omission *or of knowing that an act or omission is wrong*”.<sup>67</sup> Counsel for the accused argued that, although they knew that the murder was *illegal*, these two disturbed young men did not know that it was “wrong” in the sense of it being immoral. Although McLachlin J. (as she then was) dissented, arguing that “wrong” contemplated *either* moral or legal wrongness, the majority of the Court accepted the appellants’ argument, and ordered a new trial. The second issue, and the one on which I will focus here, concerned section 16(4) of the Code, which created the so-called “presumption of sanity” (now found in section 16(2)), stating that “everyone shall, until the contrary is proved, be presumed to be and to have been sane”. This provision had been interpreted as codifying the long-standing common law rule that, if an accused sought to rely upon the defence of insanity, the burden lay on him to establish the defence on a balance of probabilities. The appellants argued that this provision, and the underlying common law rule, offended the presumption of innocence protected by section 11(d) of the Charter, a breach that could not be justified. The burden, they argued, should — as with all other defences at the time — be the Crown’s, requiring proof beyond a reasonable doubt that the accused *was not* insane once an evidentiary foundation for the defence had been laid.

Eight members of the Court rejected this argument. In so doing, they moved with the momentum of Anglo-Canadian criminal law history. Since at least *M’Naughten’s Case*,<sup>68</sup> decided in 1843, the common law had placed this burden on the accused. This common law rule was reflected in our original 1892 *Criminal Code* and had been part of the statutory defence ever since. In her dissenting reasons, McLachlin J. denied that this reverse onus even offended the presumption of

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<sup>66</sup> *Chaulk, supra*, note 63, at 1314.

<sup>67</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 16(1) (emphasis added).

<sup>68</sup> (1843), 8 E.R. 718 (H.L.). Justice McLachlin claimed that the principled foundation for the rule had an even deeper historical pedigree, stating that “[t]he criminal law, *from time immemorial*, has presumed that persons are sane and responsible” (*Chaulk, supra*, note 63, at 1404).

innocence. Preferring to view sanity as a basic precondition to criminal responsibility, McLachlin J. argued that insanity did not speak to guilt and, hence, could not offend the presumption of innocence. By contrast, Lamer C.J.C., writing for the majority of the Court, argued that section 16(4) offended the presumption of innocence because it put the onus on the accused to prove a defence that precludes a finding of guilt — “it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused”.<sup>69</sup> Yet he concluded that the breach of this hallowed principle of the criminal justice system — the severing of the golden thread — could be justified under section 1. How so? Chief Justice Lamer’s rationale revolved around a single concern: the difficulty of proof and, hence, conviction. In claims of insanity, all of the relevant information was in the hands of the accused and, without the cooperation of the accused, which he felt could not be compelled, he argued that the Crown would be unable to discharge the normal criminal burden. This was particularly so given that the Crown would be forced to inquire into the accused’s mental state back at the time when the offence was committed. The tacit concern, of course, is that insanity might be readily feigned.<sup>70</sup> On the strength of these observations, and having rejected the characterizations of the objective of section 16(4) offered by the Crown, Lamer C.J.C. explained that section 16(4) “is a purely evidentiary section whose objective is to relieve the prosecution of the tremendous difficulty of proving an accused’s sanity in order to secure a conviction”.<sup>71</sup> He described the burden that would be imposed on the Crown if the rule were altered as “unworkable”<sup>72</sup> and “impossible”<sup>73</sup> and characterized the objective of the provision as being to avoid such a burden “and to thereby secure the conviction of the guilty”.<sup>74</sup> With this legislative purpose in hand, he stepped through the *Oakes*<sup>75</sup> test, finding a rational connection and concluding that this measure was minimally

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<sup>69</sup> *Chaulk, supra*, note 63, at 1330.

<sup>70</sup> One wonders how this situation is meaningfully different from the *de rigueur* demand made for the Crown to prove *mens rea* beyond a reasonable doubt. It suggests the point made early in this piece, that there is a strong and strengthening tendency within Canadian law to view defences as secondary or subsidiary aspects of criminal responsibility, a perspective with which I strongly disagree.

<sup>71</sup> *Chaulk, supra*, note 63, at 1337.

<sup>72</sup> *Id.*, at 1345.

<sup>73</sup> *Id.*, at 1339.

<sup>74</sup> *Id.*

<sup>75</sup> *Oakes, supra*, note 62.

impairing given that any lower burden would, almost definitionally, fail to meet this objective.

The most interesting portion of Lamer C.J.C.'s majority reasons came when he addressed what this all meant for the general balancing at the third stage of the section 1 proportionality test. Section 16(4) represented a compromise designed to balance "three important societal interests: avoiding a virtually impossible burden on the Crown; convicting the guilty; and acquitting those who truly lack the capacity for criminal intent".<sup>76</sup> To be sure, there would be deleterious impacts on the presumption of innocence; but the Court concluded that there was a pragmatic need for some give and take to ensure that "the Crown not be encumbered with an unworkable burden".<sup>77</sup> The majority in *Chaulk* viewed this as a justifiable compromise, one expressed in a remarkable coda:

The result of this compromise is that some guilty people will be acquitted and will be dealt with via the "L.G.W. system", and some insane (*and therefore not guilty*) people will be convicted and will be stigmatized and punished as criminals.<sup>78</sup>

Justice Wilson's separate reasons in *Chaulk*<sup>79</sup> are usually remembered for their expression of her strict approach to the *Oakes*<sup>80</sup> test and her demand for a strong evidentiary basis for the justification of limits on Charter rights.<sup>81</sup> She criticized Lamer C.J.C.'s analysis for justifying the breach of "one of the most, if not the most, fundamental tenet of our criminal justice system"<sup>82</sup> on the basis of an imagined possibility of an

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<sup>76</sup> *Chaulk, supra*, note 63, at 1344.

<sup>77</sup> *Id.*, at 1345.

<sup>78</sup> *Id.*, at 1344 (emphasis added). "L.G.W." refers to the Lieutenant Governor's warrant, under which accused found not guilty by reason of insanity were, at the time, detained for psychiatric treatment.

<sup>79</sup> *Chaulk, supra*, note 63.

<sup>80</sup> *Supra*, note 62.

<sup>81</sup> See, e.g., Wilson J.'s dissent in *R. v. Lee*, [1989] S.C.J. No. 125, [1989] 2 S.C.R. 1384 (S.C.C.). On her posture towards s. 1, see Kent Roach, "Justice Bertha Wilson: A Classically Liberal Judge" (2008) 41 S.C.L.R. (2d) 193, and *Judging Bertha Wilson, supra*, note 50, at 282-83.

<sup>82</sup> *Chaulk, supra*, note 63, at 1362. Justice Wilson's emphasis on the presumption of innocence and her strict approach to the Crown's burden of proof is also evidenced in her decision in *R. v. Bernard*, [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833 (S.C.C.), which concerned the relevance of evidence of intoxication to proof of *mens rea*. Although she agreed with McIntyre J.'s conclusion that the evidence in the case was not sufficient to raise a reasonable doubt as to the minimal intent necessary to make out the general intent offence of sexual assault, she disagreed that self-induced intoxication ought to be treated as a substitute form of *mens rea*. Justice Wilson thus placed herself between the positions taken by McIntyre J. and Dickson C.J.C. (who would have discarded altogether the rule in

evidentiary problem for the Crown. To this end, Wilson J. canvassed the experience and jurisprudence in the United States, where many states did not place the burden to prove insanity on the accused.<sup>83</sup> She noted that, in the 1895 case *Davis v. United States*,<sup>84</sup> Harlan J. had placed the onus on the government to disprove insanity and concluded that “[t]he fact that this decision has stood unchallenged for almost a century tends to persuade me that the lower burden on the accused has not created a pressing and substantial problem in American society.”<sup>85</sup> Drawing heavily upon the research of Professor Gerry Ferguson, she examined the legal experience in a number of U.S. jurisdictions that did not impose the reverse burden, finding no evidence that placing the burden on the Crown was in any way “unworkable”. Furthermore, she surveyed recommendations made by law reform bodies in Canada, the U.S. and the United Kingdom, all of which supported her view.

Yet more than an expression of a strict posture towards justification, dealing as it does in the stuff of doubt and guilt, one finds in her decision a strong reflection of her disposition towards criminal judgment. Her insistence on empirical attention to the lived experience of the law in jurisdictions that did not impose the reverse onus in insanity cases demonstrates a willingness to bracket the substantial weight of history to critically examine received wisdom in the criminal law, where she keenly felt the stakes to be so very high. Her reasons are infused with a cognizance of the fearsome implications of criminal judgment. She cites Dickson C.J.C. in *Oakes*, emphasizing that “[a]n individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological

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*R. v. Leary*, [1978] S.C.J. No. 39, [1978] 1 S.C.R. 29 (S.C.C.). “The real concern over the substituted form of *mens rea* arises”, she argued, as a question of the presumption of innocence “under s. 11(d) of the *Charter*” (at 889). To this end, she emphasized in her reasons that, even for general intent offences, “the Crown must still prove beyond a reasonable doubt the existence of the required mental element of the intentional application of force” (at 888). Justice Wilson’s view was, of course, adopted by the Court in *Daviault*, *supra*, note 59.

<sup>83</sup> Justice Wilson noted (*Chaulk*, *supra*, note 63, at 1372) that in principle, to succeed in justifying the breach of s. 11(d)

the government would have to adduce evidence under s. 1 to show that this was a real social problem, that perfectly sane persons who had committed crimes were in significant numbers escaping criminal liability on tenuous insanity pleas and that something had to be done about it.

However, Canada had no experience of a criminal law that did not impose the burden for insanity on the accused. It is for this reason that she looked to the United States.

<sup>84</sup> 160 U.S. 469 (1895).

<sup>85</sup> *Chaulk*, *supra*, note 63, at 1377.

and economic harms.”<sup>86</sup> Moreover, she saw and emphasized that the choice here was not between these grave consequences and simple leniency, noting that “a successful insanity plea is not an open door to freedom. It is a mandate for confinement in an appropriate institution for treatment rather than confinement simpliciter” and that “[t]he mean length of time of LGW detentions is six years and four months.”<sup>87</sup>

This foregrounded awareness of the troubling violence involved in criminal judgment that one can detect in her reasons leads her back to a principled legal core. She places enormous emphasis on the role of the presumption of innocence as a cornerstone of our system of criminal judgment, noting in particular that it is “reflected in the axiom that ‘It is better that a guilty person go free than an innocent person be convicted of a crime’”.<sup>88</sup> Indeed, this axiom — one that is so well known in our criminal law culture — is often amplified: better that 10... 100... 1,000 guilty persons go free. It is a curious axiom understood solely in the terms of trials as exercises in the discovery of truth. The standard of proof beyond a reasonable doubt is one that, as the Court emphasized in *Lifchus*,<sup>89</sup> is higher than that which we apply in even our most important personal decisions and, joined with a demand for juror unanimity, is a standard far more stringent than we ask of the scientific community. The axiom, and the twin principles of the presumption of innocence and proof beyond a reasonable doubt from which it arises, is generated out of an anxiety about the force and precariousness of the criminal law. It is to this axiom that Wilson J. trenchantly and rigorously adheres in *Chaulk*, asking, “do we wish to go down this path [of compromise] where such a fundamental tenet of our justice system ... is at stake?”<sup>90</sup> To Lamer C.J.C.’s claim that, for pragmatic reasons, a balance must be struck — even if this compromise means that certain accused who are insane will be convicted and subject to the violence that Wilson J. describes — she answers not only with an empirical refutation of the need for such a compromise, but also pointedly reponds: “in my view ... it is better that a guilty person be found not guilty by reason of insanity and committed for psychiatric treatment than an insane person be convicted of a crime.”<sup>91</sup> This caution must not be confused with timidity. Her boldness

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<sup>86</sup> *Oakes, supra*, note 62, at 119.

<sup>87</sup> *Chaulk, supra*, note 63, at 1392.

<sup>88</sup> *Id.*, at 1368.

<sup>89</sup> *Lifchus, supra*, note 54.

<sup>90</sup> *Chaulk, supra*, note 63, at 1375.

<sup>91</sup> *Id.*, at 1374.

in taking on the wisdom of the common law belies the conclusion that her decision reflects a kind of timorousness in criminal judgment; rather, her judgment in *Chaulk*, and the posture towards criminal judgment that it reflects, demonstrates a jealous guarding of the safer path in the face of the fearsomeness of the criminal law.

#### IV. THE PERILS OF ASSUMING THAT WE KNOW

Justice Wilson's sense of the moral burdens and ethical obligations that the criminal law places on the adjudicator is given further shape in the most celebrated of her criminal law judgments, *Lavallee*.<sup>92</sup> *Lavallee* was the decision that, after years of strenuous call from scholars,<sup>93</sup> finally drew the lived experience of the battered woman into the fabric of criminal jurisprudence in Canada. It was decided in the years following the tragic case of *R. v. Whynot*,<sup>94</sup> in which the Nova Scotia Court of Appeal excluded the expert evidence of battered wife syndrome in the case of Jane Stafford, who had killed her husband after suffering horrendous physical and psychological abuse at his hands. The Supreme Court's decision in *Lavallee*, written by Wilson J., was received with much acclaim — and certain notes of caution<sup>95</sup> — as a long-awaited

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<sup>92</sup> [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.).

<sup>93</sup> See, e.g., Julie Blackman, "Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill" (1986) 9 Women's Rts. L. Rep. 227; see also Phyllis L. Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985) 8 Harv. Women's L.J. 121.

<sup>94</sup> [1983] N.S.J. No. 544, 9 C.C.C. (3d) 449 (N.S.C.A.).

<sup>95</sup> See Martha Shaffer, "*R. v. Lavallee*: A Review Essay" (1990) 22 Ottawa L. Rev. 607, at 609, arguing that the decision represented "an important step towards making the law of self-defence responsive to the life experiences of women", while also cautioning that "an uncritical acceptance of the 'battered woman's syndrome' may reinforce sexist notions of women's behaviour by falling prey to the same sex stereotypes that the 'battered woman syndrome' was initially devised to counter" (at 611). To a similar effect, see Isabel Grant's contribution to Donna Martinson *et al.*, "A Forum on *Lavallee v. R.*: Women and Self-Defence" (1991) 25 U.B.C. L. Rev. 23 [hereinafter "A Forum on *Lavallee*"], entitled "The 'Syndromization of Women's Experience'" [hereinafter "The 'Syndromization' of Women's Experience'"], in which she applauds the effort to draw women's lived experiences into the criminal law but warns about the use of the pathological language to describe these experiences. She argues at 52 that, trapped in the dichotomy of either being "reasonable 'like a man' or reasonable 'like a battered woman'... the 'reasonable' woman may disappear". See also Elizabeth Sheehy, Julie Stubbs & Julie Tolmie, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim. L.J. 369; Christine Boyle, "The Battered Wife Syndrome and Self-Defence: *Lavallee v. R.*" (1990) 9 Can. J. Fam. L. 171 [hereinafter "The Battered Wife Syndrome"]; and Marilyn MacCrimmon's contribution to "A Forum on *Lavallee*", entitled "The Social Construction of Reality and the Rules of Evidence" [hereinafter "Social Construction of Reality"]. MacCrimmon commends aspects of the decision but warns of the reliance on expert psychiatric evidence, which "abstracts and re-

triumph of a gendered analysis of the criminal law. Indeed, Justice Wilson herself viewed the case in this vein. In her biography of Justice Wilson, Ellen Anderson notes that in the time between the hearing in *Lavallee* and the issuance of the judgment, Justice Wilson had been reading extensively in preparation for her influential speech, “Will Women Judges Really Make a Difference?”<sup>96</sup> Anderson quotes Justice Wilson as reflecting that while she was writing the speech, she

realized that there were quite a number of aspects of the law that needed to be rethought from a gender perspective and that was one, that it was a chance to begin doing it by looking at the defence of self-defence and how it was essentially male oriented. And I thought to myself, now here is a chance to give some leadership to what I have said in my speech that some aspects of the law must be reviewed because of the male bias and that was a chance to do that. ...<sup>97</sup>

Cautions voiced in the scholarship and subsequent jurisprudence about the potential misuse of aspects of the reasoning in *Lavallee* must be borne in mind.<sup>98</sup> However, the case unquestionably stands as a profoundly important intervention in the law’s approach to and understanding of violence against women, an intervention based on the application of a principled and careful gender analysis to the criminal law.

Justice Wilson’s judgment in *Lavallee* also resonated with certain of the themes that I have identified as constitutive of her posture towards criminal judgment, themes expressed particularly clearly in her treatment of criminal defences. Although this aspect of *Lavallee* has not been discussed in the critical literature, the decision stitches seamlessly into

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interprets” the woman’s experience. For a pre-*Lavallee* critique of the use of expert evidence of battered woman syndrome, see David L. Faigman & Amy J. Wright, “The Battered Woman Syndrome in the Age of Science” (1997) 39 *Ariz. L. Rev.* 67.

<sup>96</sup> Subsequently published as Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28 *Osgoode Hall L.J.* 507.

<sup>97</sup> Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 219.

<sup>98</sup> See Martha Shaffer, “*R. v. Lavallee*: A Review Essay” (1990) 22 *Ottawa L. Rev.* 607 and *R. v. Malott*, [1998] S.C.J. No. 12, [1998] 1 S.C.R. 123 (S.C.C.), in which L’Heureux-Dubé J. cautions against an overly rigid approach to the admissibility of evidence of the battered women’s experience. She notes, at para. 40, that a woman claiming self-defence in the context of an abusive relationship “should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman”. See Martha Shaffer, “The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*” (1997) 47 *U.T.L.J.* 1. In this follow-up article to a piece written shortly after the decision (Shaffer, “*R. v. Lavallee*: A Review Essay”), Shaffer canvassed the initial concerns raised by commentators and reviewed 35 subsequent cases to see if these concerns were borne out. Her analysis of those cases “suggests that the feminist concerns about the battered woman syndrome are being borne out, at least to some degree” (at 19).

the larger picture that I am painting of her posture in the criminal law. In *Perka*,<sup>99</sup> Wilson J.'s decision was infused with the sentiment that the breadth of lived experience is simply too complex to admit of the kinds of *ex ante* judgments that the criminal law makes and the consequent commitment that it was necessary to facilitate the adjudicator's critical assessment of the contextual rightness of a given act. In *Chaulk*,<sup>100</sup> Wilson J. demonstrated her resistance to complacency with the inherited concepts and assumptions of the criminal law, demanding that the rapidly shifting and complex social reality to which the criminal law must respond be informed by a strong evidentiary base founded in research and fact rather than in myth and presumption. Looking closely at the core theoretical intervention in *Lavallee*, one finds these dispositions and tacit commitments equally at play, dispositions and commitments themselves born, I have argued, of a due measure of appreciation of the fearsome nature of criminal judgment. But *Lavallee* is not simply a reflection of the themes developed in this chapter; it is a decision that, in its own right, adds to and enriches this picture of Justice Wilson's criminal jurisprudence.

The chilling facts of *Lavallee* are well known. Angelique Lyn Lavallee, a 22-year-old woman, was charged with the murder of Kevin Rust, her common law partner. Ms Lavallee had been the victim of serious physical and psychological abuse over the course of her three- to four-year relationship with Mr. Rust. The history and degree of abuse was supported by evidence adduced at her trial. On the night of the killing, following a party at their house, Mr. Rust had become abusive and aggressive towards Ms Lavallee. Based on the long pattern of violence that she had suffered at his hands, Ms Lavallee became terrified that he was going to beat her that night. She hid in her bedroom closet. Mr. Rust came upstairs looking for her and yelling. When he found her in the closet he grabbed her, pushed and struck her. At this point, he produced a gun, firing a shot through a window screen in the room. He then reloaded the gun and handed it to her. Ms Lavallee told the police that she contemplated killing herself. Mr. Rust threatened her: "wait till everybody leaves, you'll get it then."<sup>101</sup> He warned her that either she kill him or he would "get" her. He smiled, turned to leave the room, and Ms Lavallee shot him in the back of the head.

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<sup>99</sup> [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.).

<sup>100</sup> [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 (S.C.C.).

<sup>101</sup> *Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852, at 857 (S.C.C.).



At her trial, Ms Lavallee pleaded self-defence and adduced psychiatric evidence from one Dr. Fred Shane who, having reviewed the facts of the case and interviewed Ms Lavallee, testified about battered spouse syndrome and the effect that it had on Ms Lavallee's psychological condition. To the protestations of the Crown, the trial judge allowed this evidence to go before the jury and the jury found her not guilty. But the Manitoba Court of Appeal, which concluded that the trial judge had erred in admitting the evidence, overturned the result. Based on the preliminary views expressed by the judges in the post-hearing conference at the Supreme Court of Canada, it seemed that Ms Lavallee's prospects of victory were slim.<sup>102</sup> Indeed, accepted doctrine appeared to present substantial obstacles for her defence. Section 34(2) of the *Criminal Code*,<sup>103</sup> the relevant self-defence provision, required that the accused have both a reasonable apprehension of death and a reasonable belief that there were no legal alternatives to killing in self-defence. Moreover, the provision had been interpreted as imposing a tacit "imminence" requirement, for how could one truly believe that there were no alternatives to self-help if the threat was not imminent?

As I have suggested, Wilson J.'s reasons in *Lavallee* are a call for both recognition of the complexity of the lived experiences that the criminal law addresses and the need to criticize the adequacy of accepted and prevailing legal concepts in reflecting this complexity. Yet, at their conceptual core, her reasons are an elegant and forceful argument for the importance to just criminal judgment of a humble recognition of the limits of our knowledge. They are an admonition against the odious myopia that sets in when the person charged with the terrible task of judging another relaxes into a sanguine comfort about the generalizability of one's own knowledge. This is the insight that informs Wilson J.'s argument for the relevance of this expert evidence of battered spouse syndrome within the auspices of the doctrine that, at first blush, appeared to be so constraining. Her reasoning is a skilful exploration of the requirement for an objective measure of "reasonableness" in the two criteria for justified lethal self-defence at issue in the case. As she palpates the concept of reasonableness, she shows it to be a more supple and complex concept than the criminal law had theretofore assumed, one in need of a broadening infusion of unfamiliar facts.

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<sup>102</sup> *Judging Bertha Wilson*, *supra*, note 97, at 219 and 221.

<sup>103</sup> R.S.C. 1985, c. C-46.

Thus, Wilson J. explains that myth and assumption condemn the woman in Ms. Lavallee's position: "Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it."<sup>104</sup> Such assumptions are not the product of malice but, rather, of the inherent limitation of the adjudicator's lived experience:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".<sup>105</sup>

The "average member of the public (or of the jury) can be forgiven"<sup>106</sup> for coming to judgment bounded and informed by the limits of his or her knowledge. The law, however, must account for this constraint on just judgment; it is the role of the law of evidence — and the judge who is responsible for its integrity and evolution — to ensure that the criminal trial assists the adjudicator in stretching the limits of her or his understanding.<sup>107</sup>

In *Lavallee*, this help came in the form of expert evidence. The relevance and, hence, admissibility of Dr. Shane's evidence was precisely in helping the jurors to enlarge their sense of the contextually reasonable. Thus, when Wilson J. turned to the law's requirement for a reasonable apprehension of death, she explained that the expert evidence can help to disturb the judge or juror's assumption that one cannot reasonably feel a threat of grievous bodily harm or death when the attacker is leaving the room. The evidence of the psychological impact of cyclical abuse offers the trier of fact an understanding — perhaps otherwise unavailable to him or her — of the battered woman's heightened sensitivity to the likely onset and severity of violence. Equally, when she considered the legal requirement that the accused reasonably believed that there was no alternative legal course of action open to her, Wilson J. noted that the expert evidence of the "traumatic

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<sup>104</sup> *Lavallee*, *supra*, note 101, at 873.

<sup>105</sup> *Id.*, at 874.

<sup>106</sup> *Id.*, at 871.

<sup>107</sup> In this vein, in "The Battered Wife Syndrome", *supra*, note 95, at 174, Boyle writes that "judicial willingness to be open to perspectives and research which challenge intuitive views of the 'facts' is clearly important not only to the issue of self-defence but other issues as well."

bonding”, “learned helplessness”<sup>108</sup> and reluctance to disclose abuse to outsiders that could afflict the battered woman should be offered to the jury. This information can help meet the juror’s ill-informed, if cognitively explicable, question: “if the violence was so intolerable, why did the appellant not leave her abuser long ago?”<sup>109</sup>

In the course of her reasoning, Wilson J. compellingly exposed the ways in which history continued to inform and distort in gendered ways both the law’s received understanding of self-defence and the manner in which a juror might reason about the actions of a battered woman. She put the concept of “imminence” back in its place as a judicial gloss influenced by “the paradigmatic case of a one-time bar-room brawl between two men of equal size and strength”.<sup>110</sup> When a judge was forced to critically interrogate the received orthodoxies of the criminal law, it became manifestly clear that to continue in thrall to this paradigm would be “tantamount to sentencing [a battered woman] to ‘murder by installment’”.<sup>111</sup> She noted the hypocritical way in which the demand to flee was deployed against battered women, observing that “traditional self-defence doctrine” did not impose an obligation to flee and that “[a] man’s home may be his castle but it is also the woman’s home even if it seems to her more like a prison in the circumstances.”<sup>112</sup> But the central message of *Lavallee* was as much about the perils of assuming that we *know* as it was about the historical bias of the law. That this idea is the pivot point for her reasons is made plain when she begins her analysis of the core issues in the case by noting the clear need for assistance from experts in areas such as engineering or pathology. In such matters, “the paucity of the lay person’s knowledge is uncontentious”.<sup>113</sup> The critical

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<sup>108</sup> In “The ‘Syndromization of Women’s Experience’”, *supra*, note 95, at 52, Grant argued that Justice Wilson’s reliance on the psychiatric concept of “learned helplessness” could prove misleading: “It is not necessarily a ‘battered woman’s’ helplessness that renders her killing reasonable; it is the repetition and regularity of the abuse to which she has been subject and her perception of the threat to her life or safety.”

<sup>109</sup> *Lavallee*, *supra*, note 101, at 884.

<sup>110</sup> *Id.*, at para. 41. In “Social Construction of Reality”, *supra*, note 95, MacCrimmon draws from the psychological literature on cognitive models when she describes the “bar room brawl” as a “schema” used by judges and juries to understand and evaluate the behaviour of the accused in situations of self-defence, a schema whose premises are often inapposite when applied to women.

<sup>111</sup> *Lavallee*, *id.*, at 883, quoting from *State v. Gallegos*, 719 P.2d 1268 (N.M. 1986), at 1271.

<sup>112</sup> *Lavallee*, *id.*, at 888-89. In her contribution to “A Forum on *Lavallee*”, *supra*, note 95, at 60, entitled “A Duty to Retreat”, Christine Boyle uses the decision in *Lavallee* as the basis for an insightful critical evaluation of whether the Canadian law of self-defence should impose a duty to retreat. See also “The Battered Wife Syndrome”, *supra*, note 95, at 176-77.

<sup>113</sup> *Lavallee*, *id.*, at 870.

difficulty arises because we are not so cautious about our knowledge of the lives of others:

The need for expert evidence in these areas can ... be obfuscated by the belief that judges and juries are thoroughly knowledgeable about “human nature” and that no more is needed. They are, so to speak, their own experts on human behaviour.<sup>114</sup>

But they — we — are not; and the peril of not seeing this is the unjust infliction of state violence and the inhuman withholding of compassion.

In a fashion that is deeply interesting, but also troubling in what it discloses about the limits of our vision, much in Wilson J.’s judgment in *Lavallee* was not “new”.<sup>115</sup> The law of expert evidence was then, as it is now, predicated on the idea that judges and jurors sometimes need help to do justice in a given case. Experts provide a “ready-made inference”<sup>116</sup> at the points at which the adjudicator’s knowledge runs out. And, while meaningfully complicating it, Wilson J. emphasized and confirmed the need for the jury to assess the reasonableness of the accused’s perceptions in matters of self-defence. What *was* new was the acuity with which she saw that the incomplete and gendered deployment of these concepts had perpetrated injustice. Here she found the cure in a call for the adjudicator to take seriously the life and perspective of the accused. In this, one finds that *Lavallee* participates in a broader vision that Justice Wilson seems to have defended in her criminal law jurisprudence. Another expression of this broader vision was her resistance to the attenuation of subjective standards of *mens rea* in the criminal law.<sup>117</sup> The ready acceptance of objective measures of fault is

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<sup>114</sup> *Id.*, at 871. For an article setting the use of expert evidence in *Lavallee* in historical context, see Kimberley White-Mair, “Experts and Ordinary Men: Locating *R. v. Lavallée*, Battered Woman Syndrome, and the ‘New’ Psychiatric Expertise on Women within Canadian Legal History” (2000) 12 Can. J. Women & L. 406.

<sup>115</sup> For an argument to this effect, see Lee Stuesser, “The ‘Defence’ of ‘Battered Woman Syndrome’ in Canada” (1990) 19 Man. L.J. 195.

<sup>116</sup> *R. v. Abbey*, [1982] S.C.J. No. 59, [1982] 2 S.C.R. 24, at 42 (S.C.C.), *per* Dickson J. There are, of course, also very real risks in using expert evidence, dangers that the Court has itself emphasized. See, *e.g.*, *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9, at 11 (S.C.C.):

Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

<sup>117</sup> See especially *R. v. Tutton*, [1989] S.C.J. No. 60, [1989] 1 S.C.R. 1392 (S.C.C.) [hereinafter “*Tutton*”]; and *R. v. Waite*, [1989] S.C.J. No. 61, [1989] 1 S.C.R. 1436 (S.C.C.) [hereinafter “*Waite*”], in which she argued for a subjective conception of criminal negligence, a battle that, again, she seems to have ultimately lost. See also *R. v. Docherty*, [1989] S.C.J. No. 105,

hubristic; in the fearsome field of the criminal law, this makes it dangerous. By definition, objective measures of fault demand a comfort in our assessments of what the other person *ought to have* known or *ought to have* done, a kind of comfort that Wilson J. wrote against in *Lavallee* and for which she prescribed the onerous discipline of attempting to understand the mind and perspective of the other.

No modern thinker has wrestled more deeply with the nature of judgment, law and politics in the face of horrifying crime than Hannah Arendt. Observing the trial of Adolf Eichmann influenced her life's work and her reports from that trial give us as deep a set of insights as we have into the complexities of evil and blame.<sup>118</sup> In response to the controversy following publication of *Eichmann in Jerusalem*, Arendt wrote a short essay entitled "Truth and Politics".<sup>119</sup> In it, one finds an elegant, if deeply challenging, claim about the nature and conditions of just judgment:

I form an opinion by considering a given issue from different view points, by making present to my mind the standpoints of those who are absent; that is, I represent them. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective; this is a question neither of empathy, as though I tried to be or to feel like somebody else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not. The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel

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[1989] 2 S.C.R. 941 (S.C.C.); and Danielle Pinard, "The Constituents of Democracy: The Individual in the Work of Madame Justice Wilson" (1992) 15 Dal. L.J. 81, at 105, in which Pinard suggests that Wilson J.'s subjectivist approach to criminal fault "seems to rest ultimately on the necessary respect, by the state, for the inherent dignity of the individual". Brudner, whose subjectivist commitments are themselves explicitly based on a Hegelian respect for personhood, concurs with Wilson J.'s conclusion in *Tutton*, arguing that "negligence, gross or otherwise, has no place in the criminal law and that the Tuttons are therefore innocent of criminal (though not necessarily all) wrongdoing". (Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley and London: University of California Press, 1995), at 221.) Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed. (Toronto: Thomson Carswell, 2007), at 268, criticizes Wilson J.'s approach in *Tutton* and *Waite* as "one of doublespeak" in which "[t]here is a commitment to the aware state of mind approach but, when it does not achieve a satisfactory result, the concept of wilful blindness is distorted to achieve a conviction." Despite this critique, Stuart is also a general proponent of subjective forms of fault in criminal offences as "the fairest basis for state punishment" (at 280).

<sup>118</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

<sup>119</sup> Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (London: Penguin Books, 2006), at 223-59.

and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion. It is this capacity for an “enlarged mentality” that enables men to judge...<sup>120</sup>

Embedded, as she was, in the practical exigencies of a criminal justice system and faced with the enormous stakes and responsibility of criminal judgment, this kind of representative thinking — this “enlarged mentality” that makes possible good judgment — is what, at core, Wilson J. demanded in her reasons in *Lavallee*.

## V. CONCLUSION: A DUE MEASURE OF FEAR

In many respects, we are well rid of the kind of anxiety and fear that characterized the act of criminal judgment for much of the history of the common law trial. That fear was born, in equal parts, of an unforgiving top-down public theology that served as a real constraint on human freedom and of a time in which punishment was bloody in the extreme. Most people in Canada today do not view their public duties as infused with a religious significance,<sup>121</sup> and even those who do are not subject to the kind of deep and constant anxiety that seems to have inflected the world out of which our modern criminal trial emerged. And despite the great violence and consequent harm that persists in the imposition of criminal punishment, it is an unmitigated good that Canada no longer meets crime with the state-sanctioned spilling of blood. We are wrong, though, if we view the development of modern Anglo-Canadian law and legal institutions as a story of clear or inexorable moral progress. Despite their harshness, this old world view and these gruesome practices

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<sup>120</sup> *Id.*, at 237.

<sup>121</sup> A telling case in point is the reaction of Prime Ministers Jean Chrétien and Paul Martin, both Roman Catholics, to the Vatican’s insistence that it was the duty of the Catholic politician to take all measures to resist the legal recognition of same-sex marriage. See Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (Nairobi: Pauline Publications Africa, 2003). “Congregation for the Doctrine of the Faith” is the modern name for the oldest of the congregations of the Roman Curia, once infamously active under the name “Holy Office of the Inquisition”. The case of civil marriage commissioners who feel that their civil duties are justifiably circumscribed by their personal religious views stands as an important contemporary counter-example. For a discussion of this issue, see Robert Leckey, “Profane Matrimony” (2006) 21(2) C.J.L.S. 1, at 20-21; Bruce MacDougall, “Refusing to Officiate at Same-Sex Civil Marriages” (2006) 69(2) Sask. L. Rev. 351; and Geoffrey Trotter, “The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants — A Response to Professor Bruce MacDougall” (2007) 70(2) Sask. L. Rev. 365.

imposed an ethical discipline on the adjudicator. When the act of criminal judgment was understood to be deeply perilous — a genuinely fearsome event — the judge, whether professional or lay, could not but question his warrant to stand in judgment of another. The adjudicator was keenly aware of the limits of his knowledge, the complexity of his moral world and the need to adhere to the safer path. This awareness inculcated a form of modesty and caution in the act of criminal judgment.

As much as it has been concerned with painting a picture of Justice Bertha Wilson's contributions to the criminal law, this piece has equally sought to pose the question of whether we are comfortable with the degree to which we see this ethic informing our contemporary practices of criminal judgment. Looking to three of her key interventions in the law of criminal defences, I have identified a unity in her posture towards criminal adjudication. The judgments that I have examined here are rich with a sense of the need for caution and humility in the use of the criminal law. It is a complex sentiment composed of a number of aspects, and each case exposes a somewhat different dimension. Her reasons in *Perka*<sup>122</sup> insist on the need for maintaining a means by which we can push back on the normative capaciousness of the criminal law's *ex ante* judgments about rightness or wrongness, a need that arises from the intrinsic complexity of the world with which the criminal law must interact. In *Chaulk*,<sup>123</sup> she forcefully sought to resist the reversal of the burden of proof in the law of insanity, a stance that so clearly reflected her commitment to the safer path in criminal judgment. And in *Lavallee*,<sup>124</sup> Justice Wilson sounded a resonant call for the indispensable role in just judgment of critical self-reflection on the limits of one's knowledge and experience. I have focused on these three cases and the illuminating area of criminal defences but, once seen, one can detect these commitments and the overarching sentiment that animates them throughout her work in the criminal law. Whether in her generous interpretation of the Charter's criminal law protections,<sup>125</sup> her attitude

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<sup>122</sup> [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.).

<sup>123</sup> [1990] S.C.J. No. 139, [1990] 3 S.C.R. 1303 (S.C.C.).

<sup>124</sup> [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.).

<sup>125</sup> See, e.g., her judgments in *Clarkson v. R.*, [1986] S.C.J. No. 20, [1986] 1 S.C.R. 383 (S.C.C.); *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500 (S.C.C.); *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.); *R. v. Gamble*, [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595 (S.C.C.); *Thomson Newspapers v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] S.C.J. No. 23, [1990] 1 S.C.R. 425 (S.C.C.); *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.).

towards the exclusion of evidence under section 24(2),<sup>126</sup> or her memorable defence of liberty in the face of the coercive force of the criminal law in *Morgentaler*,<sup>127</sup> her posture had a particular integrity. Her work in the criminal law reflects a keen appreciation of the violence and precariousness of the criminal law and an abiding discomfort — a due measure of fear — in criminal judgment.

Certain of Justice Wilson's criminal law judgments, such as *Lavallee*<sup>128</sup> and *R. v. Bernard*,<sup>129</sup> have had a significant and direct impact on the shape of modern Canadian criminal law. Some others, like *Perka*<sup>130</sup> and *Morgentaler*,<sup>131</sup> have exerted a more indirect but abiding influence. Yet in the ethical dimension explored in this piece, our recent experience of criminal justice in Canada seems to have drifted substantially from Justice Wilson's vision. Parliament has, in recent times, shown a misguided and bellicose confidence in the use of the criminal law to attend to social ills, adopting a "tough-on-crime" agenda that peddles a more aggressive use of a legal tool that is neither our most effective nor our most humane. But even in the jurisprudence, the contemporary influence of this humility and caution in the criminal law seems all too absent. In two of the three crucial judgments that I have described, Justice Wilson's reasons stood alone and have not been picked up in subsequent Canadian jurisprudence. Throughout this piece, I have pointed to certain ways in which contemporary Canadian criminal law doctrine has moved in the direction of more confidence and less restraint: compared to when Justice Wilson was on the Court, confessions are easier to admit into evidence, objective measures of blame have flourished and burdens for criminal defences have shifted to the accused. We are more content to deny bail than at any point since the Charter was introduced and now afford the police investigative latitude unknown even at common law.<sup>132</sup> Although the tendencies are far from

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<sup>126</sup> See, e.g., *R. v. Black*, [1989] S.C.J. No. 81, [1989] 2 S.C.R. 138 (S.C.C.); *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36 (S.C.C.); *Clarkson v. R.*, *id.*

<sup>127</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

<sup>128</sup> [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.).

<sup>129</sup> [1988] S.C.R. No. 96, [1988] 2 S.C.R. 833 (S.C.C.).

<sup>130</sup> [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232 (S.C.C.).

<sup>131</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

<sup>132</sup> See, e.g., *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.); *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.); *R. v. Clayton*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.).



uniform,<sup>133</sup> they are nevertheless troubling. Happily, even if not strongly reflected in the ethos currently animating our system of criminal justice, a due sense of the fearsomeness of the criminal law and the demands that this places on the individual engaged in the act of criminal judgment is preserved in the jurisprudence of Justice Bertha Wilson, an ethical resource to which we can turn and a voice of conscience that we ought to heed.

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<sup>133</sup> One can, of course, point to certain cases that suggest a sense of criminal judgment more sympathetic to Wilson J.'s view. The expansion of the law of duress in *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.), is a case in point.